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IN THE SUPREME COURT OF MISSOURI

Appeal No. SC97626

SOPHIAN PLAZA ASSOCIATION, et al.,

Respondents,

v.

CITY OF KANSAS CITY, MISSOURI,

Appellant.

Appellant's Substitute Brief

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

Office of the City Attorney

Tara M. Kelly # 64624
Associate City Attorney
414 East 12th Street
2300 City Hall
Kansas City, MO 64106
Telephone: (816) 513-3117
Facsimile: (816) 513-3133
Tara.Kelly@kcmo.org

ATTORNEYS FOR RESPONDENT
CITY OF KANSAS CITY, MISSOURI

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JURISDICTIONAL STATEMENT

This appeal follows the entry of a judgment in a bench trial in Platte County against the Appellants, and on behalf of the Respondents. As this case was transferred from the Western District Court of Appeals and involves questions of whether the trial court erred in finding standing for Respondents and finding the City of Kansas City, Missouri ("City") liable for contempt and breach of contract, this Court has jurisdiction under the Mo. Const. art. V, § 10.

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STATEMENT OF FACTS

A. Kansas City creates a tax-funded trash program for single family homes and small attached dwellings.

In the early 1970s, the City sought to increase its general earnings and profits tax. Tr. 316:17-20. Among the potential uses for that fund would be the provision of trash services to single family homes. Tr. 316:17-20. When an ordinance was passed providing free trash services, it excluded buildings with seven or more units, as well as trailer parks. Tr. 317:5-8. At that time, Section 16.20(a) of the City's Code read that: "The director shall not provide for the collection and disposal of residential refuse from trailer parks or buildings containing seven or more dwelling units." Ex. 2; A40-41.[1]

B. Litigation ending in 1976 led to City payments to owners of commercial apartment buildings and trailer parks that were excluded from the City's trash program.

In 1974 and 1975, fifteen plaintiffs ("Original Fifteen Plaintiffs") sued the City in three separate lawsuits for violation of equal protection in excluding buildings with seven or more units and trailer parks from City-provided trash service. LF139 (Case No. 74-172); LF152 (Case No. 74-173); LF164 (Case No. 75-515). The cases were consolidated and, although each was pled as a class action, no class action briefing, argument, or certification was ever done. Ex. N; Ex. O; Tr. 441:15-21 (taking judicial notice that the docket sheet for Case No. 74-173 no longer is in the Platte Circuit Court records).

After taking evidence, the 1976 court found a violation of equal protection. Ex. 2; A41. As a result, the 1976 court entered a judgment on April 7, 1976, requiring the City to collect refuse from the Original Fifteen Plaintiffs "unless and until the City enacts a valid ordinance setting a reasonable and non-arbitrary classification." Ex. 3; A42.

On August 31, 1976, a document ("1976 Stipulation and Agreement") was signed for the Fifteen Original Plaintiffs by their attorney and, for the City, solely by L.B.

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[1] "LF___" refers to the Legal File. "Ex. ___" refers to the trial exhibit number, deposited with the Court. Per Platte County local rules, the Class' exhibits are marked with a number and the City's exhibits are marked with a letter. "A__" refers to the Appendix. "Tr." refers to the trial transcript.

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Saunders. Ex. 5; A46. The 1976 Stipulation and Agreement says that the City will provide "services to dwelling units of the owners or pay $1.15 per month per occupied dwelling unit to owners in lieu of providing services." Ex. 5, ¶2; A47. "Services" are defined as "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 hereafter established by any ordinance of city-wide application… relating to residential refuse collection." Ex. 5, ¶1(c); A47.

On August 31, 1976, § 82 of the City's Charter read, in part,

> All contracts shall be executed in the name of the city by the head of the department, board or agency or the officer concerned.… No contract or order purporting to impose any financial obligation on the city shall be binding upon the city unless it be in writing and unless there is a balance, otherwise unencumbered, to the credit of the appropriation to which the same is to be charged sufficient to meet the obligation thereby incurred, and unless such contract or order bear the certificate of the director of finance so stating.…

Ex. K; A50. Section 95 read that:

> All contracts, agreements or other obligations entered into, all ordinances and resolutions passed, and all orders made contrary to the provisions of this article shall be void, and no person whatever shall have any claim or demand against the city thereunder, nor shall any act or omission on the part of the council, or of any officer or employee of the city, contrary to the provisions of this article, waive or qualify the limitations fixed by this article, or impose upon the city any liability whatever in excess thereof.

Ex. L; A53.

L.B. Saunders was an Assistant City Attorney at the time he signed the 1976 Stipulation and Agreement. Ex. 5; A48. During the 2016 trial, the City also submitted a document showing the department heads for 1853 through the mid-1980s, a summary identifying the department heads on August 31, 1976, and L.B. Saunders' application for retirement on which he was required to list every position that he held while employed with the City. Ex. G; Ex. H; Ex. I. All three documents show that L.B. Saunders was not a

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department head on the day the 1976 Stipulation and Agreement was signed. In addition, the 1976 Stipulation and Agreement lacks certification from the director of finance that sufficient funds are available to meet the obligations under the 1976 Stipulation and Agreement. Ex. 5; A48.

Prompted by the 1976 Stipulation and Agreement, the 1976 court modified its Judgment on September 1, 1976 ("1976 Modified Judgment"). Ex. 4; A44. In the 1976 Modified Judgment, the court 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…." Ex. 4; A45. The court explicitly extended the reach of its order "to owners of similarly situated properties no parties in this litigation." Ex. 4; A45. There was no provision that the Modified Judgment and mandatory injunction would end when "the City enacts a valid ordinance which establishes a reasonable and justifiable classification for those persons who are not entitled to refuse collection by the City." Ex. 3; A43. Although the Modified Judgment did not state that the mandatory injunction was also permanent, it had no stated end date. Instead, the Modified Judgment incorporates the 1976 Stipulation and Agreement which ends the Apartment Rebate Program only when "the City terminates city-wide services to privately-owned dwelling units." A48.

The City then adopted, by ordinance, an Apartment Rebate Program for trash services. Tr. 318:16-19. That program remained in place from the 1970s through May 1, 2010. Tr. 318:20-24; Ex. JJ, KK (Ordinance 080935 and legislative history).

C. The City's solid waste ordinances changed significantly in the 2000s.

Prior to April 2004, the City had unlimited curbside collection of trash, meaning that citizens could put out as much trash as they liked, and there was no recycling program. Tr. 358:12-22. In April 2004, the City changed its ordinances and moved to a waste reduction model. Tr. 358:25-359:1. The City did this for several reasons including the decreasing availability of landfill space, the benefits to the environment, and to manage costs. Tr. 359:2-25; Ex. U. The new ordinances allowed collection of just two bags of trash at the curb and provided unlimited recycling. Tr. 363:17-364:25. The ordinances also

included ancillary programs to reduce waste: recycling drop-off, bulky item pick up, household hazardous waste collection, and a tire recycling program. Tr. 366:16-367:24; Ex. U-35-38. The collection of refuse occurs only curbside, as the City neither owns nor rents the equipment to collect from dumpsters. Tr. 363:17-364:10; 366:10-15.

D. The City's subsequent elimination of the payments to larger buildings prompted this litigation by owners who benefitted from – but were never parties to – the 1970s litigation.

In 2008, largely due to the nationwide recession, the City began experiencing budget difficulties. Tr. 329:2-331:18; 399:11-16; 347:7-20; 403:5-404:15; Ex. T; Tr. 407:8-408:3. As a result, the City was forced to freeze salaries, freeze hiring, and eliminated both vacant and occupied positions. Tr. 331:19-332:9; 419:2-421:5; Ex. T-7. At that time, the Apartment Rebate Program was costing the City approximately $1.4 million each year. Ex. 27; A54.

At the same time, the Apartment Rebate Program no longer supported the City's solid waste goals embodied in ordinances enacted, as noted above, to reduce the amount of waste being deposited into the City's landfills. Tr. 332:10-333:14. In the experience of the City, buildings with seven or more units do not share these waste reduction goals – and the waste removal services they provide do not comply with the waste reduction ordinances. This was supported by the Class representatives' answers to interrogatories, where none of the three could identify any Class members that limit their dwellings to two bags of refuse per unit per week, that provide free, unlimited recycling to units with their dwellings, and could not say how many, if any, Class members use curbside collection. Ex. DD, ¶¶ 9, 10, 15, 22; Ex. EE, ¶¶ 9, 10, 15, 22; Ex FF, ¶¶ 9, 10, 15, 22. For example, those buildings with seven or more units are not limited to two bags per week. Ex. DD, ¶ 9; Ex EE, ¶ 9; Ex. FF, ¶ 9; Ex. GG, 10:21-25; Ex. HH, 7:24-8:1; Ex. II, 23:8-11. They do not provide free recycling. Ex. GG, 14:11-17:18 (highlighted portions only); Ex. HH, 11:17-25; Ex. II, 23:14-17. They do not provide the ancillary programs provided by the City. Ex. GG, 17:19-18:13; Ex. HH, 8:2-18, 9:16-18; Ex. II, 23:18-25:5 (highlighted portions only). They utilize dumpsters instead of participating in curbside collection. Ex. GG, 11:1-12:11; Ex.

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HH, 5:9-7:16; Ex. II, 22:12-23:7. This is not the provision of equivalent services. Tr. 392:21-393:14. The City cited all of these as reasons for why it chose to eliminate the Apartment Rebate Program. Ex. JJ.

The City gave notice in April of 2008 that it would be terminating the Apartment Rebate Program. Ex. 11. The ordinance eliminating the Apartment Rebate Program passed on January 28, 2010 and went into effect shortly thereafter. Ex. KK. The Class filed suit on February 27, 2015, pursuing, ultimately, breach of contract and contempt claims. LF19. The Class included all owners in existence on May 1, 2010, LF 553, ¶ 19, regardless of whether the buildings belonging to those owners were even in existence in 1976.[2] After a three-day bench trial, the circuit court found for the Class on April 7, 2017. LF535-55. The City filed a timely notice of appeal on April 14, 2017, LF556-57, and, after briefing in the Western District, the case was transferred to this Court on April 2, 2019.

[2] For example, Sophian Plaza, a named plaintiff, was not an association until 1978. Ex. GG, 8:18-21. Townsend Place, another named plaintiff, did not exist until 1990. Ex. HH, 4:9-10. The owner of Stadium View Apartments, the third named plaintiff, has "no idea" what role the owners of that building had in the 1970s litigation. Ex. II, 13:4-7.

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POINTS RELIED ON

I. The trial court erred in entering a judgment because the Class lack standing to sue for contempt, in that its members were not parties to the original 1970s lawsuits.

Chassaing v. Mummert, 887 S.W.2d 573 (Mo. banc 1994)

Frankel v. Moskovitz, 503 S.W.2d 428 (Mo. App. 1973)

Rule 92.02(e)

II. The trial court erred in entering a judgment because the Class lacked standing to sue for breach of contract of the 1976 Stipulation and Agreement in that plaintiffs failed to show that they were parties to the agreement or category of third-party beneficiaries with a right to claim standing.

Verni v. Cleveland Chiropractic College, 212 S.W.3d 150 (Mo. banc 2007)

L.A.C. ex rel. D.C. v. Ward Pkwy. Shopping Ctr. Co., 75 S.W.3d 247 (Mo. banc 2002)

Mo. Const. art. VI, §§ 23, 25

RSMo. § 432.070

III. The trial court erred in finding contempt because the 1976 Modified Judgment was not a valid order in that the circuit court in 1976 lacked personal jurisdiction over "similarly situated properties."

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

Beatty v. Metro. St. Louis Sewer Dist., 914 S.W.2d 791 (Mo. banc 1995)

Epstein v. Villa Dorado Condo. Ass'n, Inc., 316 S.W.3d 457 (Mo. App. 2010)

IV. The trial court erred in holding the City in contempt of the Modified Judgment because the Modified Judgment is void as it violates the Missouri Constitution, Article 2, section 1 requiring a separation of powers in that the 1976 trial court went beyond finding an equal protection violation to

entering a perpetual judgment that included the specifics of a solid waste ordinance.

Mo. Const. art II, § 1

Asbury v. Lombardi, 846 S.W.2d 196 (Mo. banc 1993)

Albright v. Fisher, 64 S.W. 106 (Mo. 1901)

V. The trial court erred in finding the City breached the 1976 Stipulation and Agreement because the 1976 Stipulation and Agreement is a void contract that does not comply with RSMo. § 432.070, in that the 1976 Stipulation and Agreement was not within the scope of the City's powers nor expressly authorized by law, nor signed by an individual with the ability to bind the City in contract, and lacks the certification of the Director of Finance.

Donovan v. Kansas City, 175 S.W.2d 874 (Mo. banc 1943)

RSMo. § 432.070

The Lamar Company, LLC v. City of Columbia, 512 S.W.3d 774 (Mo. App. 2016)

City of St. Louis v. Cavanaugh, 207 S.W.2d 449 (Mo. 1947)

VI. The trial court erred in concluding that the City breached the 1976 Stipulation and Agreement and was therefore liable for breach of contract, because that conclusion is not supported by substantial evidence and is against the weight of the evidence, in that the Class failed to produce any evidence that it performed or tendered performance.

Keveney v. Missouri Military Acad., 304 S.W.3d 98 (Mo. banc 2010)

VII. The trial court erred in ordering specific performance to provide trash service or the Apartment Rebate Program because doing so violates Article 2, section 1 of the Missouri Constitution, in that it requires the City to appropriate money and act contrary to a validly enacted ordinance whose constitutionality has not been challenged.

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Mo. Const. art. VI, § 19(a)

Rebman v. Parson, Case No. SC97307, 2019 WL 1613630 (Mo. banc Apr. 16, 2019)

VIII. The trial court erred in its attorneys' fees award because it had no legal authority to enter an award for attorneys' fees in that it awarded attorneys' fees against a sovereign without a waiver.

Richardson v. State Highway & Transp. Comm'n, 863 S.W.2d 876 (Mo. 1993)

Missouri Hosp. Ass'n v. Air Conservation Comm'n of State of Mo., 900 S.W.2d 263 (Mo. App. 1995)

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ARGUMENT

In this suit, a class of property owners who were not part of litigation in the 1970s sued to enforce an agreement reached – without proper authority – and a judgment entered – though extending beyond the court's authority – in that litigation. As discussed in points I and II, this Class lacks standing to sue for violations of the 1976 Modified Judgment (Point I) and the 1976 Stipulation and Agreement (Point II).

Even if they had standing, the Class' suit necessarily fails as a matter of law because the 1976 Modified Judgment was invalid, as was the agreement on which it was based. As discussed in Point III, the circuit court lacked personal jurisdiction in 1976 with regard to the nonparties – such as those in the Class here – to whom it purported to grant relief. As discussed in Point IV, the 1976 Modified Judgment violated the separation of powers. And as discussed in Point V, the 1976 Modified Judgment's provisions that the Class now seeks to enforce were based on the 1976 Stipulation and Agreement – a purported settlement contract reached without complying with the mandatory requirements of §432.070.

And if the plaintiffs had standing and their suit had a sufficient legal basis, they would still not be entitled to the relief that they obtain. As discussed in Point VI, they never showed that they provided "services" as required by the 1976 Stipulation and Agreement. As discussed in Point VI, the 2016 judgment, like the 1976 judgment, violates separation of powers. And as discussed in Point VII, there is no waiver of sovereign immunity that would allow plaintiffs to obtain an award of attorneys' fees.

Part I: The trial court erred in entering a judgment, as the Class did not have standing.

When L.B. Saunders signed the 1976 Stipulation and Agreement, and when the City decided not to appeal the Modified Judgment, City officials knew with whom they would deal if – or when – it became appropriate or necessary to significantly update or otherwise change the City's waste removal program: the Fifteen Original Plaintiffs. None of those Parties are members of the plaintiff Class here. So the first question is whether the Class members, having chosen not to appear in 1976 – and, perhaps, not even owning eligible property or in existence in 1976 – have standing to sue for violation of what the Fifteen

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Original Plaintiffs obtained. As discussed in Point I, as to a claim of civil contempt based on the Modified Judgment, and in Point II, as a claim of breach of contract, that is, of the 1976 Stipulation and Agreement, the answer is, no.

I. The trial court erred in entering a judgment because the Class lack standing to sue for contempt, in that its members were not parties to the original 1970s lawsuits.

A. Preservation of Error

The City included this argument in its answers to the petitions, LF 69 ¶¶ 7, 9; LF 375 ¶¶ 7, 9; elicited testimony consistent with this argument during trial, Trial Tr. 136:11-18; Ex. GG, 8:15-21; Ex. HH, 4:5-10; Ex II, 12:24-13:7; presented the argument in its closing, Trial Tr. 303:10-16; and submitted the necessary findings and conclusions in its proposed findings of fact and conclusions of law, LF 431 ¶¶ 34-42.

B. Standard of Review

Appellate review of a trial court's determination regarding a litigant's standing is *de novo*, with no deference given to the lower court's decision. *Blue Cross & Blue Shield of Mo. v. Nixon*, 81 S.W.3d 546, 551 (Mo. App. 2002). To determine standing, this Court examines the basis of the petition and the undisputed facts. *Id.*

C. The Class and its members lack standing to bring a contempt claim against the City because civil contempt is available only to a party to the original action.

"Standing is a jurisdictional matter antecedent to the right to relief." *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002). Members of the Class asserted below they had standing to sue for contempt, alleging a violation of the 1976 Modified Judgment.[3] But suit for contempt based on a judgment is available only to parties to that judgment – and none of the plaintiffs here were plaintiffs or parties in 1976.

A court examining standing inquires into "whether the persons seeking relief have a right to do so." *Id.* "Standing requires that a party seeking relief have a legally cognizable interest in the subject matter and that he has a threatened or actual injury." *E. Mo. Laborers*

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[3] For purposes of this Point, we assume that the 1976 Modified Judgment was valid – which it was not, for the reasons explained in Points III and IV below.

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Dist. Council v. St. Louis Cty., 781 S.W.2d 43, 46 (Mo. banc 1989). "Where, as here, a question is raised about a party's standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented." *Farmer*, 89 S.W.3d at 451. That is to say, "'[r]egardless of the merits of appellants' claims, without standing, the court cannot entertain the action.'" *Pace Const. Co. v. Mo. Highway & Transp. Comm'n*, 759 S.W.2d 272, 274 (Mo. App. 1988) (quoting *Champ v. Poelker*, 755 S.W.2d 383, 387 (Mo. App. 1988)).

"Civil contempt is 'instituted to preserve and enforce the rights of a private *party to an action* and to compel obedience to a judgment or decree intended to benefit such a private *party litigant*.'" *D.R.P. v. M.P.P.*, 484 S.W.3d 822, 826 (Mo. App. 2016) (quoting *Walters v. Walters*, 181 S.W.3d 135, 138 (Mo. App. 2005)) (emphasis supplied). "A proceeding for civil contempt is one instituted to preserve and enforce rights of a private *party* to an action and to compel obedience to a judgment or decree in favor of such *party*." *Frankel v. Moskovitz*, 503 S.W.2d 428, 432 (Mo. App. 1973) (emphasis supplied) (citing *Holt v. McLaughlin*, 210 S.W.2d 1006 (Mo. 1948)). Stated in the alternative, "[c]ivil 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." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994). "A civil contempt proceeding may *only* be instituted by a *party* who has a right under a court order that has been violated and who is seeking to have that right protected or enforced. . . . And since it is a proceeding to protect the *rights of a party* to an action, the real party in interest is the *party litigant* whose rights are claimed to have been violated." *Frankel*, 503 S.W.2d at 432 (citing *Jafarian-Kerman v. Jafarian-Kerman*, 424 S.W.2d 333 (Mo. App. 1967)) (emphasis supplied).

Again, the Class members were not parties to the original 1970s action in which the Modified Judgment was entered. As civil contempt can only be instituted by an original party, the Class members lacked the standing to sue the City for contempt.

This conclusion is reinforced by this Court's Rules. Rule 92.02(e) emphasizes that each injunction "shall be specific in terms . . . and is binding *only* up on the *parties* to the

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action, their officers, agents, servants, employees, and attorneys, and upon those persons in *active* concert or participation with them who receive actual notice of the order by personal service or otherwise (emphasis supplied)." *See, e.g., Williams Pipeline Co. v. Allison & Alexander, Inc.*, 80 S.W.3d 829, 839-40 (Mo. App. 2002) (holding that a non-party was properly enjoined from encroaching on easement rights because it was in active concert in encroaching upon an easement). The Class undertook no efforts to show that its members were parties to the 1970s cases or that their members were in *active* concert or participation with those parties.[4] Without such a showing, the Class lacks the standing to bring a contempt case and judgment should not have been awarded on those grounds.

II. The trial court erred in entering a judgment because the Class lacked standing to sue for breach of contract of the 1976 Stipulation and Agreement in that plaintiffs failed to show that they were parties to the agreement or category of third-party beneficiaries with a right to claim standing.

A. Preservation of Error

The City included this argument in its answers to the petitions, LF 69 ¶¶ 7, 8, 10, LF 375 ¶¶ 7, 8, 10; elicited testimony consistent with this argument during trial, Trial Tr. 136:11-18; Ex. GG, 8:15-21; Ex. HH, 4:5-10; Ex. II, 12:24-13:7; presented the argument in its closing, Trial Tr. 294:25-295:9; and submitted the necessary findings and conclusions in its proposed findings of fact and conclusions of law, LF 429 ¶¶ 27-30.

B. Standard of Review

Appellate review of a trial court's determination regarding a litigant's standing is *de novo*, with no deference given to the lower court's decision. *Blue Cross & Blue Shield*, 81 S.W.3d at 551. To determine standing, this Court examines the basis of the petition and the undisputed facts. *Id.*

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[4] In fact, for the three named plaintiffs, they could not show they were in active concert or participation with the original parties, as none of the named plaintiffs existed in 1976.

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C. The Class lacks standing to bring a breach of contract claim because neither it, nor its members, were parties to the 1976 Stipulation and Agreement.

The trial court erred in allowing the Class to use the 1976 Stipulation and Agreement to assert the breach of contract claim, as the Class lacked standing to assert rights under it.[5] *See Verni v. Cleveland Chiropractic College*, 212 S.W.3d 150, 153 (Mo. banc 2007) ("only parties to a contract and any third-party beneficiaries of a contract have standing to enforce that contract."). The Class' lack of standing on the 1976 Stipulation and Agreement stems from two points: (1) the 1976 Stipulation and Agreement was limited on its face to the Original Fifteen Plaintiffs that brought suit in the 1970s; and (2) at most the Class members would be incidental beneficiaries who lack standing as a matter of law.

1. The Class members were not parties to the 1976 Stipulation and Agreement.

Neither the Class nor any of its members contracted with the City in the 1976 Stipulation and Agreement. That document does not define "parties." However, James W. Humphrey, Jr. signs on behalf of "Plaintiffs" and L.B. Saunders signs on behalf of the City. The plaintiffs in the 1970s cases are limited to the Original Fifteen Plaintiffs; the 1970s cases, although filed as class action lawsuits, were never certified as such. At most, then, the purported contract encompasses only the Original Fifteen Plaintiffs and the City.[6] This conclusion is supported by the 1976 court which extended the Modified Judgment "to owners of similarly situated properties *not parties in this litigation*." Ex. 4; A45 (emphasis supplied).

Furthermore, § 432.070 helps define a "party to the contract" in terms of a municipality and requires both consideration and the signature of the party or agent of the party to be bound. The City cannot be found to have entered into a contract with the Class, as, in addition to those deficiencies noted in Point V, no consideration (performed prior or

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[5] For purposes of this Point, we assume that the 1976 Stipulation and Agreement was valid—which it was not, for the reasons explained in Point V below.

[6] The City also points out, *infra* at Point V, that the 1976 Stipulation and Agreement binds no parties because it was an invalid contract that did not comply with RSMo. § 432.070.

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subsequent to the purported agreement) was ever provided by the Class,[7] and no document was signed by an agent of the Class. Therefore, under neither contract law nor § 432.070 did the Class have standing to sue on the 1976 Stipulation and Agreement as a party.

2. There is no third-party beneficiary standing to sue a municipality as allowing such a suit would not comply with the mandatory strictures of RSMo. § 432.070.

As it is not a party to the 1976 Stipulation and Agreement, the only other way the Class can obtain standing to enforce the contract is if its members are third-party beneficiaries. Originally, the Class' petition involved a straight "breach of contract" claim. Perhaps realizing, however, that none of its members had actually been a party to the 1976 Stipulation and Agreement, the Class filed an Amended Petition on June 3, 2016, alleging that, instead of being parties to the contract, the Class is to be considered a third-party beneficiary. There is no statutory or case law, however, supporting the idea that a common law doctrine – that third-party beneficiaries can sue for breach of contract – is sufficient to overcome the statutory requirements of § 432.070, and the City cannot find a single Missouri case for the proposition that the long history of § 432.070 jurisprudence in this state should be dismissed where an alleged third-party beneficiary is involved. Instead, the case law is replete with statements that § 432.070 seeks to protect municipalities, not "parties who seek to impose obligations upon government entities," *Gill Const., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699, 708 (Mo. App. 2005) (quoting *City of Kansas City v. Southwest Tracor, Inc.*, 71 S.W.3d 211, 215 (Mo. App. 2002)), and that the requirements of § 432.070 must be strictly enforced.[8]

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[7] The Original Fifteen Plaintiffs gave up their right to sue the City in the 1976 Stipulation and Agreement which, of course, is consideration. The Class, as a non-signatory to the 1976 Stipulation and Agreement, gave up nothing to the City, including the right to sue in the future. Therefore, the Class has not even a scintilla of consideration to support a contract.

[8] Although the policy goal of § 432.070 is to protect municipalities, there are a number of instances in Missouri jurisprudence where the strict application of § 432.070 has worked as a sword against a municipality and not just as a shield. For example, in the recently decided case of *City of Dardenne Prairie v. Adams Concrete & Masonry, LLC*, a municipality sued on breach of contract. 529 S.W.3d 12 (Mo. App. 2017), *transfer denied*

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Without any law on point, this Court should turn to common rules of statutory primacy. When a statute abrogates a common law principal, that common law principal falls to the statute on point. *See, e.g., Pub. Serv. Comm'n of State v. Mo. Gas Energy*, 388 S.W.3d 221, 230 (Mo. App. 2012). In this instance, any contract liability for which a municipality may be held liable must fall within the statutory requirements of § 432.070, and those requirements should be *strictly* applied. There is no exception written into § 432.070 that a third-party beneficiary to a contract can dispense with any of these mandatory requirements. Therefore, as the Class was not a party to the 1976 Stipulation and Agreement, it cannot sue on the contract.

This argument has been applied to deny standing to third-party beneficiaries. In *Mays-Maune & Assoc., Inc. v. Werner Bros., Inc.*, 139 S.W.3d 201 (Mo. App. 2004), a building materials supplier brought an unjust enrichment claim against a general contractor, subcontractor, and the school district. The court, however, affirmed the dismissal of the claim against the school district because the supplier failed to comply with the requirements of § 432.070. *Id.* at 208–09. That is, there was no written contract between the supplier and the school district, and the court rejected the supplier's claim that by pleading the existence of a valid written contract between the school district and the general contractor, it somehow had satisfied the statute. *Id.*

And in *Catapult Learning, Inc. v. Bd. of Educ. of City of St. Louis*, No. 4:07CV935SNL, 2007 WL 2736271 (E.D. Mo. Sept. 17, 2007), the plaintiff brought suit against a school board for alleged non-payment for services provided to a third-party defendant. The court, however, dismissed the plaintiff's claim against the school district

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(July 16, 2017 *and* Oct. 5, 2017). In responding to the countersuit by the masonry company it had allegedly contracted with, the municipality alleged that there was no contract in compliance with § 432.070. As the municipality admitted that there was no compliant contract, its own breach of contract suit was dismissed on the pleadings. *See also Newsome v. Kansas City, Missouri School District*, 520 S.W.3d 769, 776-77 (Mo. banc 2017) (holding, pursuant to § 432.070, that an insurance policy endorsement did not comply with the requirements of § 432.070 and, therefore, a school district lost its sovereign immunity on insurance grounds).

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for failure to comply with the mandatory requirements of § 432.070. Specifically, the court stated:

> There is no written contract, signed by the plaintiff and the Board, in existence. There is only the Agreement signed by plaintiff and [the third-party defendant]. Plaintiff has not pleaded nor has attached any document which purports showing that the Board subscribed to the agreement between plaintiff and [the third-party defendant]. Plaintiff does not plead . . . that [the third-party defendant] was the Board's 'agent' authorized by law and duly appointed to enter into any agreement with plaintiff on the Board's behalf. Plaintiff has failed to plead and cannot prove the existence of a written contract between it and defendant Board which complies with the mandatory requirements of § 432.070 R.S.Mo.

Id. at *3. Therefore, because the school district was not a signatory to any written contract with the plaintiff, the court dismissed both the breach of contract and unjust enrichment claims.

This Court, therefore, should overturn the circuit court's judgment finding the City in breach of the 1976 Stipulation and Agreement, and this Court "should unhesitatingly enforce compliance with all mandatory legal provisions designed to protect a municipal corporation and its inhabitants.'" *Southwest Tracor*, 71 S.W.3d at 215.

3. Even if § 432.070 did allow third-party contractual standing against a municipality, the Class does not qualify and still, therefore, lacks standing to bring a breach of contract suit on the 1976 Stipulation and Agreement.

Assuming that this Court disagrees with Point II.C.2, and holds that a third-party beneficiary to a contract may recover against the City, the Class still lacks standing under third-party beneficiary law. Being a third-party beneficiary of a contract does not – alone – give standing to bring a cause of action. As Missouri common law defines, "[a] third-party beneficiary is one who is not privy to a contract or its consideration but who may nonetheless maintain a cause of action for breach of the contract." *L.A.C. ex rel. D.C. v. Ward Pkwy. Shopping Ctr. Co.*, 75 S.W.3d 247, 260 (Mo. banc 2002). There are three types of third-party beneficiaries to a contract: donee beneficiaries, creditor beneficiaries,

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and incidental beneficiaries. *Id.* Not all third-party beneficiaries, however, have enforceable rights under a contract.

Donee and creditor beneficiaries may maintain actions and recover under a contract, while incidental beneficiaries may not. *Id.* A donee third-party beneficiary exists when "the purpose of the promisee 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." *Id.* A creditor beneficiary is "one upon whom the promisee intends to confer the benefit of the performance of the promisee's contract with the promisor and thereby discharge an obligation or duty the promisee owes the beneficiary." *Fed. Deposit Ins. Corp. v. G. III Investments, Ltd.*, 761 S.W.2d 201, 204 (Mo. App. 1988). The courts uniformly hold that "[o]nly donee and creditor beneficiaries have enforceable rights under a contract." *See OFW Corp. v. City of Columbia*, 893 S.W.2d 876, 879 (Mo. App. 1995). In contrast, an incidental beneficiary is one who will benefit from the performance of a promise but who is neither a promisee nor an intended beneficiary. *Id.*

The Class, therefore, must have proven its members to be either creditor or donee beneficiaries, as incidental beneficiaries lack standing to bring a breach of contract suit. A creditor beneficiary in this case would be one who is owed something by the Original Fifteen Plaintiffs from the 1970s cases. Those Original Fifteen Plaintiffs, then, would have assigned their rights under the contract to the Class members in order to discharge the obligation. The Class undertook no effort to show that the Original Fifteen Plaintiffs were indebted in any way to the Class or its members and, therefore, cannot qualify as creditor beneficiaries. The Class, likewise, cannot qualify as donee beneficiaries. The Missouri Constitution art. VI, §§ 23, 25 specifically prohibit cities and other political subdivisions from making gifts to private individuals or entities. *Cf. St. Louis Children's Hosp. v. Conway*, 582 S.W.2d 687, 690 (Mo. 1979) (donation of property interest to a private hospital violated Art. 6, §§ 23, 25).

As the City is constitutionally prohibited from "mak[ing] a gift to the beneficiary," the Class cannot be a donee beneficiary. This leaves the Class members, at best, as

incidental third-party beneficiaries "without recourse to bring an action as a third-party beneficiary of the contract." *State ex rel. E.A. Martin Mach. Co. v. Line One, Inc.*, 111 S.W.3d 924, 931 (Mo. App. 2003). The Original Fifteen Plaintiffs and the City – the actual parties to the 1976 Stipulation and Agreement – could modify that agreement at any time, without the consent of or even notice to the members of the Class.

Part II: There is no basis in law for the Class' theories of recovery, as the Modified Judgment and 1976 Stipulation and Agreement were not valid.

If the members of the Class had standing, their claims would still fail because their bases fail. Their claims are based on the premise that there was a 1976 judgment (and the prerequisite Stipulation and Agreement) that included them. But as discussed in Point III, the 1976 Modified Judgment was invalid, insofar as it extended beyond the Fifteen Original Plaintiffs, because the court lacked jurisdiction over members of the broader class that may have included some of the members of the Class. As discussed in Point IV, the 1976 Modified Judgment, purporting to bind the legislature of Kansas City perpetually as to all property owners, violated constitutional separation of powers. And as discussed in Point V, the Stipulation and Agreement was not a valid contract, and could not support the broad reach of the Modified Judgment.

The City recognizes that each of these arguments attacks the broad, long-final 1976 judgment. Each is a "'collateral attack [, *i.e.*,] an attempt to impeach a judgment, whether interlocutory or final, in a proceeding not instituted for the express purpose of annulling the judgment.'" *State ex rel. Gen. Credit Acceptance Co., LLC v. Vincent*, 570 S.W.3d 42, 48 (Mo. banc 2019) (quoting *Beil v. Gaertner*, 197 S.W.2d 611, 613 (Mo. 1946)). *See also Reimer v. Hayes*, 365 S.W.3d 280, 283 (Mo. App. 2012) (defining a collateral attack on a judgment as occurring "in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement").

Such attacks are not entirely precluded. In fact, a "collateral attack is appropriate when the underlying judgment is void . . . ." *Id. See also La Presto v. La Presto*, 285 S.W.2d 568, 570 (Mo. 1955) ("But a judgment which is void on the face of the record is entitled to no respect, and may be impeached at any time in any proceeding in which it is

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sought to be enforced or in which its validity is questioned by anyone with whose rights or interests it conflicts."). A void judgment is one in which the court was without jurisdiction to enter the judgment and is a legal nullity. *Id.* "A void judgment can have no conclusive effect, either as res judicata or as an estoppel, because the proceeding that culminated in the void judgment was itself without integrity." *Id.* (citing *Wright v. Mullen*, 659 S.W.2d 261, 263 (Mo. App. 1983)).

III. The trial court erred in finding contempt because the 1976 Modified Judgment was not a valid order in that the circuit court in 1976 lacked personal jurisdiction over "similarly situated properties."

A. Preservation of Error

The City pleaded that the 1976 trial court lacked personal jurisdiction over "similarly situated properties" in its answers. LF 69 ¶ 11; LF 375 ¶ 12. The City argued at trial that the 1976 court lacked personal jurisdiction as the 1970s cases were not certified as class actions. Tr. 295:17-298:11; Tr. 470:21-473:3. The City presented those arguments in its proposed Findings of Fact and Conclusions of Law. LF 410-11 ¶¶ 13-18; LF 432 ¶¶ 35-41.

B. Standard of Review

This Court should affirm the judgment of a trial court "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). When the review of a court tried case involves questions of law, those "'matters [are] reserved for *de novo* review by the appellate court, and [the Court of Appeals] therefore give[s] no deference to the trial court's judgment in such matters.'" *Brown v. Brown*, 152 S.W.3d 911, 914 (Mo. App. 2005) (quoting *H & B Masonry Co. v. Davis*, 32 S.W.3d 120, 124 (Mo. App. 2000)). To the extent this Court is required to revisit the trial court's decision in 1976 to exercise personal jurisdiction over "similarly situated properties," personal jurisdiction is an issue that this Court reviews independently of the trial court's determination. *Noble v. Shawnee Gun Shop, Inc.*, 316 S.W.3d 364, 370 (Mo. App. 2010).

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C. The 1976 Modified Judgment was void and not a "lawful order" as the 1976 court lacked personal jurisdiction over "similarly situated properties."

This Court has held "disobedience of a *lawful order* of a court is such an interference with the administration of justice as to constitute a contempt." *Twenty-First Judicial Circuit, Bar Comm. v. Fahey*, 583 S.W.2d 171 (Mo. banc 1979) (emphasis supplied). *See also Int'l Motor Co. v. Boghosian Motor Co.*, 914 S.W.2d 5, 8 (Mo. App. 1995) ("the failure to obey a *lawful order* of the court . . . constitutes contempt of the court" (emphasis supplied, quoting *Zeitinger v. Mitchell*, 244 S.W.2d 91, 97 (Mo. 1951))). "A party alleging contempt establishes a prima facie case for civil contempt when the party proves: (1) the contemnor's obligation to perform an action as required by the decree; and (2) the contemnor's failure to meet the obligation." *Walters*, 181 S.W.3d at 138.

Contempt, as the trial court found in this case, rests on a lawful order issued by the 1976 trial court. The 1976 Modified Judgment was not a lawful order for two reasons: the court lacked personal jurisdiction over the parties whose rights it sought to affect (Point I); and the Modified Judgment violated the separation of powers (Point II). As there is not a "lawful order" arising from the 1970s litigations, there can be no contempt on the part of the City and the trial court erred in so finding.

One circumstance where collateral attack is appropriate is when the court issuing the attacked judgment lacked personal jurisdiction. *See Wuebbeling v. Clark*, 502 S.W.3d 676, 686 (Mo. App. 2016) (listing lack of personal jurisdiction, subject matter jurisdiction, or denial of due process as reasons to collaterally attack a judgment). Personal jurisdiction refers "to the power of a court to require a person to respond to a legal proceeding that may affect the person's rights or interests." *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009).

The Modified Judgment orders that the City provide services not just "to the properties of the plaintiffs," but also "to the owners of *similarly situated properties not parties in this litigation*." A4 (emphasis supplied). That extension is essential to the Class

– none of whom were then "plaintiffs," but who either owned or later acquired property that is "similarly situated," *i.e.*, it is a building with seven or more dwelling units.

Although the 1970s cases had been filed as class actions, no evidence exists in the dockets that they were ever considered a class action or that the class certification process was taken under consideration. A72, A73. As such, the 1976 court lacked the personal jurisdiction to affect the rights, either positively or negatively, of the similarly situated owners the court specifically identified as not being parties to the litigation.

Personal jurisdiction is the power of a court over the parties. *Webb*, 275 S.W.3d at 253. When a court lacks personal jurisdiction, it means that the constitutional principle of due process bars the court from affecting the rights and interest of a particular party. *Id.* A court obtains personal jurisdiction over a plaintiff only by the filing of a petition. *Manning v. Fedotin*, 64 S.W.3d 841, 848 (Mo. App. 2002).

The obvious exception to the necessity of filing a petition is through a class action. Class action requirements "have been carefully drafted to take into consideration the fact that class actions are a procedural exception to the general principle of jurisprudence that one is not bound by a judgment *in personam* entered in litigation to which he was not designated as a party or made a party by service of process or entry of appearance." *Epstein v. Villa Dorado Condo. Ass'n, Inc.*, 316 S.W.3d 457, 460 (Mo. App. 2010). These requirements are "not merely technical or directory, but mandatory." *Id.*

In *Epstein*, several apartment owners in buildings without elevators filed a class action lawsuit seeking relief from fees charged to them by their condominium association for elevator repairs. The court agreed with the owners and ruled that the assessments were illegal, invalid, and void "as to *all* owners in buildings without elevators . . . ." *Id.* at 459 (emphasis supplied). The court, however, "never issued an order certifying a class such as that requested by Owners in their Petition. Additionally, nothing in the record indicates that the unit owners proposed as part of the class received proper notice as required by Rule 52.09(c)(2)." *Id.* at 460. The Eastern District held that "[b]ecause there was never proper class certification under Rule 52.08, the trial court erred when it extended the judgment to parties not named in the suit." *Id.* at 461.

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The Eastern District also held that "it was error under both Section 527.110 and Rule 87.04 to extend the judgment to those unit owners not a party to the case." *Id.* Section 527.110 and Rule 87.04 provide that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." In explaining this holding, the court explained that "all unit owners not served by elevators were not made parties to the proceedings, however any declaration made by the trial court affected these owners directly, and therefore, all owners without elevator access had an obvious interest in any judicial declaration regarding the elevators, rendering them an indispensable party to the trial-court proceeding." *Epstein*, 316 S.W.3d at 461. In so holding, the Court of Appeals overturned the trial court's remedy afforded to non-party property owners.

Similar to both this case and *Epstein* is *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791 (Mo. banc 1995) (overruled on Hancock Amendment grounds). In *Beatty*, three tax payers brought suit claiming that a rate increase by their sewer district violated the Hancock Amendment. *Id.* at 792. The trial court, after the merits were determined, called this a "representative taxpayer suit" and ordered the sewer district to credit all of its customers' periodic bills as a method of refund. *Id.* There was, however, no reference to class action in the "named plaintiffs' Petition for Declaratory Judgment and Injunction; neither [was] there any pleading of fact to support class action relief; neither is there any request for class action relief." In short, "[t]he record reflects no attempt to amend [the] petition, nor any evidence introduced at any time in [the] lawsuit, that would indicate that class issues were considered or that the requirements of Rule 52.08 were established." *Id.* at 795. It was only after judgment was entered and appeal was taken that plaintiffs requested a credit refund to all ratepayers.

In *Beatty*, this Court held, just as it had in *State ex rel. Niess v. Junkins*, 572 S.W.2d 468, 470 (Mo. banc 1978):

> There was no pre-trial order with reference to maintenance of this suit as a class action. There was no finding at any time as

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> to compliance with the requirements of Rule 52.08(b) and there was no notice given to members of the class in accordance with Rule 52.08(c)(2). Consequently, we conclude that this case was not maintainable as a class action and the trial court erred in holding that it was.

Here, as in *Epstein*, *Beatty*, and *Niess*, there is no evidence that the 1976 court ever maintained the 1970s actions as class actions. Although the actions were pleaded as class actions, the Class made no showing that there was a class certification brief filed, that there was opposition or a chance to be heard on the merits of class certification, or that the 1976 court undertook the mandatory analysis required by Rule 52.08. The only evidence presented, then, was by the City when it introduced the docket sheets from the three 1970s cases. Those docket sheets have no class certification briefing, arguments, or orders on them. Without proof that the 1970s actions were class actions, the 1970s court had no personal jurisdiction over "similarly situated" properties which the court described as "not parties in this litigation." A4. As such, the 1976 Modified Judgment was not a "lawful order" that requires compliance by the City.[9]

D. The City cannot consent to, or "invite error" by consenting to, personal jurisdiction exercised by the 1976 court.

1. The City did not and could not "consent" to the personal jurisdiction of a party opponent because the method of consent – the 1976 Stipulation and Agreement – was a legal nullity and personal jurisdiction can only be waived by the individual affected, not the party opponent.

The Western District dismissed these arguments concerning the 1976 trial court's lack of personal jurisdiction over "similarly situated properties" by holding that the city "proposed to the court a resolution which resolved the plaintiffs' claims on a class-wide basis." *Sophian Plaza v. City of Kansas City*, Case No. WD80678, 2018 WL 5795541, at *6 (Mo. App. Nov. 6, 2018). The City's purported "proposal" to the 1976 court, however,

[9] The City believes that, by attempting to exercise personal jurisdiction over similarly situated properties, the Modified Judgment was not a valid order at all. However, in the event that this Court believes it is a valid order, it is valid only for those properties for which the 1970s trial court had personal jurisdiction over, i.e. the Original Fifteen Plaintiffs.

was the 1976 Stipulation and Agreement. As argued in Point V, *infra*, the 1976 Stipulation and Agreement is a void contract without any legal effect; without legal effect, it is not a valid "proposal" agreeing to a class-wide remedy. The Western District, however, never addresses the City's arguments as to the validity of the 1976 Stipulation and Agreement, explicitly declining to consider the City's § 432.070 arguments.

Moreover, while personal jurisdiction can be waived, it can only be waived by the party over whom jurisdiction is being asserted, "'because it is a personal privilege.'" *In re Marriage of Hendrix*, 183 S.W.3d 582, 588 (Mo. banc 2006) (quoting *State ex rel. Lambert v. Flynn*, 154 S.W.2d 52, 57 (Mo. banc 1941)). The fact that an assistant city attorney, in 1976, purportedly consented to the 1976 court entering an order that exceeded its jurisdiction cannot and should not be taken into consideration. The City was a party opponent to "similarly situated properties," and a party opponent cannot waive the jurisdiction of a party whose rights are being affected. The 1976 court exceeded its personal jurisdiction over similarly situated properties not parties to the litigation, and the fact that the parties asked for the court to so exceed its jurisdiction is not dispositive.

2. Judicial estoppel should not preclude the assertion of the 1976 trial court's lack of personal jurisdiction as the non-exclusive factors favor allowing the argument, as do the equities involved.

The Western District also held that the principle of judicial estoppel prevented the City from asserting in this action the lack of personal jurisdiction over nonparties in 1976. Missouri recognizes the doctrine of judicial estoppel "'which is said to be designed to preserve the dignity of the courts and insure order in judicial proceedings.'" *Vacca v. Mo. Dep't of Labor and Industrial Relations*, No. SC96911, 2019 WL 1247074 at *6 (Mo. *banc* Mar. 19, 2019) (quoting *Edwards v. Durham*, 346 S.W.2d 90, 100-01 (Mo. 1961)). For judicial estoppel to apply, there is a requirement of a "finding a party took inconsistent positions . . . ." *Id.* at *1. Beyond that prerequisite, there are non-exclusive factors to be considered when evaluating the applicability of judicial estoppel: "'whether the party has succeeded in persuading a court to accept that party's earlier position'" and "'whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose

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an unfair detriment on the opposing party if not estopped.'" *Id.* at *8 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001))

The first consideration – the prerequisite – is whether the positions taken in court by the City in 1976 and in the current litigation are inconsistent. As shown *infra* at Point V, the 1976 Stipulation and Agreement was not a valid contract, as it violates multiple provisions written into RSMo. § 432.070. Because the 1976 Stipulation and Agreement violates § 432.070, it is "void rather than voidable." *City of Fenton v. Exec. Int'l Inn, Inc.*, 740 S.W.2d 338, 340 (Mo. App. 1987). As a void contract, neither the legislative fix proposed in the 1976 Stipulation and Agreement nor the request to have the 1976 Stipulation and Agreement written into the Modified Judgment can have legal effect and bind the City. The City put forward no position on whether the 1976 court had personal jurisdiction over similarly situated properties, and, therefore, the City cannot be said to be "*clearly* inconsistent" today.

It is the last consideration of judicial estoppel that is largely in favor of the City. Rather than receiving an "unfair advantage or impos[ing] an unfair detriment" on the Class, the City is advocating for the application of the principles of personal jurisdiction, constitutionally imposed separation of powers, attempting to exercise its statutorily granted police powers, and complying with the changing needs of its citizens, the environment, and its budget. It is the Class, rather, that is gaining an unfair advantage by stripping away the City's ability to legislate and forcing compliance with a void contract to which they are not parties and lack the ability to enforce. Further, if the Class lacks standing to assert contempt, it loses nothing and is disadvantaged in no way: it still has the ability to challenge the City's currently enacted ordinance prohibiting trash service to those buildings with seven or more units. The elements of judicial estoppel do not favor the Class, and the trial court erred in granting summary judgment.

Further, "judicial estoppel cannot be applied to grant jurisdiction over a claim that could not otherwise be brought." *In re J.D.S.*, 482 S.W.3d 431, 442 (Mo. App. 2016). After examining cases from the Supreme Court, several circuit courts, and a number of states, the Western District held that: "A litigant cannot obtain standing to bring an action

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solely based on judicial estoppel. To do so would create a new avenue for a court to obtain jurisdiction and allow a court to rule in a proceeding without any currently recognized constitutional authority to do so." *Id.* at 443. The City has put forth a number of arguments explaining why the Class lacks the ability to enforce the 1976 Stipulation and Agreement, why the 1976 court lacked jurisdiction over plaintiffs similarly situated and the subject matter, and why the Class lacks standing to bring a contempt action. The City references these arguments here for this point: the Class had no standing to bring this case to enforce a void contract and judgment in a case in which they were not parties and cannot now use judicial estoppel to grant jurisdiction over a claim that could not otherwise be brought.

IV. The trial court erred in holding the City in contempt of the Modified Judgment because the Modified Judgment is void as it violates the Missouri Constitution, Article 2, section 1 requiring a separation of powers in that the 1976 trial court went beyond finding an equal protection violation to entering a perpetual judgment that included the specifics of a solid waste ordinance.

A. Preservation of Error

The City violation of the separation of powers in its answers. LF 69 ¶¶ 11, 12; LF 375 ¶¶ 12, 13. The City argued against the granting of summary judgment on the separation of powers, LF 318-228, but could not present evidence or argument at trial due to the grant of partial summary judgment to the Class on this issue. The City did ask, at trial, that the grant of summary judgment be reconsidered; that request was denied. Tr. 298:12-16.

B. Standard of Review

This Court should affirm the judgment of a trial court "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy*, 536 S.W.2d at 32. When the review of a court tried case involves questions of law, those "'matters [are] reserved for *de novo* review by the appellate court, and [the Court of Appeals] therefore give[s] no deference to the trial court's judgment in such matters.'" *Brown*, 152 S.W.3d at 914 (quoting *H & B Masonry Co.*, 32 S.W.3d at 124).

The trial court rejected the City's separation of powers argument through the Class' motion for partial summary judgment, finding that the City had waived or was judicially

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estopped from asserting the defense. "The standard of review for an appeal challenging the grant of a motion for summary judgment is de novo." *Walsh v. City of Kansas City*, 481 S.W.3d 97, 105 (Mo. App. 2016) (citing *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). Accordingly, this Court does not defer to the trial court's decision. *Id.*

C. The 1976 Modified Judgment was void and not a "lawful order," as it violated the separation of powers.

Article II, section 1 of the Missouri Constitution provides:

> The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

This is "to keep the several departments of our state government separate and independent in the spheres allotted to each . . . ." *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993) (quoting *Rhodes v. Bell*, 130 S.W. 465, 468 (Mo. App. 1910)).

"The constitutional demand that the powers of the departments of government remain separate rests on history's bitter assurance that persons or groups of persons are not to be trusted with unbridled power. For this reason, the separation of the powers of government into three distinct departments is, as oft stated, 'vital to our form of government.'" *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 231 (Mo. banc 1997) (quoting *State on Info. of Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc 1971)). "Thus, '[t]he doctrine of the separation of powers [is not meant to] promote efficiency but to preclude the exercise of arbitrary power.'" *State Auditor*, 956 S.W.2d at 231 (quoting *Myers v. United States*, 272 U.S. 52, 293 (1926)).

The separation of powers can be violated in two broad ways: "One branch may interfere impermissibly with the other's performance of its constitutionally assigned power. Alternatively, the doctrine of the separation of powers may be violated when one branch assumes a power that more properly is entrusted to another." *State Auditor*, 956

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S.W.2d at 231 (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 963 (1983)). The court's 1976 Modified Judgment violates the separation of powers in both ways, and is therefore void and unenforceable. *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988), *overruled on other grounds by Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000) ("such a ruling would be void as being a violation of the doctrine of separation of powers").

1. The 1976 court violated the separation of powers by assuming the legislative lawmaking powers given to the City's Council, thereby making the 1976 Modified Judgment unconstitutional.

The role of the courts in reviewing the constitutional validity of legislative action traditionally has been to declare whether the action is constitutional. This function derives from the court system's duty to make final determinations of questions of law. *Asbury*, 846 S.W.2d at 200 ("The quintessential power of the judiciary is the power to make final determinations of questions of law.") If a legislative action conflicts with a constitutional provision, the courts must hold the action invalid. *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002). But when an action is void due to unconstitutionality, it is up to the legislature to decide whether to attempt to pass a similar, but constitutionally acceptable replacement statute. And when legislative inaction is declared unconstitutional, it is the role of the legislature to decide the best way to comply with the constitution. This is true because the *legislature* is the proper branch of government to make policy decisions. *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 674 (Mo. banc 2009). If multiple answers exist to a question, the legislature, not the judiciary, is the appropriate branch to choose the best one.

Applying this analysis to the present case, the court in 1976 had the right to declare the City's ordinance violative of equal protection which it did in the original February 20, 1976 Order and April 7, 1976 Judgment. A23-24; A74-75. In the February 20 Order, the court simply declared the applicable subsection to be "unconstitutional and invalid . . . ." A24. However, when modifying that judgment on September 1, 1976, the court directed 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. A79-80. This direction was the usurpation of the City's legislative powers.

As was stated in *Asbury*, the court had the ability, in 1976, to declare whether the City's ordinance was constitutional. But when it found that the action was unconstitutional, it should have been left to the legislature (i.e. the City Council) to determine how to best comply with the constitution. The court's directions to the City usurped that role.

On at least two separate occasions, courts have stopped short of commanding the legislative body of a political subdivision to adopt a specific ordinance, instead recognizing that considering and enacting the specifics is a legislative and not judicial function. In *Huttig v. City of Richmond Heights*, the Missouri Supreme Court invalidated a zoning ordinance which only allowed a residential use for a property as unreasonable and ordered that commercial uses be allowed on plaintiff's property. 372 S.W.2d 833, 844 (Mo. 1963). In so holding, the Court stated, "It is not our function . . . to prescribe what commercial use shall be permitted on this property, especially since no specific plan or proposal has been filed" and held only "that the present ordinance . . . is void as applied to the tract in question . . . ."

Similarly, in *Lenette Realty & Investment Co. v. City of Chesterfield*, the court of appeals invalidated a zoning ordinance as unreasonable. 35 S.W.3d 399, 408 (Mo. App. 2000). Quoting *Huttig*, the Eastern District refused to adopt the plaintiff's proposed zoning plan and approved the circuit court's order that the city must only "place a reasonable zoning classification on the properties." *Id.* at 408–09. The Eastern District refused to endorse the plaintiff's proposed zoning plan, as "[a]ny such judicial command [as proposed by the plaintiff] to a legislative body raises serious questions regarding the constitutionally mandated distinctions between the legislative and judicial branches of this state's government." *Id.* at 408. This Court cited *Lenette* with approval in *E. Missouri Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755, 763 (Mo. 2012), in which this Court held that a trial court had the authority to compel a legislative body to meet its constitutional obligations, but must leave it to those bodies to determine how to meet them. While the Court withheld judgment as to whether the trial

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court in that case violated the separation of powers, it held that the trial court went too far when it ordered the city to pass an ordinance to carry out its duty to bargain collectively. *Id.* at 763–64.

The 1976 court, while entitled to find the City's ordinance unconstitutional, overstepped its authority in writing a particular legislative fix into the Modified Judgment. "[T]he court has no authority to amend the statute by judicial construction, even though it should be of the opinion that the statute, as so amended, would be more reasonable, and would, therefore, be a better statute than the one enacted by the Legislature." *Brown v. Raffety*, 136 S.W.2d 717, 719 (Mo. App. 1940). When a court declares an ordinance to be unconstitutional, the court cannot then "venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers." *State ex rel. Crow v. West Side St. Ry. Co.*, 47 S.W. 959 (Mo. banc 1898). The Missouri Supreme Court sitting *en banc* has explicitly called judicial writing of a statute "judicial usurpation of the legislative function" and commented "[t]hat we cannot do. We cannot write a new law. We can only consider this one." *City of Charleston ex rel. Brady v. McCutcheon*, 227 S.W.2d 736, 739 (Mo. banc 1950). Courts "cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. 2001). Ordering the amendment of a legislative enactment would be contrary to the doctrine of separation of powers and courts have no authority to do so. *Treme v. St. Louis Cty.*, 609 S.W.2d 706, 710 (Mo. App. 1980).

As the 1976 Modified Judgment is a judicial usurpation of the type this Court warned against in *Brady*, the 2016 trial court exceeded its jurisdiction to issue the order. The Modified Judgment cannot be a "lawful order" with which the City was required to comply in perpetuity.

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2. The 1976 court violated the separation of powers by interfering with the City's ability to pass an ordinance repealing the trash rebate program at any time in the future without the court's permission.

One of the primary rights and responsibilities the City's Council has is to pass ordinances and, therefore, legislate for the City. 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 – even if that action is taken almost 40 years after the mandatory injunction is ordered. When one branch of government must secure permission from another branch before acting on the powers the other branch has been promised by the constitution, a violation of the separation of powers has occurred.

In *Albright v. Fisher*, this Court considered an injunction, issued by a trial court, which restrained the City of St. Louis from "considering, passing, or adopting, or taking any further action upon or in relation" to an ordinance to extend a street car. 64 S.W.106 (Mo. 1901). This Court drew an analogy: "If the governor refuses or neglects to discharge his duties, exceeds his powers in flagrant cases, there is ample remedy by impeachment and removal from office. It is not believed that the courts have the power to discharge his duties for him, or to say what he shall or what he shall not do." *Id.* at 109. After then holding that a city's law-making body was part of the "legislative" branch of government, this Court continued that analogy by holding that "it is quite beyond the power of the courts to interfere with the exercise of [legislative] functions in any way or manner whatsoever, whether by enjoining the passage of an ordinance or by mandatorily compelling the presiding officer of either house to make that an ordinance which was not an ordinance theretofore by appending his unwilling signature thereto." *Id.*

This Court then explicitly limited the judiciary's power by holding that "[w]hile it is the duty of the supreme court to construe laws enacted by the general assembly, and while it has the power to declare them valid or invalid, as the case may be, it would be a gross usurpation of power for it to assume functions which belong exclusively to [the legislative] body." *Id*. at 110. If there was any doubt left as to this Court's holding that

enjoining the passage of an ordinance is a violation of the separation of powers, that doubt was crushed by this Court's further language:

> [I]t has been deemed unnecessary to discuss authorities pro and con of the question whether a court, on general principles, will intervene in cases of ordinances then on their passage, or about to be passed, and on the calendar for that purpose, since we regard our constitutional provisions *conclusive* against the exercise of any such supposed jurisdiction.

Id. (emphasis supplied). Over 100 years ago, then, this Court made clear that legislating by the courts, such as prohibiting the passage of an ordinance, is a violation of the separation of powers and "that no interference whatever of one department with another is tolerable under article 3 of our constitution." *Id.*

Just as in *Albright*, the 1976 court proactively prohibited the City from ever passing a specific ordinance. Even if that was not the court's intent, that is how the Class asked the trial court to rule: that, after the 1976 Modified Judgment, the City never had the authority to change the solid waste scheme, which is enacted by the City's Council by ordinance, and for which money must be appropriated annually by the City Council by ordinance, without first seeking the approval of another branch of government. However, just as with a governor that may overstep his role, the 1976 trial court may not "discharge [the City's] duties for [it], or to say what [the City] shall or what [the City] shall not do." To 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. This Court has ruled that the constitution is conclusive against such practice. The 1976 Modified Judgment was, therefore, unconstitutional and cannot be a "lawful order" with which the City was required to comply.

Further, it was only the 1976 Modified Judgment that suffered this defect. The circuit court entered its original judgment on April 7, 1976. A74-75. That original judgment required that the City provide trash service only "until the City enacts a valid ordinance setting a reasonable and non-arbitrary classification." A75. In other words, the

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City had a way to end the injunction contained within the original Judgment: pass a valid ordinance.[10] The April 1976 Judgment did not strip the City of its ability to consider whether a rational basis existed to treat multi-unit dwellings differently and pass an ordinance based on those differences; the April 1976 Judgment does not run afoul of *Asbury*, as it leaves the legislative function squarely on the shoulders of the City to craft another, valid ordinance. The 1976 Modified Judgment allows no such freedoms to the City, and therein lies the constitutional problem. Without the ability to pass a valid ordinance at some time in the future, the Modified Judgment runs afoul of the Missouri Constitution and is not a "lawful judgment."

D. The trial court erred in granting partial summary judgment on the separation of powers affirmative defense.

As shown above in Point IV.C, the 1976 trial court violated the separation of powers by judicially imposing a legislative fix for the ordinances that it had found violated equal protection. The City, however, was unable to present evidence of this affirmative defense at trial, as the Class had moved for summary judgment to exclude it. Its brief alleged that the City had waived the separation of powers argument in 1976 and that the City was judicially estopped from arguing violation of separation of powers.

1. The trial court erred in finding that the City had waived its separation of powers argument, because waiver is unavailable for constitutional questions concerning the system of checks and balances.

Even though the 1976 Modified Judgment is void and, therefore, has no conclusive effect, either as res judicata or as an estoppel, *Hussmann Corp. v. UQM Elecs., Inc.*, 172

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[10] The City believes it has done just that. In 2010, the City passed an ordinance ending the Apartment Rebate Program. The testimony concerning the cutting of that program focused on both the economic factors the City was facing at the time, as well as the fact that buildings with seven or more units largely did not follow the cost and environment saving measures that the City had adopted in its city-wide ordinances such as a two-bag limit per residence and unlimited, free recycling.

Initially, the Class' Petition included a count for the current ordinance being a violation of equal protection. The Class voluntarily dismissed that Count, meaning that there has been no constitutional challenge or ruling on the City's current ordinance. To date, then, the City has a valid ordinance which prohibits trash collection from the Class.

S.W.3d 918, 920 (Mo. App. 2005), the Class claims that the City has waived its constitutional objections. LF 250-59. In doing so, it cited two cases in the trial court: *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. 2013) and *City of Kansas City v. McGary*, 218 S.W.3d 449 (Mo. App. 2006). LF 252-53. As an initial matter, it is worth noting that, in both cases, the court below was determining the rights of a criminal defendant. In *Damon*, the class was composed of those individuals who had been ticketed by a red-light camera, and in *McGary*, the defendant was being prosecuted for allowing a prohibited nuisance on his rental property. The instant case does not concern criminal prosecution.

Further, both cases also involve the challenge to the constitutionality of City ordinances relating to the process protections afforded to defendants in municipal court. This Court, sitting *en banc*, explicitly recognized that there are "personal" constitutional rights that can be waived. *State v. Poelker*, 378 S.W.2d 491, (Mo. banc 1964) (citing, with approval, *State v. Page*, 186 S.W.2d 503, 507–08 (Mo. App. 1945) (listing some of the personal privileges which are waiveable)). Due process rights are among them. *See, e.g. State v. Middleton*, 998 S.W.2d 520, 525 (Mo. 1999) (waiving due process right to be present) *and State v. Sharp*, 533 S.W.2d 601, 605 (Mo. banc 1976) (waiving right to a jury trial).

Although the Missouri courts have yet to address whether the non-personal constitutional rights can be waived, this is something that the federal courts, including the United States Supreme Court, have addressed. The foundational case on this topic is *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986). In *Schor*, the Court was determining whether an appellant had waived his right to trial before an Article III court. The Court held that he had "waived any right he may have possessed to the full trial of [the] counterclaim before an Article III court." *Id.* at 849. This was because, the Court explained, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." *Id.* at 848–49.

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The Court went on to explain that the waiver of "personal rights" is not always dispositive because Article III "not only preserves to litigants their interest in an impartial and independent federal adjudication of claims . . . , but also serves as 'an inseparable element of the constitutional system of checks and balances.'" *Id.* at 850 (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982)). To the extent that the purpose of preserving the separation of powers is implicated, "the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction . . . . When these Article III limitations are at issue, notions of consent and waiver *cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.*" *Id.* at 851 (emphasis supplied).

This case, likewise, involves the institutional interest of the separation of powers. The 1976 court both infringed on the rights that belonged to the City Council and future City Councils, if they felt it was appropriate, from exercising rights that were constitutionally granted to it. When the foundation of the State's ability to check and balance the various governmental institutions is at stake, this Court should follow the guidance of the United States Supreme Court and hold that the system of checks and balances cannot be waived by litigants.

2. The trial court erred in finding that the City was estopped from litigating the separation of powers affirmative defense, because the elements of judicial estoppel favor allowing the consideration of the constitutionality of the 1976 Modified Judgment.

As with estoppel for personal jurisdiction, the City has not adopted inconsistent positions in the 1970s litigations and this litigation, as the position of the City was advanced in a void contract. Further, the non-exclusive factors favor not applying judicial estoppel. The signatories to the 1976 Stipulation and Agreement obviously persuaded the 1976 court to incorporate the 1976 Stipulation and Agreement into the Modified Judgment. Missouri has consistently held that consent judgments are contractual in nature. *Ishmon v. St. Louis Bd. of Police Com'rs*, 415 S.W.3d 144, 150 (Mo. App. 2013). Thus, the trial court's role in 1976 was not to be persuaded or determine constitutionality, but, rather, to implement

the contractual arrangement between the parties. It stands to reason, then, that if the underlying contract is void *ab initio*, as argued in Point V, the judgment is, as well.

Next, allowing a court the ability to correct an unconstitutional order and allowing consideration of the constitutional arguments furthers the goal of judicial estoppel. Missouri courts exist, in part, to ensure compliance with the Missouri Constitution. The court's dignity is negatively impacted in issuing an order that deprives other branches of government of *their* constitutional rights. In denying the City the opportunity to make this argument, the trial court erred, and this Court should reverse the opinion of the trial court.

Finally, it should be remembered that judicial estoppel is a "flexible, equitable doctrine." *Vacca*, 2019 WL 1247074, at *10. For forty years, the City operated under a void contract, void judgment, and unconstitutional court order. It has acted in good faith. It was only when environmental understanding evolved and economic circumstances required – for the good of all citizens receiving all services within the City – that the City modified the trash rebate program. As argued in Point VI, the properties receiving the rebates do not adhere to the requirements of the City's current solid waste ordinances: they do not provide free recycling, they do not limit trash, and they do not provide the ancillary services required by the current ordinance. In short, they are not providing the same services. It is unfair and unequitable that they should be allowed to benefit from the City's solid waste program when they are unwilling or unable to comply with its requirements as the rest of the citizens of Kansas City must do. For these reasons asserted herein, the trial court should not have estopped the City from asserting its separation of powers defense.

V. The trial court erred in finding the City breached the 1976 Stipulation and Agreement because the 1976 Stipulation and Agreement is a void contract that does not comply with RSMo. § 432.070, in that the 1976 Stipulation and Agreement was not within the scope of the City's powers nor expressly authorized by law, nor signed by an individual with the ability to bind the City in contract, and lacks the certification of the Director of Finance.

A. Preservation of Error

The City has never wavered from its position that the 1976 Stipulation and Agreement does not comply with RSMo. § 432.070. The City pleaded as affirmative defenses in its Answer and Amended Answer that there was not a valid contract, that it was

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not duly signed and executed by the City, and that it deprives the City of its police powers, LF 68-69 ¶¶ 3-6; LF 374-75 ¶¶3-6. The City argued during trial and its closing argument that the 1976 Stipulation and Agreement was not a valid contract, that it was not duly signed and executed by the City, and that it deprives the City of its police powers, Tr. 478:24-481:5. The City proposed findings of fact and conclusions of law that the 1976 Stipulation and Agreement was not a valid contract, that it was not duly signed and executed by the City, and that it deprives the City of its police powers, LF 425-428 ¶¶ 13-26.

B. Standard of Review

In a court-tried case, this Court should "affirm the circuit court's judgment unless there is no substantial evidence to support it, it misstates or misapplies the law, or it goes against the weight of the evidence." *Brooke Drywall of Columbia, Inc. v. Bldg. Const. Enterprises, Inc.*, 361 S.W.3d 22, 26 (Mo. App. 2011) (citation and quotations omitted). "The trial court's judgment is presumed valid, [and] the burden is on the appellant to demonstrate its incorrectness[.]" *Harness v. Wallace*, 167 S.W.3d 288, 289 (Mo. App. 2005). "Substantial evidence is evidence which has probative force and from which the trier of fact could reasonably find the issues in harmony with its decision." *Grider v. Tingle*, 325 S.W.3d 437, 440 (Mo. App. 2010). If there is error, this Court must overturn the judgment if that error "materially affect[s] the merits of the action." Rule 84.13(b).

To the extent that this point on appeal requires this Court to determine the validity of the 1976 Stipulation and Agreement, this Court's review is de novo, as questions of contract interpretation are questions of law. *Wildflower Cmty. Ass'n, Inc. v. Rinderknecht*, 25 S.W.3d 530, 534 (Mo. App. 2000). When a contract is unambiguous, the parties' intent is determined based on the contract's language and parol evidence is not permitted. *Baker–Smith Sheet Metal, Inc. v. Bldg. Erection Servs. Co.*, 49 S.W.3d 712, 716 (Mo. App. 2001).

C. All contracts with a municipal entity are required to meet the strictures of RSMo. § 432.070 or will be void.

Missouri law clearly directs that any contract with a municipality must be in writing and satisfy all legal requirements and limitations imposed on the City by its charter.

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Donovan v. Kansas City, 175 S.W.2d 874, 878 (Mo. banc 1943) (holding contract illegal and *ultra vires* when there was no written certification by the Director of Finance as required by city charter). *Cf. Kennedy v. City of St. Louis*, 749 S.W.2d 427, 433-34 (Mo. App. 1988) (holding that charter provisions are mandatory and cannot estop a city from asserting § 432.070 and citing *W. Virginia Coal Co. of Mo. v. City of St. Louis*, 25 S.W.2d 466, 471 (Mo. 1930)). Absent strict compliance with the City's charter, any alleged contract or obligation is void, not merely voidable. Section 432.070, RSMo., states:

> No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor 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 in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

The requirements set forth in this statute are mandatory and must be strictly complied with in order to bind the City. "Section 432.070 . . . requires the contracts made by a city must be in writing and duly executed as provided in said statute. <u>The requirements of the statute are mandatory, not directory, and a contract not so made is void</u>." *Burger v. City of Springfield*, 323 S.W.2d 777, 782 (Mo. 1959) (emphasis supplied) (citing *Kansas City v. Rathford*, 186 S.W.2d 570, 574 (Mo. 1945)); *Bride v. City of Slater*, 263 S.W.2d 22, 26 (Mo. 1953) (contracting provisions are "mandatory rather than directory" and, if not followed, "the contract is void"); *Donovan*, 175 S.W.2d at 881–82 (an *ultra vires* contract "is not voidable only, but wholly void, and of no legal effect"). The Missouri Court of Appeals, Western District, reiterated the requirement for this strict compliance in *Gill Construction, Inc. v. 18th & Vine Authority*, stating that "[a] contract made in violation of the statute is 'void rather than voidable.'" *Gill*, 157 S.W.3d at 708 (citation omitted).

D. The 1976 Stipulation and Agreement is a void contract.

Throughout the proceedings below, the Class alleged that the 1976 Stipulation and Agreement was a valid contract entitled to enforcement. The Class claimed that it was a

third-party beneficiary to the 1976 Stipulation and Agreement, and the City's failure to provide trash service or the Apartment Rebate Program has deprived them of the benefit of an actual party's negotiations.

"A breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Keveney v. Missouri Military Acad.*, 304 S.W.3d 98, 104 (Mo. banc 2010). The City did not breach a contract because the 1976 Stipulation and Agreement was never a valid contract.

The rationale and public policy for the mandatory requirements of § 432.070 is quite clear: to protect the *public entity*, either from third-party claimants or even itself. "The purpose of Section 432.070 is to protect municipalities." *Gill*, 157 S.W.3d at 708. "Section 432.070 does not protect 'parties who seek to impose obligations upon government entities.'" *Id.* (quoting *Southwest Tracor*, 71 S.W.3d at 215). "To that end, '[a] court should unhesitatingly enforce compliance with all mandatory legal provisions designed to protect a municipal corporation and its inhabitants.'" *Southwest Tracor*, 71 S.W.3d at 215 (quoting *State ex rel. State Highway Comm'n v. City of Washington*, 533 S.W.2d 555, 558 (Mo. 1976)).

In the case at bar, the City needs protection, both from the Class seeking to impose liability on it, and from its 1976 representative who signed a void document. The 1976 Stipulation and Agreement is void both because it exceeded the City's powers because it purports to have contracted away the City's police power in perpetuity and because the proper contracting procedures were not followed.

1. The 1976 Stipulation and Agreement is void as it contracts away the City's police power of regulating solid waste.

The first requirement of § 432.070 is that a contract be "within the scope of [the City's] powers or be expressly authorized by law" – *i.e.*, that the contract be within the City's authority. A long line of Missouri cases establish a key limitation on the authority of a city: a municipality may not contract or bargain away its police powers, or any such

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purely governmental function, and any attempt to do so is invalid as contrary to public policy and § 423.070. *See, e.g., Stewart v. City of Springfield*, 165 S.W.2d 626, 629 (Mo. 1942) (settlement agreement that contracted away riparian rights was found to contract away police powers and was void); *Coal. to Pres. Educ. on the Westside v. Sch. Dist. of Kansas City*, 649 S.W.2d 533, 538 (Mo. App. 1983) (contract to open and operate a school was not valid as it contracted away school district's governmental power to close a school). A contract that bargains or contracts away a municipality's legislative authority is beyond the municipality's power and is void *ab initio*. *Farm & Home Inv. Co. v. Gannon*, 622 S.W.2d 305, 307 (Mo. App. 1981); *Ballman v. O'Fallon Fire Prot. Dist.*, 459 S.W.3d 465, 467 (Mo. App. 2015). "The police power cannot be hindered by contract; the obligation of contract necessarily gives way to a proper exercise of police power." *City of Hamilton v. Pub. Water Supply Dist. No. 2 of Caldwell Cty.*, 849 S.W.2d 96, 102 (Mo. App. 1993). "[A] contract that fails to comply with § 432.070 is void *ab initio*, not merely voidable." *Kindred v. City of Smithville*, 292 S.W.3d 420, 424 (Mo. App. 2009). The statutory requirements are mandatory, not directory. *Gill*, 157 S.W.3d at 708. Put simply:

> [A] city cannot surrender or contract away its governmental functions and powers. A city has no power to hamper the free exercise of its legislative discretion and the authority to establish and locate sewers and to provide plans for their construction is legislative. The police power may not be hindered or frustrated by contracts between individuals or companies or governmental subdivisions.

Lodge of the Ozarks, Inc. v. City of Branson, 796 S.W.2d 646, 650 (Mo. App. 1990).

The 1976 Stipulation and Agreement is void because it contracted away the City's legislative authority and its ability to exercise its police power to regulate the trash program. A city's police power is "the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society." *Engelage v. City of Warrenton*, 378 S.W.3d 410, 414 (Mo. App. 2012). The function of the police power is to preserve the health, welfare and safety of the people by regulating all threats harmful to the public interest. *Id.* A city has no inherent police power but rather enjoys only that police power conferred to it by a specific delegation from

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the state. *Id.* A constitutional charter city, such as the City, derives its powers from Mo. Const. art. VI, § 19(a). *State ex inf. Hannah ex rel. Christ v. City of St. Charles*, 676 S.W.2d 508, 511 (Mo. 1984).

There can be no doubt that the collection and disposal of solid waste is part of the City's police powers. "Generally, the function of the police power has been held to promote the health, welfare, and safety of the people by regulating all threats either to the comfort, safety, and welfare of the populace or harmful to the public interest." *Craig v. City of Macon*, 543 S.W.2d 772, 774 (Mo. banc 1976). "More specifically, the preservation of the public health is recognized as a goal of the highest priority, and the accumulation of garbage is a serious threat to the public health." *Id.* In *Craig*, this Court, sitting *en banc*, explicitly recognized the entire solid waste program of a city to be within its police powers. This is intuitive, as the Missouri legislature has charged municipalities with the mandatory collection and disposal of solid waste, and are, therefore, authorized to adopt ordinances, orders, rules, regulations, and standards for the storage, collection, transportation, processing, and disposal of solid waste. § 260.215 RSMo. Given the combination of these two sources, the Missouri Attorney General's Office has also recognized a solid waste program as being firmly entrenched in the police powers of a municipality. Mo. Opinion No. 189, 1977 WL 33720 at *1 (Oct. 24, 1977) ("The regulation of the collection of garbage and refuse is a governmental function falling within the police powers of the state or municipality.").

Even though the regulation of solid waste, including waste generated by dwellings with seven or more units, is a police power granted to the City, the City, according to the Class, contracted away, indefinitely, its right to legislate this program with respect to multi-unit dwellings when it entered into the 1976 Stipulation and Agreement. Until the end of time, or until the solid waste program ends entirely, the City is obliged to continue the Apartment Rebate Program, regardless of any change in circumstances – financial, environmental, or otherwise. This impermissibly hobbles every subsequent City Council by removing from their power the ability to exercise the City's police power and a "municipal corporation may not delegate, contract away or surrender its legislative

authority." *Gannon*, 622 S.W.2d at 307. The Stipulation and Agreement is *ultra vires* and void.

The Western District's opined on this very issue in *The Lamar Company, LLC v. City of Columbia*, 512 S.W.3d 774 (Mo. App. 2016) (applications for transfer denied Jan. 24, 2017 and April 4, 2017), in which it was held that a settlement agreement, like the purported contract at issue here, cannot contract away police powers. In *Lamar*, Lamar's predecessor sued the City for rejecting its billboard permits. *Id.* at 778. After the entry of partial summary judgment in favor of Lamar's predecessor, the parties entered into a settlement agreement. In that agreement, Lamar's predecessor was granted the ability to move forty-two of its billboards anywhere it would like, subject only to wind and electrical requirements. *Id.* After Lamar acquired its predecessor, it applied for permits to move eight of the forty-two billboards. *Id.* at 779. Columbia denied the applications, citing that the proposed billboards did not meet the city's billboard ordinance. *Id.* Lamar sued Columbia for breach of the settlement agreement. *Id.*

After the trial court found that the settlement agreement was void *ab initio* pursuant to § 432.070 because it "bargains and contracts away [City's] police powers," Lamar appealed. *Id.* at 783. The Western District began its analysis by reciting the requirements of § 432.070 – a contract must be within the scope of the entity's powers, for proper consideration, and duly authorized and in writing – and notes that "a contract which fails to satisfy any one of the mandatory requirements described in section 432.070 is 'outside the object of its creation . . . and therefore beyond the powers conferred upon it by the Legislature,' and 'is not voidable only, but wholly void, and of no legal effect.'" *Id.* (quoting *St. Charles Cty. v. A Joint Bd. Or Comm'n*, 184 S.W.3d 161, 166 (Mo. App. 2006)). The Western District then shifted to the contracting away of Columbia's police power, held that zoning ordinances are an exercise of police power, and held, therefore, that the settlement agreement "***contracted away*** [Columbia's] lawful zoning authority with respect to future applications to rebuild or relocate any of the forty-tow signs identified in the Agreement." *Id.* at 786–87 (emphasis in original). The Western District concluded that the settlement agreement "plainly" contracted away Columbia's police powers, and,

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therefore, agreed with the trial court that the agreement was void *ab initio* and could not serve as the basis for a breach of contract claim.

This case largely tracks the factual scenario presented in *Lamar*.[11] As shown, *supra* in Point V.D.1, the regulation of solid waste is a police power afforded the City. When the Assistant City Attorney signed the 1976 Stipulation and Agreement, he did not leave the full panoply of regulation options available to the City; instead, he locked the City into one of two options: pick up the trash or pay a rebate. According to the terms of the 1976 Stipulation and Agreement, the City must pick one of these options regardless of whether the City has enacted a valid ordinance with a rational basis for excluding the Class members, as was contemplated by the April 7, 1976 Judgment. As such, the 1976 Stipulation and Agreement contracts away the City's police powers and is, therefore, void *ab initio* and cannot serve as the basis for a breach of contract suit.

2. The 1976 Stipulation and Agreement is void as it binds future City Councils.

The 1976 Stipulation and Agreement created the Apartment Rebate Program and required that the program continue, in perpetuity, until trash service for the entire City was terminated. This action in 1976, therefore, bound all future City Councils to continue the program – and fund the program – regardless of what environmental changes occurred, what the fiscal outlook of the City was like, or what the current legislators believed was a rational legislative objective. Legislative actions that bind future legislatures are void, and the 1976 Stipulation and Agreement is no exception. *See, e.g., Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993) ("But temporary officeholders may not contract away the

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[11] Although the factual similarities for contracting away police powers are largely the same in both this case and *Lamar*, there are some dissimilarities between the two situations. The trial court in *Lamar* found that the signatory to the settlement agreement at issue had actual or apparent authority to enter into the contract and the contract was ratified by the Columbia City Council which approved a resolution authorizing the City Manager to execute the settlement agreement. The signatory in the present case, as shown, *infra* at Point IV.C.4, had no authority to sign the agreement, and there was no evidence that the City Council ratified the agreement or that it was executed by the City Manager.

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basic powers of government to enact laws – or in this case to adopt budgets – in the same way natural persons may make enduring promises about their own future behavior.”).

The void nature of contracts binding subsequent municipal legislatures can be seen in *City of St. Louis v. Cavanaugh*, 207 S.W.2d 449 (Mo. 1947). In *Cavanaugh*, a man was prosecuted for failing to pay a toll. He argued that the ordinance authorizing the toll was invalid, as, when the bond that built the bridge was passed, an ordinance was passed in 1906 decreeing that “said bridge shall at all times be and forever remain a free bridge.” *Id.* at 451. Additional bonds were issued in 1914 accompanying an ordinance saying that the “bridge and approaches shall at all times be and forever remain free.” *Id.* The defendant argued that, based on these two ordinances and the will of the people in approving the bond issues, that the City was forever foreclosed from instituting a toll. This Court held that the state had granted the City the authority to institute a toll and “[a] determination of the terms and conditions upon which the proposed bridge could be used, after its completion, involved the legislative function and the exercise of police power. The proposed bridge was to be ‘for public use,’ and it is well settled that the power to collect tolls on such a bridge or highway is a part of the sovereign power of the state.” *Id.* at 454. As such, this Court held that “[t]he members of the Board of Aldermen could not bind their successors in office with reference to the matter of tolls or no tolls” and “[w]hether the proposed bridge should be and remain forever a free bridge could not be determined in advance and irrevocably, because the matter was directly connected with the future welfare of the city and involved legislative discretion and the police power, as granted to the city.” *Id.* at 455.

Cavanaugh parallels this case. In both instances, a city made an unenforceable promise: that there would never be a toll in *Cavanaugh* and that the City would forever collect trash or engage in the Apartment Rebate Program in this case.[12] And in both

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[12] To be clear, the City vociferously argues that it made no such promise, as the individual that signed the 1976 Stipulation and Agreement had no such authority to enter into the agreement. However, to the extent that this Court holds the 1976 Stipulation and Agreement to be a valid contract, the end effect is that it promises to either collect trash or fund the Apartment Rebate Program in perpetuity.

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instances, a city's promise was *ultra vires* and attempted to impermissibly bind future legislatures. Just as in *Cavanaugh*, where the "Board of Aldermen of 1906 and 1914 could not forever abandon or surrender the powers lawfully conferred upon the city by its charter and the statutes, nor restrict the city in 1943 in the exercise of the powers theretofore granted to it," *id.* at 454, neither can an Assistant City Attorney in 1976 forever bind future City Councils from exercising the powers granted to them by its charter and state statute. Even if the City Council had approved the agreement, as a document that attempts to bind future Councils, the 1976 Stipulation and Agreement is void and the trial court erred in finding that the City breached a void contract.

3. The 1976 Stipulation and Agreement is void as it lacked certification from the Director of Finance.

"A contract is void where the public agency fails to follow proper procedures and *exceeds its statutory authority*." *St. Charles Cty.*, 184 S.W.3d at 165 (internal citation omitted, emphasis in original). "A contract of a corporation which is ultra vires, in the proper sense – that is to say, outside the object of its creation as defined *by the law of its organization*, and therefore beyond the powers conferred upon it by the Legislature – is not voidable only, but wholly void, and of no legal effect." *Donovan*, 175 S.W.2d at 879 (emphasis supplied). "The contract cannot be ratified by either party, because it could not have been authorized by either" and "[n]o performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." *St. Charles Cty.*, 184 S.W.3d at 166 (citing *Donovan*, 175 S.W.2d at 879).

The City's Charter, in 1976 and continuing through today, makes clear that, to be authorized to enter into a contract, a City agent must meet certain requirements in addition to the requirements set forth by Missouri Statute and case law precedent. These are the "law of its organization" referenced by this Court in *Donovan*. In 1976, when an Assistant City Attorney signed the Stipulation and Agreement allegedly on behalf of the City, the City Charter mandated that any contracts, agreements, or obligations involving the City must be in writing and comply with certain other requirements in order to be valid. Section 82 of the Charter of Kansas City dictated that

> [n]o contract or order purporting to impose any financial obligation on the city shall be binding upon the city unless it be in writing and unless there is a balance, otherwise unencumbered, to the credit of the appropriation to which the same is to be charged sufficient to meet the obligation thereby incurred, and unless such contract or order bear the certificate of the director of finance so stating.

Section 95 of the Charter of Kansas City further provided:

> All contracts, agreements or other obligations entered into, all ordinances and resolutions passed, and all orders made contrary to the provisions of this article shall be void, and no person whatever shall have any claim or demand against the city thereunder, nor shall any act or omission on the part of the council, or of any officer or employee of the city, contrary to the provisions of this article, waive or qualify the limitations fixed by this article, or impose upon the city any liability whatever in excess thereof.

This provision voids any contract that does not follow the formalities of § 82. Parties contracting with the City are charged with notice of these provisions. *See Hoevelman v. Reorganized Sch. Dist. R2 of Crawford Cty.*, 452 S.W.2d 298, 302 (Mo. App. 1970). "Persons dealing with such officers and agents are chargeable with notice of the powers of the public corporation and of the prescribed statutory manner of exercising such powers." *Bride*, 263 S.W.2d at 26.

Directly on point is *Donovan*, 175 S.W.2d 874, where the estate of a merchant sued the City for failing to pay for perishable foods it received at its hospitals and penal institutions. *Id.* at 877. The orders for foods had no written certifications from the Director of Finance that sufficient unencumbered balances existed. *Id.* at 878. In examining the sufficiency of the writing required by Section 3349, R.S. 1939 (a predecessor to RSMo. § 432.070)[13], this Court noted that there was not a compliant contract because no such certification existed. *Id.*

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[13] *Donovan* recites the text of Section 3349, R.S. 1939 as: "No * * * city * * * shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract * * *, including the consideration, shall be in

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Similarly, no such certification appears on the 1976 Stipulation and Agreement. The 1976 Stipulation and Agreement unequivocally imposes a financial burden on the City: to provide trash service (thereby causing expenditure), pay an agent to provide trash service (thereby causing expenditure), or participate in the Apartment Rebate Program (thereby causing expenditure). As of 2008, the City was paying $1.4 million a year for the Apartment Rebate Program. Despite the required expenditure, there is no counter-signature from the Director of Finance approving and setting aside funds – the same factual scenario found in *Donovan*. In fact, the Director of Finance could not have so certified – to do so, he would have had to certify that there was an appropriated amount that could satisfy the City's obligations *forever*, which, of course, would be an infinite sum.

Despite the Class' arguments to the contrary, tr. 495:3-14, the plain language of the charter provision requires all contracts that necessitate an expenditure of money, as the 1976 Stipulation and Agreement did, need the Director of Finance certification. As the 1976 Stipulation and Agreement lacked this certification, the contract is *ultra viries* and could not serve as the basis for a breach of contract claim, and the trial court erred in finding that it could.

4. The 1976 Stipulation and Agreement is void, as the Assistant City Attorney in 1976 had no authority to bind the City in contract.

Section 432.070 makes clear that when an individual signs on behalf of a municipal entity, that agent must be "authorized by law and duly appointed and authorized in writing." This has been held to be an essential element of § 432.070 jurisprudence:

> Section 432.070 requires that the contract *and* the underlying authority for the contract be in writing. Even if a contract is in writing and signed by an agent of the city – such as a mayor – the contract is not valid unless duly authorized by the Board of Aldermen. Absent authorization by the Board of Aldermen, no valid contract exists. Where no statute requires the passage of an ordinance to authorize a contract, it is sufficient, but not necessary, that the authorization be entered of record upon the minutes of the Board of Aldermen. Moreover, the

writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing." 175 S.W.2d at 876.

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> authorization by the Board of Aldermen must not be vague and uncertain; rather, it must sufficiently identify the subject matter under consideration with reasonable exactitude and specificity.

City of Dardenne Prairie, 529 S.W.3d at 19 (applications for transfer denied July 13, 2017 and Oct. 5, 2017) (emphasis in original, internal citations omitted).

At the time the City purportedly entered into the 1976 Stipulation and Agreement, the City had a clear, written policy on how contracts were to be entered into. Section 82 of the City Charter required that a contract "be executed in the name of the city by the head of the department . . . ." It was uncontroverted at trial that the Assistant City Attorney who signed the 1976 Stipulation and Agreement, purportedly on behalf of the City, was not a department head at the time he signed the agreement, nor was he ever a department head. A86-127; A128; A129-136.

Missouri case law is replete with examples of municipal contracts being held invalid because they were not signed by the person(s) with proper authorization. For example, *Kennedy*, 749 S.W.2d 427, concerns a similar provision of the St. Louis City charter. That charter "requires all contracts relating to City affairs shall be made by the comptroller in cases not otherwise provided by law or ordinance." *Id.* at 433. The hospital employment contracts at issue were not executed by the comptroller, but were, instead, executed by the hospital's Chief of Staff. *Id.* at 429. As a result, the Eastern District held that the employment contracts were not properly executed and were, therefore, a violation of § 432.070. *Id.* at 433-34.

Similarly, in *Allen v. City of Fredericktown*, 591 S.W.2d 723 (Mo. App. 1979), the Eastern District considered the case where a developer applied for reimbursement for their installation of water and sewer lines. *Id.* at 723–24. Prior to installation, however, the ordinance concerning reimbursement required that the Board of Aldermen must first approve any development plans. *Id.* at 724. The trial court found there was no contract between the city and developer, notwithstanding approval by the mayor and city clerk, because the board of aldermen was the only body that could approve the contract. *Id.* at

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725. In affirming the finding of the trial court that that there was no properly executed contract, the Eastern District opined that

> more than the mayor's and city clerk's imprimaturs or conversations with a municipal employee unauthorized to speak for the City are necessary to raise any writing to the status of an effective written contract within the meaning of s 432.070 or to qualify as a binding authorization of approval of contract conditions by the City. There must be direct authorization by the Board of Aldermen.

Id. at 726.

Because the 1976 Stipulation and Agreement was not signed by a department head as required by the City's Charter, the City was not represented by an "agent[] authorized by law and duly appointed and authorized in writing" and the 1976 Stipulation and Agreement is void, not merely voidable.[14] RSMo. § 432.070. As a result, the City could not have breached the contract, and the trial court erred in so finding.

Part III: The judgment was erroneous because no evidence exists to show that performance under the 1976 Stipulation and Agreement was tendered and the order for specific performance violates the separation of powers.

VI. The trial court erred in concluding that the City breached the 1976 Stipulation and Agreement and was therefore liable for breach of contract, because that conclusion is not supported by substantial evidence and is against the weight of the evidence, in that the Class failed to produce any evidence that it performed or tendered performance.

A. Preservation of Error

The City, in its Answer to the Amended Petition, pleaded that the Class failed to perform under the 1976 Stipulation and Agreement. LF 375 ¶ 9. During trial, the City presented evidence and argued that the Class could not recover under breach because the performance had not been tendered. Tr. 392:21-393:14; 482:1-12. The City proposed, in

[14] The City recognizes, of course, that government lawyers make statements in and to the court when representing their clients. The distinction between the 1976 Stipulation and Agreement and this in-court representation is that the 1976 Stipulation and Agreement is a contract purporting to bind the City and its City Council in perpetuity. The City's contracting formalities should be followed when the latter is at issue.

its proposed findings and conclusions, that the Class had not performed or tendered performance under the 1976 Stipulation and Agreement. LF 431 ¶¶ 31-33.

B. Standard of Review

In a court-tried case, this Court should "affirm the circuit court's judgment unless there is no substantial evidence to support it, it misstates or misapplies the law, or it goes against the weight of the evidence." *Brooke Drywall*, 361 S.W.3d at 26 (citation and quotations omitted). "The trial court's judgment is presumed valid, [and] the burden is on the appellant to demonstrate its incorrectness[.]" *Harness*, 167 S.W.3d at 289. "Substantial evidence is evidence which has probative force and from which the trier of fact could reasonably find the issues in harmony with its decision." *Grider*, 325 S.W.3d at 440. If there is error, this Court must overturn the judgment if that error "materially affect[s] the merits of the action." Rule 84.13(b).

To the extent that this point on appeal requires this Court to interpret the 1976 Stipulation and Agreement, this Court's review is de novo, as questions of contract interpretation are questions of law. *Wildflower Cmty. Ass'n*, 25 S.W.3d at 534. When a contract is unambiguous, the parties' intent is determined based on the contract's language and parol evidence is not permitted. *Baker–Smith Sheet Metal*, 49 S.W.3d at 716.

C. The Class failed to produce any evidence that it performed or tendered performance of the 1976 Stipulation and Agreement.

If this Court finds that the 1976 Stipulation and Agreement was a valid contract (Point V) and that the Class has standing to sue for the rights to that contract (Point II), the trial court erred in finding that the Class had performed or tendered performance under the contract. The record simply does not contain the evidence required to support such a finding.

"A breach of contract action includes the following essential elements: (1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Keveney*, 304 S.W.3d at 104. "Pleading and proof of performance or tender of performance is essential to recovery on an express contract."

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Rosenthal v. Jordan, 783 S.W.2d 452, 455 (Mo. App. 1990). "[F]ailure of performance is not an affirmative defense which contemplates additional facts not included in allegations necessary to support a plaintiff's case and which, if proven, allow a defendant to avoid legal responsibility, even though plaintiff's allegations are also established by the evidence." *Id.* Instead, the burden is on the party bringing the breach action to present evidence that each of these elements has been met. *Keveney*, 304 S.W.3d at 105. *See also R.K. Matthews Inv., Inc. v. Beulah Mae Hous., LLC*, 379 S.W.3d 890, 897 (Mo. App. 2012) (holding that the burden of proof resets with the party claiming breach of contract).

The 1976 Stipulation and Agreement states that either the City will provide refuse "services" to apartment buildings and trailer parks or will make a payment in lieu of providing services. A77, ¶ 2. The payments in lieu of services need only be made for "each occupied dwelling unit for which said owner is providing services . . . ." A77, ¶ 3. "Services" is defined as

> 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 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.

A77, ¶ 1(c). In short, the owners receiving payments were required to provide the same services that were being offered by the City on a city-wide basis. This makes for good public policy as it is only logical that the apartment and trailer park owners should be required to meet the same obligations for free trash as the rest of the City's residents.

It was undisputed during trial that, during the time period in which the City allegedly breached the 1976 Stipulation and Agreement, the City, under its then-existing solid waste ordinances, allowed residents the collection of two bags of trash each week, and provided for free curb-side recycling. Tr. 363:17-364:25; Tr. 365:9-11. This was in addition to other ancillary services provided by the City in a city-wide manner such as hazardous waste collection, bulky item collection, and tire collection. Tr. 366:16-367:24. The City Council, in fact, concluded that the two-bag limit and free recycling are essential to the City's solid

waste goals: the two-bag limit allows the City to limit the amount of waste in landfills and the free recycling allows residents a mechanism to decrease the amount of trash they generate so that it fits into the two bags allowed by the City. Tr. 364:11-25. The ancillary programs offered by the City also divert waste from landfills, thereby decreasing both the economic and environmental impact of the City's solid waste program. Tr. 367:1-24.

At no point did the Class, either through the class representatives or through an expert, ever present evidence that all or even any members of the Class are providing these services. The only pertinent evidence elicited was presented by the City. And that evidence was none of the Class representatives – entities found by the trial court to be representative of the Class – limited their residents to two trash bags per week, provided *free* recycling services to residents,[15] or provided any of the ancillary services such as bulky item pick up, a tire recycling program, or household hazardous waste disposal.

During closing arguments, counsel for the Class argued that the City did not show that the Class members were not providing these services at the time the City allegedly breached the 1976 Stipulation and Agreement in May of 2010 when it stopped providing the Apartment Rebate Program. Tr. 495:20-496:4. However, as *Keveney* clearly holds, the Class has the burden to show that it *had* performed under the 1976 Stipulation and Agreement and, frankly, that the Class was doing what every other resident in the City of Kansas City, Missouri was required to do in order to receive free trash services. The Class presented no such evidence, and the trial court, therefore, erred in finding that all the elements of breach of contract had been satisfied. This finding both lacked substantial evidence and went against the weight of the evidence that the City presented. Finally, it is clear that the finding affected the merits of the case, as substantial evidence on this element of breach of contract was required before breach could be found. As breach was found by the trial court, this finding contributed to the merits.

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[15] Both Sophian Plaza and Townsend Place testified that they provided recycling to their residents. However, both also testified that their residents were required to *pay* for the service; it was not provided without charge as the City does through the ordinances.

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The Western District held, on this point, that the 1976 Stipulation and Agreement said that Class members must only provide services equivalent to the 1976 services because of the use of the disjunctive. Contextually, however, this is nonsensical. When read in that manner, it would allow apartment complexes to continue polluting in the manner in which citizens polluted this country in 1976 while the rest of the citizens of the City were required to comply with the current ordinances.[16] The more appropriate reading, therefore, would be that the Class needed to comply with the solid waste ordinances in 1976 or whatever the solid waste ordinances thereafter required. The current solid waste ordinances require that citizens are limited to two bags of trash, receive free recycling, and are afforded several ancillary services. Furthermore, even if the Western District was correct, and the Class need only prove it complied with the 1976 solid waste ordinances, the Class did nothing to prove that it complied with the solid waste ordinances of 1976. Conspicuously absent from the record is Chapter 16 from 1976 which contained the solid waste ordinances.

Without evidence to support a breach of the 1976 Stipulation and Agreement, there is, likewise, no evidence to support a finding that the City failed to abide by the 1976 Modified Judgment. As a result, the contempt finding, to the extent it is based on the 1976 Stipulation and Agreement, is likewise in error.

VII. The trial court erred in ordering specific performance to provide trash service or the Apartment Rebate Program because doing so violates Article 2, section 1 of the Missouri Constitution, in that it requires the City to appropriate money and act contrary to a validly enacted ordinance whose constitutionality has not been challenged.

A. Preservation of Error

This is a legal argument that the City made during its motion for directed verdict and in its closing argument to the trial court. Tr 298:17-24; 480:2-14.

[16] This interpretation is even more shocking when considering apartment complexes such as the named plaintiffs in this action, none of whom were in existence at the time the 1976 Stipulation and Agreement was signed. In essence, the Western District's holding is that, even if a Class member came into existence in the 1990s or 2000s, they would still be entitled to pollute as though it were 1976.

B. Standard of Review

Specific performance is an equitable remedy and should be affirmed "'unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *McBee v. Gustaaf Vandecnocke Revocable Trust*, 986 S.W.2d 170, 173 (Mo. banc 1999) (quoting *Murphy*, 536 S.W.2d at 32). When the review of a court tried case involves questions of law, those "'matters [are] reserved for *de novo* review by the appellate court, and [the Court of Appeals] therefore give[s] no deference to the trial court's judgment in such matters.'" *Brown*, 152 S.W.3d at 914 (quoting *H & B Masonry*, 32 S.W.3d at 124).

C. As a charter city, the City has the right to pass ordinances that are presumed valid, and to appropriate money in the way it sees fit, and the trial court has impeded both rights in ordering specific performance.

The City is a charter city and has "all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter or so adopted by statute." Mo. Const. art. VI, § 19(a). *See also Coop. Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 578 (Mo. banc 2017) (stating that Mo. Const. art. VI, § 19(a) is the basis of a charter city's powers). In this case, the City has exercised that constitutional authority by passing an ordinance – currently in effect – prohibiting the provision of trash service to "[m]obile home developments, travel trailer camps, clustered multifamily housing, and buildings containing seven or more dwelling units." Kansas City Code § 62-41.[17] There is no longer any ordinance that authorizes the Apartment Rebate Program.

The trial court, however, has ordered specific performance, which requires the City to either collect the trash of entities from which the ordinance prohibits collection or to provide the Apartment Rebate Program to those entities. It does this without holding the

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[17] Municipal ordinances are presumed to be valid and lawful. *McCollum v. Dir. of Revenue*, 906 S.W.2d 368, 369 (Mo. banc 1995). In the instant case, the Class had originally challenged the constitutionality of the City's ordinance, but voluntarily dismissed that claim prior to trial. LF 407.

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current ordinance unconstitutional or invalid in any way. In simple terms, the trial court has ordered the City to violate a validly enacted ordinance.

The trial court is empowered to review the constitutionality of this ordinance and prevent its execution, but cannot order the City to act contrary to a validly enacted ordinance absent a finding of unconstitutionality. To do so would be to usurp the legislative functions. "While it is the duty of the supreme court to construe laws enacted by the general assembly, and while it has the power to declare them valid or invalid, as the case may be, it would be a gross usurpation of power for it to assume functions which belong exclusively to [the legislative] body." *Albright*, 64 S.W. at 110.

The order to perform also comes with obligations to expend monies. "The judiciary, of course, has no authority to appropriate funds." *Rebman v. Parson*, Case No. SC97307, 2019 WL 1613630, at *6 (Mo. banc Apr. 16, 2019). Because the City Council eliminated the Apartment Rebate Program in 2010, there have been no funds appropriated for it since that time. In *Rebman*, this Court held that it was not a violation of the separation of powers to require an expenditure from funds that have already been appropriated. *Id.* The saving language, this Court noted, was that the circuit court's order was limited to the "appropriation for administration" *id.*, and did not require the appropriation of additional funds. In the instant case, there is no saving language: the City has not appropriated funds for the Apartment Rebate Program since 2010. To order specific performance would require the expenditure of funds that have not been appropriated and would run afoul of the separation of powers.

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 to be unconstitutional or invalid in some way. Doing so usurps the City's ability to legislate and is a separate violation of the separation of powers than that committed by the 1976 trial court in issuing the Modified Judgment.

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Part IV: The attorneys' fee award was not proper.

VIII. The trial court erred in its attorneys' fees award because it had no legal authority to enter an award for attorneys' fees in that it awarded attorneys' fees against a sovereign without a waiver.

A. Preservation of Error

The City opposed the Class' motions for attorneys' fees preserving its arguments concerning the American Rule, the lack of special circumstances, and shedding light on the lack of evidentiary support for costs or fees to be awarded. LF 489-507.

B. Standard of Review

The question of authority to award attorney's fees as a matter of law under the undisputed facts before the trial court is reviewed de novo and must be supported by competent and substantial evidence. *Birdsong v. Children's Div., Mo. Dep't of Soc. Servs.*, 461 S.W.3d 454, 459 (Mo. App. 2015).

C. The 2016 trial court erred in awarding costs and attorneys' fees against the City because attorneys' fees cannot be assessed against the sovereign.

Costs and attorneys' fees cannot be assessed against "the sovereign" without express statutory authority. *Richardson v. State Highway & Transp. Comm'n*, 863 S.W.2d 876, 882 (Mo. 1993) ("Absent statutory authority, costs cannot be recovered in state courts from the state of Missouri or its agencies or officials."); *In Interest of K.P.B.*, 642 S.W.2d 643, 644–45 (Mo. 1982) (holding statutory authority is essential to assessment of attorneys' fees against sovereign; court had no inherent authority to assess fees against the state or county); *State ex inf. Ashcroft v. Riley*, 590 S.W.2d 903, 907 (Mo. 1979) (costs, including service, witness fees, mileage, and transcripts, cannot be assessed against state or attorney general without statutory authority). This holds true for several types of cases, including contempt. *Missouri Hosp. Ass'n v. Air Conservation Comm'n of State of Mo.*, 900 S.W.2d 263, 267 (Mo. App. 1995). In *Missouri Hospital Association*, the trial court ordered attorneys' fees against the Department of Natural Resources in the amount of $12,088. The Western District ruled that was an abuse of discretion because, in a contempt proceeding, "no specific statute authorizes assessment of attorney fees against the state under the circumstances presented." *Id.* at 268. A city is a political subdivision of the state – an

extension of the state – and just like the state, costs cannot be assessed against the city without statutory authority. *State ex rel. RAS Inv., Inc. v. Landon*, 75 S.W.3d 847, 850 (Mo. App. 2002) ("A municipality is created by the state sovereign and is an extension of the state.").

CONCLUSION

For the foregoing reasons, the City of Kansas City, Missouri respectfully requests that this Court overturn the decision of the trial court and enter judgment in its favor. In the event that this Court does not overturn judgment, the City asks that this Court remand this case for further proceedings.

Respectfully submitted,

Office of the City Attorney

By: /s/ Tara M. Kelly
Tara M. Kelly, # 64624
Associate City Attorney
2300 City Hall
414 East 12th Street
Kansas City, Missouri 64106
Telephone: (816) 513-3117
Facsimile: (816) 513-3133
Tara.Kelly@kcmo.org
ATTORNEYS FOR APPELLANT CITY OF KANSAS CITY, MISSOURI

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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 24,502 words, exclusive of the sections exempted by Mo. S. Ct. Rule 84.06(b), determined using the word count program in Microsoft Word.

/s/ Tara M. Kelly
Tara M. Kelly

CERTIFICATE OF SERVICE

I hereby certify that a copy of this substitute brief was served via e-filing on the 13th day of May, 2019, to all counsel of record.

/s/ Tara M. Kelly
Tara M. Kelly