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 Reply 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

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INTRODUCTION

Today, we know more about the environmental impact of our behaviors than in 1976. The 1960s and 1970s was the era of the Clean Air Act (1960), the Cuyahoga River fire (1969), the National Environmental Policy Act (1970), the Clean Water Act (1972), the Resource Conservation and Recovery Act regulating hazardous waste (1976), and Three-Mile Island (1979). As the City of Kansas City, Missouri ("City") gained knowledge, both about our environmental impact and solid waste policy, we changed. The world changed. City was unable to remain blind to the waste problem – after all, City landfills were closing faster than expected, and the costs of shipping waste increased. Tr. 3610:1-362:5. City had to address the problem – or at least ameliorate it – and did so by instituting a waste reduction ordinance in 2004. This waste reduction model limits those receiving free trash service to two bags per week. To ensure that citizens can meet this limit, City also instituted free recycling and ancillary programs such as household hazardous waste, large appliance recycling, brush and tire disposal, and bulky item removal.

But the plaintiffs' in this case ("Class") position is, in effect, "that's everyone else's problem. We want to pollute as though it is 1976." They do this by attempting to enforce the 1976 Stipulation and Agreement and the Modified Judgment – a judgment to which they were not a party and were not bound. Resp. Br. at 47-48 ("third-party beneficiaries of the [1976 Stipulation and Agreement] were not bound by the 1976 Modified Judgment."). It is hardly surprising that, in 1976, neither the litigants nor the trial court understood how the laws and environment would change.

A City Council in the 1970s mistakenly, but understandably, let stand the Modified Judgment. They believed their answer was correct. But Councils are not prophets. They make mistakes, and later Councils fix them. Statutes can be repealed. Executive orders can be modified. Even the Constitution can be amended. Future lawmakers have just as much power to depart from decisions of their forebears as their forebears had to make decisions. Unless, we are told by Class, the decisions were incorporated into a contract then adopted into a judgment. But democracy does not permit public officials to bind the polity forever – even with the imprimatur of a circuit court judge.

Class proposes two "pivot points" in this case. City urges an alternative: Can estoppel, waiver, invited error, law of the case – whatever term Class uses – mean that when a City Council and employees go beyond their authority – and beyond the Constitution – their successors are forever barred from acting? No. There must be reasonable limitations to how future Councils can be bound. As discussed in the opening brief and below, the circuit court decision erases those limits in a realm critical to public health.

ARGUMENT

I. This Court should not entertain arguments concerning Heartland Apartment Association.

Supreme Court briefing is not the time to reassert arguments abandoned prior to trial as Class does throughout its opposition referring to the HAA settlement. Class brought an Equal Protection claim against City because, it averred in part, it was treated differently

than similarly-situated HAA. But Class dismissed that count. LF407. This Court should disregard the settlement with HAA as it has no bearing on the merits of *this* suit.

In addition to citing the HAA agreement generally, Class claims there was an admission "that the collection of refuse or payment in lieu of trash collection were mandated by the 1976 Modified Judgment." Resp. Br. at 24. Not true. The HAA settlement simply stated the Modified Judgment existed and facially required collection or payment. To the contrary, the settlement reads that "City…does not concede, admit, or otherwise stipulate that [HAA] is a party entitled to relief under the [1976 Stipulation and Agreement] and Modified Judgment." LF45. This language is in the body of the agreement rather than the whereas clauses which contain the "admission." *See, e.g., G.H.H. Invs., LLC v. Chesterfield Mgmt. Assocs., LP*, 262 S.W.3d 687, 693 (Mo. App. 2008) ("[R]ecitals are not strictly a part of the contract because they do not impose contractual duties on the parties."). Nor does the HAA settlement require the Director of Finance's certification, as the only remedy for failure to appropriate monies is HAA's ability to sue under the original agreement. LF45.

II. Class lacks standing.

A. Class lacks contractual standing.

Class admits it was not a party to the 1976 Stipulation and Agreement, but argues it has standing as donee beneficiary. It then attacks City's use of *Gill Const., Inc. v. 18th & Vine Auth.*, 157 S.W.3d 699 (Mo. App. 2005) and *Catapult Learning, Inc. v. Bd. of Educ. of City of St. Louis*, No. 4:07CV935SNL, 2007 WL 2736271 (E.D. Mo. Sept. 17, 2007), stating the cases do not discuss third-party beneficiaries. However, in each, there existed

a contract on which a plaintiff asserted a third-party claim. Both plaintiffs were unsuccessful because neither had a §432.070-compliant contract; they were invoking contracts between other entities. Here there is no §432.070-complaint contract between City and Class.

Next, Class attempts to use *St. Joseph Light & Power Co. v. Kaw Valley Tunneling, Inc.*, 589 S.W.2d 260 (Mo. banc 1979) to argue for third-party standing against a municipality. The third-party beneficiary claim there was made against a city contractor, not the city itself.[1] The city was sued *in tort*, and liable *in tort* for its negligence. *Id.* at 266. This is not a tort case.

Class cites *Kansas City Hispanic Ass'n Contractors Enter., Inc. v. City of Kansas City*, 279 S.W.3d 551 (Mo. App. 2009). A contractor sued as a third-party beneficiary to enforce H&R Block's obligation to hire WBE/MBEs under an agreement with the TIF Commission – there was no issue regarding third-party claims against City. *Id.* at 556. Furthermore, the agreement attempted to give third-party standing to WBE/MBEs: "MBEs and WBEs are third party beneficiaries…." *Id.* But the Western District *still* found the plaintiff was not entitled to sue because the enforcement right, itself, needs to be expressed directly. *Id.* This jibes with this Court's ruling in *L.A.C. ex rel. D.C. v. Ward Parkway*

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[1] Although the case is confusing, the third-party beneficiary claim was only against Kaw Valley: "Transfer was granted…to deal primarily with two questions. First, *whether Kaw Valley is liable to a third party beneficiary* of its contract with the city…." *Id.* (emphasis supplied). "The Power Company contends that Kaw Valley was obligated by its contract with the city to protect the property…and that the Power Company was a third party beneficiary under such contract and could assert a claim for damages against Kaw Valley…." *Id.* at 270.

Shopping Ctr. Co., L.P., 75 S.W.3d 247, 260 (Mo. 2002) stating third-party benefits must be "expressed directly and clearly…." The 1976 Stipulation and Agreement does not expressly, directly, or clearly identify "similarly situated properties," nor does it express an intent those rights be enforceable by separate suit. And Class cannot identify a single instance where a third-party beneficiary claim was successful against a municipality.

Finally, Class claims it did not receive a "gift." Class thus tries to distinguish *St. Louis Children's Hosp. v. Conway*, 582 S.W.2d 687 (Mo. banc 1979), arguing the hospital received a gift – property for no consideration. What Class overlooks is its own relationship to the 1976 Stipulation and Agreement: the Original Plaintiffs provided consideration; Class provided none. Therefore, Class is in the same position as the hospital: receiving a "thing of value" for no consideration.

B. Class lacks standing to assert contempt.

Class argues it need only have a "pecuniary interest" in the outcome of the 1970s litigation. It quotes three cases: *State ex rel. New York, C. & St. L. R. Co. v. Nortoni*, 55 S.W.2d 272, 274–75 (Mo. 1932); *Popsicle Corp. of U.S. v. Pearlstein*, 168 S.W.2d 105, 109 (Mo. App. 1943); and *Secor v. Singleton*, 35 F. 376, 377 (C.C.E.D. Mo. 1888). All three cases predate (by decades) this Court's *en banc* rulings in *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 578 (Mo. banc 1994) and *Teefey v. Teefey*, 533 S.W.2d 563, 566 (Mo. banc 1976), which clarified that "[c]ivil contempt is intended to benefit *a party* for whom an order, judgment, or decree was entered." *Chassaing*, 887 S.W.2d at 578 (emphasis supplied); *see also Teefey*, 533 S.W.2d at 566 (contempt is for "the protection of a party to the litigation"). None support Class' argument.

Secor, a federal case, does not apply Missouri law. Further, the quotes on which Class relies are *dicta*, as the district court determined the complainants *did not* have a pecuniary interest. *Secor*, 35 F. at 378. Finally, the court found by allowing the purportedly contemptuous acts to continue for three years, the complainants forfeited their rights to assert contempt. *Id.* at 379–80. Here, City passed its ordinance in 2010, but Class filed suit in 2015. "It is not possible to conceive," how Class "can at the present day be in anywise interested in the pending controversy." *Id.*

Reliance on *Nortoni* is likewise flawed. The quoted language comes from Corpus Juris, a statement of a general, not Missouri, law. 55 S.W.2d at 771. Further, this Court held Indiana had jurisdiction over contempt, making the quote *dicta*. *Id.* The case did not apply "pecuniary interests."

The only case that discusses "pecuniary interests" is *Popsicle*. But the facts of *Popsicle* are distinguishable. In *Popsicle*, Popsicle had a consent decree it sold to a third party. This third party filed a contempt suit to enforce the original decree. *Popsicle* holds that where an injunction is "in rem and affects the use of realty," a third party can assert contempt.

> However in the usual case where the injunction operates only in personam, the rule is not so broad, and for one to be entitled to institute the proceeding as a successor in right, he must occupy a status such…as the personal representative substituted for a deceased plaintiff..., or the receiver of a corporation which was the plaintiff in the injunction suit.

Popsicle, 168 S.W.2d at 109. The court goes on: "the offense complained of must be injurious to the rights of the plaintiff in the [original] suit…." *Id.*

This case does not concern the use of realty and is not *in rem*. To secure standing for this *in personam* injunction, Class must show it is successor-in-right to the Modified Judgment. Class made no such showing. Nor did Class show the offense was "injurious to the rights" of the Original Plaintiffs. *Popsicle* does not apply.[2]

III. The 1976 Modified Judgment is void for lack of personal jurisdiction.

Class transforms City's personal jurisdiction argument into a restatement of standing: "the issue is whether an individual benefitting non-party…can enforce the Judgment/Agreement via a contempt or breach of contract action…." Resp. Br. at 49. In so doing, Class skirts case law on point.

City argues there was no contempt because the Modified Judgment was void as the 1970s trial court asserted personal jurisdiction over parties not appearing before it. City analyzed three cases: *Epstein v. Villa Dorado Condo. Ass'n, Inc.*, 316 S.W.3d 457 (Mo. App. 2010) (overturning condominium assessments due by non-parties made judgment void); *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791 (Mo. banc 1995) (awarding damages to non-party rate payers made judgment void); and *State ex rel. Niess v. Junkins*, 572 S.W.2d 468 (Mo. banc 1978). In response, Class argues "[t]he lack of formal class certification…is irrelevant," Resp. Br. at 49, and gives three reasons: (1) City invited error, (2) the class certification factors were met, and (3) personal jurisdiction is irrelevant.

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[2] Class asserts City abandoned its argument on transfer concerning *In re J.D.S.*, 482 S.W.3d 431 (Mo. App. 2016). Resp. Br. at 22. City cited and argued *In re J.D.S.* in its opening brief. There is no longer a conflict, however, as this Court vacated the *Sophian Plaza* Western District opinion on transfer.

City addressed invited error and judicial estoppel in its opening brief, App. Br. at 38-41; Class addressed neither.[3] Further, there is a difference between "the party who invites error and the party who yields to it on demand of the court." *Myers v. Buchanan*, 333 S.W.2d 18, 24 (Mo. banc 1960). *Myers* approves *Griffith v. Cont'l Cas. Co.*, 235 S.W. 83, 85 (Mo. banc 1921) which holds, when a party has already suffered an adverse ruling, the acceding party "did not invite the error, but…did the best it could to minimize the effect" of the ruling. The 1970s trial court already ruled against City; all City did was attempt to minimize the effect. Lastly, when both parties have participated in the error, a "court will not aid either party…." *Millhouser v. Kansas City Pub. Serv. Co.*, 55 S.W.2d 673, 676 (Mo. 1932). Class posits *City* "asked for" the Modified Judgment, but *all* parties did so. This Court should aid neither party, nor the non-party Class.

Class argues the failure of the 1970s court to certify a class was harmless, as "[a] formal certification would likely have produced the same outcome…." Resp. Br. at 50. Class opines "the goal of class certification is to obtain judicial approval of the Rules 52.08(a) and (b) factors." Resp. Br. at 50. While that is an operational goal, that is not the overarching goal. "Class actions are designed to provide an 'economical means for disposing of similar lawsuits' while simultaneously protecting defendants from inconsistent obligations *and the due process rights of absentee class members*." *State ex rel. Coca-Cola Co. v. Nixon*, 249 S.W.3d 855, 860 (Mo. banc 2008) (emphasis supplied). Protection of due process is critical, because "[i]ndividuals who did not initiate the

[3] City does not believe the waiver does not apply to City. Resp. Br. at 22. Instead, consent and invited error by an opposing party cannot apply to lack of personal jurisdiction.

litigation and who will have little or no practical control over the litigation nonetheless will be bound by the its result." *Beatty*, 914 S.W.2d at 794.

Class argues that because purported third-party beneficiaries received a benefit, the Missouri courts may ignore class action factors. This is inconsistent with this Court in *Beatty* and *Niess*, and the Eastern District in *Epstein*. A class action would provide notice to all class members, allow them decide whether to join or bring their own suit, challenge the adequacy of the representation, and challenge the settlement. It also would have prevented "others similarly situated" from suing City. It is not incumbent on City to show which "elements of the certification analysis would have failed;" it would be speculation and futile, as "[t]he requirements of [Rule 52.08] are not merely technical or directory, but mandatory." *Beatty*, 914 S.W.2d at 795. If this Court allows Class to bypass those requirements for a favorable result, they can just as easily be bypassed with an unfavorable one.

Finally, Class contradicts itself with regards to waiver of personal jurisdiction. It initially says only Class can waive personal jurisdiction. *See* Resp. Br. at 48. Class cites no legal precedent restricting the protection of jurisdiction. But then Class makes the preposterous argument City could waive Class members' personal jurisdiction. *See* Resp. Br. at 48 ("even if the City could assert the Class Plaintiffs' personal jurisdiction rights, it could also waive them…[T]he City necessarily invited the Class Plaintiffs[4] to the table and waived any personal jurisdiction…."). "[P]ersonal jurisdiction is an individual right to

[4] It was impossible to "invite" Class to the table, as a significant portion (including all named plaintiffs) did not exist at the time.

which a party *can* consent." *State ex rel. Heartland Title Servs., Inc. v. Harrell*, 500 S.W.3d 239, 241 (Mo. banc 2016) (emphasis added to show a party may waive personal jurisdiction). To hold a defendant can consent to the personal jurisdiction of non-parties would throw the entire judicial system into disarray. If defendants did start waiving non-parties' personal jurisdiction, it would no longer be an "individual right," but one exercised by any party over any party. It would nullify the protections of personal jurisdiction.

IV. The 1976 and 2016 courts violated the separation of powers.

A. The current ordinance is lawful.

Class begins its separation of powers argument with a back-door Equal Protection challenge, arguing that the 1970s ordinance violative of Equal Protection is, today, violative of Equal Protection. Class had its chance to make an Equal Protection challenge to the current ordinance, but abandoned it (LF407). And with good reason: the distinction between those receiving trash service and those who do not is not just rational, but compelling.

An Equal Protection argument would require Class to tackle facts such as:

- City can use only one landfill. Tr. 360:1-361:18.
    - Forest View closed three years earlier than expected, and
    - Johnson County ended its relationship with City. *Id.*
- The decrease in landfills increased costs: since 2004, City's costs to deposit waste has increased approximately 30%. Tr. 361:17-362:2.

Then, consider a hypothetical 10-unit apartment building:

- The building has a dumpster. City has no equipment to collect from it; it is placed

down a narrow alleyway City trucks cannot reach. If residents placed their trash curbside, it would result in mounds of trash, unsightly and unsanitary.

- If it did collect the dumpster, the waste is deposited into the truck without counting bags of trash. There could be three bags or thirty.
- Assume there are thirty bags. With ten units and two bags per unit, there should be twenty. Who deposited the extra? Who should be charged?
- Because most apartment buildings do not recycle, and those that do, charge, recyclable materials are thrown away, undermining City's goals of environmental responsibility and decreasing waste.
- In the dumpster there is illegal waste. The collectors cannot see it and may inadvertently take it to the landfill, increasing waste, costs, and environmental damage.

Class has never addressed how City could extend its current service to Class members.

Looking at the current ordinance from the standpoint of environmental protection, it is apparent that Class could never make the requisite "clear showing of arbitrariness and irrationality." *Amick v. Dir. of Revenue*, 428 S.W.3d 638, 640 (Mo. banc 2014). Yet this is a legislative area where "even illogical and unscientific approximations may suffice." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

But Class must address environmental *and* financial consideration. Due to the recessions of the 2000s, the City has been in a state of budget crisis. Tr. 399:6-16. When it was terminated, the Apartment Rebate Program cost approximately $1.4 million. Ex. 27. Elimination of the program allowed City to spend its limited tax dollars on other programs

consistent with its policy goals. Each of these rational bases is reflected in the "Whereas" clauses to the ordinance eliminating the Apartment Rebate. Ex. JJ.

Reasons such as these have been held to provide a rational basis for excluding multi-unit dwellings from solid waste services. *See Ramsgate Court Townhome Ass'n v. W. Chester Borough*, 313 F.3d 157, 160 (3d Cir. 2002) (no Equal Protection violation for excluding condominium owners because "the Borough's limits on waste removal are based on economic considerations [because p]roviding free trash collection costs money" and "the Borough is forced to *divide its finite budget among various expenditures*. By limiting this service, the Borough is able to spend its tax dollars elsewhere."); *Goldstein v. City of Chicago*, 504 F.2d 989, 992 (7th Cir. 1974) (no Equal Protection violation because "the owner(s) of large residential buildings with a great amount of garbage have more effective bargaining power…than the owner of a single unit.").[5]

B. A specific ordinance is not needed to violate the separation of powers.

Next, Class argues that the 1970s court did not assume legislative powers because it did not explicitly require an ordinance. The 1970s court gave three legislative options: (1) trash for everyone, (2) trash for no one, or (3) Apartment Rebate. Excluded are: a

[5] These results are seen time and again in cases that upheld such distinctions: *Gertsma v. City of Berea*, 735 N.E.2d 459 (Ohio Ct. App. 1999) (excluded because of increased bargaining power); *Beauclerc Lakes Condo. Ass'n v. City of Jacksonville*, 115 F.3d 934, 936 (11th Cir. 1997) (same); *Philadelphian Owners Ass'n v. City of Philadelphia*, 57 F. App'x 961 (3d Cir. 2003) (excluded for economic considerations). *See also TG Canton, Inc. v. Charter Twp. of Canton*, No. 242635, 2003 WL 22976115 (Mich. Ct. App. Dec. 18, 2003) (excluded because not "curbside" and used dumpsters); *Iroquois Props. v. E. Lansing*, 408 N.W.2d 495 (Mich. Ct. App. 1987) (exclusion based on increasing costs and changing landfill practices); *Pleasure Bay Apartments v. City of Long Branch*, 328 A.2d 593 (N.J. 1974) (exclusion because dumpsters were not "curbside").

fee/tax requiring everyone to pay, modifying the trash scheme to pick up only certain kinds of trash, or what occurred here, formulating a rational basis for excluding apartments — and legislative solutions not even postulated yet.

Two of the three legislative options – collecting refuse from apartments and the Apartment Rebate Program – require expenditures of money for which no appropriation exists. To explain away the need for an appropriation, Class cites this Court's recent decision in *Rebman v. Parson*, __ S.W.3d __, 2019 WL 1613630 (Mo. Apr. 16, 2019, modified June 25, 2019). There, the State argued the injunction encroached on the General Assembly's plenary authority to appropriate funds. This Court disagreed "because the circuit court's order…did not direct the department to spend funds…not appropriated." *Id.* at *6. There was an appropriation available to pay Rebman — and the circuit court left intact the director's full range of discretionary options in managing the division and spending his appropriation, *e.g.*, lower all salaries, terminate Rebman for other reasons, or terminate another ALJ. "[N]othing in the circuit court's order limited the director's constitutional authority and discretion over how to spend the appropriation for ALJ salaries." *Id.* The difference is, here, no appropriation exists for the Apartment Rebate. Requiring City to pay the rebate is judicial appropriation of funds.

Class makes the false assertions "[t]he City did not even try to modify its trash program beyond that program previously declared unconstitutional in 1976" and "[t]he City did not try to craft a different policy solution to its refuse issues, though it was surely permitted to do so." Resp. Br. at 59. The record shows City *has* modified its trash program since 1976 by adopting waste reduction. When City found apartment complexes were

unable or unwilling to participate in waste reduction model, City also determined there was a rational basis for excluding them.

Class tells Court "the City's proper course was to *ask the judiciary* to consider its new argument and relieve it of the 1976 Modified Judgment." Resp. Br. at 62 (emphasis supplied). In other words, Class proposes, City must seek permission from the judicial branch to perform its legislative duties. This is the proposition that *Albright v. Fisher*, 64 S.W. 106 (Mo. 1901), stands against: usurpation of the legislative authority to enjoin future passage of an ordinance. *Id.* at 110. Even if the 1976 trial court did not explicitly enjoin its passage, that is how the circuit court has interpreted the 1976 ruling. Because it is unconstitutional, the Modified Judgment is void. *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980) (consent decree only "carries with it a presumption of validity that is overcome [when it] contains provisions which are unreasonable, illegal, unconstitutional, or against public policy.").

C. City cannot waive the separation of powers.

Class continues to argue City waived separation of powers in the 1970s because separation of powers is not an "institutional right." Class defines (without authority) "institutional right" as "a government-structure right – that is, a right that, if waived, would fundamentally alter the way government operates…." Resp. Br. at 65. What is the right to legislate without permission from a co-equal branch, if not an "institutional right?"

Nor is this unique to City. Each city in Missouri passes laws and can pass them without having to ask permission. *That* is the institutional right being litigated in this case, and if altered or waived, would "fundamentally alter the way government operates." Resp.

Br. at 65. Municipalities should be allowed to pass laws – however wise or unwise, good or bad, responsible or irresponsible – without having to "ask the judiciary" for permission. Resp. Br. at 62. Ultimately it is the power of the legislature to set priorities, tend to the public health and welfare, and appropriate monies. The courts may strike down those laws and tell the municipality to try again, but not dictate how the legislative body should fix the struck-down law — not to use what would be called, in the free speech context, "prior restraint."

To advance its waiver argument, Class relies on *Damon v. City of Kansas City*, 419 S.W.3d 162 (Mo. App. 2013), a criminal case in which an individual defendant waived his individual – not institutional – constitutional rights. City agrees that individual rights can be waived. *State v. Poelker*, 378 S.W.2d 491, 494 (Mo. banc 1964) (quoting with approval *State v. Page*, 186 S.W.2d 503, 507–08 (Mo. App. 1945) (listing waivable personal privileges)). But separation of powers is not a personal right; it strikes at the very heart of our democracy and should be treated as more than something that can be waived by an Assistant City Attorney in 1976.

Class resorts to *reductio ad absurdum*, stating that "[t]he City seeks immunity from liability from constitutional violations under the guise of separation of powers." Resp. Br. at 66. This is not true. The courts may rule the current or future ordinances violate Equal Protection if they do. What the courts may *not* do is to hem City into one of three judicially-approved options, thereby removing the full range of City's legislative powers. If "City always retained the power to pass an ordinance that did not violate the constitution," Resp. Br. at 62, the question should be, does the *current* ordinance pass constitutional muster.

To protect this vital institutional right, this Court should hold as the United States Supreme Court has done: "notions of consent and waiver *cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect.*" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (emphasis supplied).

Class asserts without support, City is prohibited from asserting separation of powers under the "law of the case" doctrine. Resp. Br. at 63. However, there are no appellate proceedings attached to the 1970s cases. The law of the case doctrine concerns only appellate court rulings, and has *no application at all* to trial court rulings. *See State ex rel. Koster v. Didion Land Project Ass'n, LLC*, 469 S.W.3d 914, 918 (Mo. App. 2015) ("[t]he law of the case doctrine does not apply to successive trial court rulings."); *Williams v. Kimes*, 25 S.W.3d 150, 153 (Mo. 2000) ("[t]he doctrine of the law of the case…applies *appellate decisions* to later proceedings in that case." (emphasis supplied)).

Class does not address the points regarding judicial estoppel City made in its opening brief: the 1976 Stipulation and Agreement, being *void ab initio*, cannot advance a legal position. What Class does claim, however, is it was disadvantaged because it must now pay for trash service after 33 years. If City took Class' proposed resolution – ending trash service for City –Class would *still* pay for trash. It is City, supposedly bound by a void contract, void judgment, and stripped of its legislative powers that has been disadvantaged.

Further, this Court should apply its directive in *Vacca* that judicial estoppel is a "flexible, equitable doctrine." *Vacca v. Missouri Dep't of Labor & Indus. Relations*, __

S.W.3d __, 2019 WL 1247074, at *10 (Mo. banc Mar. 19, 2019, modified June 4, 2019). Class has chosen not to adhere to the current solid waste ordinances. It is inequitable for it to benefit. Further, "the doctrine of estoppel is not applicable to acts of a governmental body." *Bartlett & Co. Grain v. Director of Revenue*, 649 S.W.2d 220, 224 (Mo. App. 1983). *See also New Hampshire v. Maine*, 532 U.S. 742, 755 (2001) (doctrine of estoppel which precludes inconsistent positions in judicial proceedings is not applied to states); *Farmers' and Laborers' Coop. Ins. Ass'n v. Director of Revenue*, 742 S.W.2d 141, 143 (Mo. banc 1987). It shall not apply if it interferes with the discharge of governmental duties, curtail police power, or thwart public policy. *State ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 910 (Mo. App. 1993); *New Hampshire*, 532 U.S. at 755-56 (no judicial estoppel when compromise governmental interest, policy change, or change in essential fact). Here, estoppel has been used both to interfere with City's legislative duties and curtail City's police powers. *See also The Lamar Co., LLC v. City of Columbia*, 512 S.W.3d 774, 793 (Mo. App. 2016) (general rule that municipalities can be bound by estoppel "bows to the statutory requirement" of §432.070). For these reasons, the trial court should not have estopped City from asserting its separation of powers defense.

V. The 1976 Stipulation and Agreement violates §432.070.

A. The 1976 Stipulation and Agreement bargains away City's police powers, perpetually.

Class agrees control over solid waste is a police power of City. It does not agree the 1976 Stipulation and Agreement limited that police power. In making this objection,

Class relies on *Kindred v. City of Smithville*, 292 S.W.3d 420 (Mo. App. 2009). In *Kindred*, the Western District held that a municipality required to let a single property hook up to the sewers had not "contract[ed] away or surrender[ed] its police powers to control and regulate its sewer system…." *Id.* at 426. However, that is not analogous to what has happened here.

Class argues it must only comply with the waste ordinances as they existed in 1976. Since then, the City has adopted a waste reduction model. If Class need not comply with the new model and corresponding ordinance, City has contracted away its power to "control and regulate" trash. It, due to a purported contract, cannot limit Class' amount of waste, limit the types of waste, or require Class compliance with ancillary programs unless City is willing to abdicate responsibility for trash entirely. The analogy with *Kindred* would be if Smithville had agreed "the Kindreds can dump anything in the sewer, even if it violates ordinances enacted 30 years from now." In *Lamar*, the Western District distinguished *Kindred*, explaining, in *Kindred*, it was granting a right "no greater than the right granted to any citizen." 512 S.W.3d at 791. Here, however, as in *Lamar*, Class receives a *greater* benefit than single family homes. That is one way in which City has lost control its ability to "control and regulate" trash.

But, additionally, City is locked permanently, into one of three options: (1) everyone; (2) no one; or (3) the Apartment Rebate Program. City is precluded from using its inherent police power in the fashion outlined by the Eleventh Circuit:

> A government is not required to provide sanitation service to all or none; the Equal Protection Clause does not always preclude a legislature from treating some of its citizens

> differently from others. A government's line-drawing need not be accomplished with mathematical precision….

Beauclerc Lakes Condo. Ass'n v. City of Jacksonville, 115 F.3d 934, 935-36 (11th Cir. 1997). Additionally, "[c]ourts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority. *Consent is not enough* when litigants seek to grant themselves powers they do not hold outside of court." *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (emphasis supplied). *See also Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993) ("Consent alone is insufficient to support a commitment by a public official that ties the hands of his successor.").

B. An Assistant City Attorney has no right to bind City in contract.

Class then argues the Assistant City Attorney who signed the 1976 Stipulation and Agreement had authority to do so. It does this by egregiously misquoting the then-existing Charter: "§28 of the City's Charter in effect in 1976 provides that the City law department shall 'represent the city in all legal matters' and 'shall direct the management of all litigation in which the city is a party or is interested.'" Resp. Br. at 79. What §28 *actually* says is that the "director of the law department" shall direct the management of all litigation, not an Assistant City Attorney. Section 28 then goes on to lay out what authority Assistant City Attorneys have over contracts: "approv[al] as to form." This is a far cry from obligating City to expend millions of dollars in perpetuity. If the City Attorney, himself, had signed the 1976 Stipulation and Agreement, City could not advance this argument, as his authority to bind City in contract was granted in writing by §82 of the

operative Charter ("[a]ll contracts shall be executed in the name of the city by the head of the department….").

And authority in writing is an essential element of §432.070. "Section 432.070 requires that the contract *and* the underlying authority for the contract be in writing." *City of Dardenne Prairie v. Adams Concrete and Masonry, LLC*, 529 S.W.3d 12, 19 (Mo. App. 2017) (applications for transfer denied July 13, 2017 and Oct. 5, 2017) (emphasis in original). The requirement for written authority defeats Class' argument that "[a]n attorney in charge of a case has *implied* authority…." *Promotional Consultants, Inc. v. Logsdon*, 25 S.W.3d 501, 505 (Mo. App. 2000). *Implied* authority is not *written* authority.[6]

Class claims §82 only applies to supply contracts. The Charter provision reads: "*All* contracts shall be executed in the name of the city by the head of the department…." (emphasis supplied). The reference to contracts for purchases and supplies creates an exception to the general rule: "All contracts shall be executed in the name of the city by the head of the department…*except contracts made by the commissioner of purchases and supplies for purchases of supplies, materials or equipment.*" (emphasis added). There would be no need to single out purchase contracts if the entire section was directed at only them.

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[6] Class makes the unsupported argument that "the City attorney, as the City's representative appearing on its behalf, had every right to execute the settlement agreement *or to have his agent, an assistant city attorney, do so*." Resp. Br. at 81. City agrees the City Attorney's signature, with other formalities, would suffice. But there is no written authority for an Assistant City Attorney to do so, nor does Class cite case law which supports this argument.

Class' last argument is that City ratified the void contract by passing an ordinance and appropriating funds, for many years, for the Apartment Rebate Program. But the strictures of §432.070 prohibit liability on a theory of ratification, and performance cannot make a void contract enforceable. *Fleshner v. Kansas City*, 156 S.W.2d 706, 707 (Mo. 1941); *St. Charles Cty. v. A Joint Bd. or Comm'n*, 184 S.W.3d 161, 166 (Mo. App. 2006) ("No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." (citing *Donovan v. Kansas City*, 175 S.W.2d 874, 879 (Mo. banc 1943)). None of Class' cases concern municipalities or §432.070 contracts, nor do they excuse or limit the mandatory requirements of §432.070 with which the 1976 Stipulation and Agreement did not comply.[7]

VI. Class did not offer *any* proof of tender of performance.

Class asserts that, unlike other property owners, Class members need only comply with the 1976 waste ordinances. It is true that "or," used in the phrase "'[s]ervices' shall mean residential refuse collection…which meet or exceed criteria now established…*or* which meet or exceed criteria hereafter established" is typically used in the disjunctive. LF40. However, "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). *See also Council Plaza Redevelopment Corp. v. Duffey*, 439 S.W.2d 526, 532 (Mo. 1969) ("the disjunctive 'or' which in its ordinary

[7] Class cites *Lynch v. Webb City Sch. Dist.*, 418 S.W.2d 608, 614 (Mo. App. 1967) for the proposition that "substantial compliance with the statute is sufficient." *Lynch* was limited by *DeMarr v. Kansas City, Mo., Sch. Dist.*, 802 S.W.2d 537, 542 (Mo. App. 1991): "This court elects to give the broad language of *Lynch* narrow application…."

sense marks an alternative which generally corresponds to the word 'either.'"). This Court has endorsed interpreting "or" as "and" when to do otherwise would "result in an absurdity…." *Stiers v. Dir. of Revenue*, 477 S.W.3d 611, 615 (Mo. 2016). And Class' reading of "or" here would be absurd: it would promise Class a perpetual payment for doing what may have been state-of-the-art in 1976, but is problematic today.

Regardless, the entire debate is semantics, as Class has not proven it tendered "services" as meant by the 1976 ordinances, either. Without a showing as to compliance with the law, City was justified in not paying Class the Apartment Rebate.

VII. Attorneys' fees and costs should not have been awarded.

This Court may still visit the issue of sovereign immunity barring attorneys' fees and costs under the plain error doctrine. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. 2009). "Plain errors are those which are 'evident, obvious, and clear.'" *Id.* If plain error is found, the court proceeds to determine "whether the claimed error resulted in manifest injustice or a miscarriage of justice." *Id.* at 607–08.

Here, the decision to award fees and costs against a sovereign is plainly in error. *See, e.g., 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) (statutory authority essential to attorneys' fees against sovereign; no inherent authority to assess fees); *State ex inf. Ashcroft v. Riley*, 590 S.W.2d 903, 907 (Mo. 1979) (costs cannot be assessed against state without statutory authority).

This bar against attorneys' fees and costs has even been applied in contempt cases. *See Missouri Hosp. Ass'n v. Air Conservation Comm'n of State of Mo.*, 900 S.W.2d 263, 267 (Mo. App. 1995) (barring attorneys' fees in contempt case absent statutory authorization). Class relies on the "inherent powers" and the fact that "Missouri law recognizes certain exceptions to the 'American Rule'" to justify attorneys' fees and costs. Resp. Br. at 93, 94. The problem with Class' argument is two-fold. First, none of its cases are against a sovereign. Second, neither "inherent powers" nor exceptions to the American Rule are statutory authority.

The second question is would allowing the attorneys' fees and costs result in manifest injustice. It would for two reasons. First, this is not a small amount of money. The circuit court awarded $1,362,562.50 in attorneys' fees and $59,035.56 in costs in addition to damages. These fees and costs were not supported by receipts or timekeeping. LF457-62 (costs without receipts); 473-88 (fees without timekeeping).

Second, City is not a for-profit institution that need only dip into its profits, dividends, or executive bonuses to pay these fees. Every dollar that City earns and spends is for the taxpayers, visitors, and citizens of City. Each dollar spent on unsubstantiated attorneys' fees and costs is a dollar that will not go to firefighting, potholes, health inspections, or providing myriad other services. A cap on sovereign immunity waivers exists for a reason; because these entities serve the citizens of the State of Missouri. Yet

the fees and costs awarded are more than four times the current cap. To award those fees would be nothing but manifest injustice.[8]

CONCLUSION

For the foregoing reasons and the reasons asserted in its opening brief, the City of Kansas City, Missouri respectfully requests that this Court overturn the decision of the trial court and enter judgment in its favor.

Respectfully submitted,

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[8] To be clear, this leaves Class counsel far from impoverished. This argument does nothing to touch the $2,747,319.10 coming from counsel's contingency on the damages award.

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 7,747 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 15th day of July, 2019, to all counsel of record.

/s/ Tara M. Kelly
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