ELECTRONICALLY FILED
2016 Jul 07 PM 3:58
CLERK OF THE SHAWNEE COUNTY DISTRICT COURT
CASE NUMBER: 2016-CV-000424

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

JAYHAWK RACING PROPERTIES, LLC, and HEARTLAND PARK RACEWAY, LLC,	)	
	)	Case No. 2016CV424
Plaintiffs,	)	
	)	Division 5
vs.	)	
	)	K.S.A. Chapter 60
CITY OF TOPEKA, KANSAS,	)	
	)	
Defendant.	)	

MOTION TO DISMISS COUNTS I AND II OF PLAINTIFFS' PETITION AND MEMORANDUM IN SUPPORT THEREOF, TO BE TREATED AS MOTION FOR SUMMARY JUDGMENT

Defendant, City of Topeka, Kansas ("City"), by and through its attorneys, and pursuant to K.S.A. 60-212(b)(6) and (d), hereby moves the Court to dismiss Counts I and II of Plaintiffs' Petition for failure to state a claim upon which relief can be granted against the City, and for summary judgment thereon. In support of the Motion, the City states as follows:

I. INTRODUCTION.

The present action is an attempt by Plaintiffs, Jayhawk Racing Properties, LLC ("Jayhawk") and Heartland Park Raceway, LLC ("Heartland") (collectively, "Plaintiffs"), to upend the legislative process and impose duties and obligations on the City contrary to Kansas law.

Because the law is well-settled that a legislative body may not bind itself, or its successors, to future legislative action, Plaintiffs have no claims against the City related to the Memorandum of Understanding at issue in this case, and Counts I and II must be dismissed, with prejudice.

II. UNCONTROVERTED FACTS.

1. Heartland Park ("Property") is a multi-purpose motorsports facility located in Topeka, Kansas. *City of Topeka v. Imming*, 51 Kan. App. 2d 247, 248 (2015). (Pl.'s Pet. ¶ 6.)

2. In 2006, the City issued over $10,000,000 in Sales Tax and Revenue ("STAR") Bonds to fund improvements to the Property. *Imming*, 51 Kan. App. 2d at 248. (Pl.'s Pet. ¶¶ 3, 23.)

3. STAR Bonds allow municipalities to finance the development and redevelopment of major commercial, entertainment, and tourism districts ("STAR Bond Districts") to stimulate economic growth. *Imming*, 51 Kan. App. 2d at 248. (Pl.'s Pet. n.1.)

4. When the City issued the STAR Bonds in 2006, Jayhawk was operating the facility and owned a reversionary interest in the Property. *Imming*, 51 Kan. App. 2d at 248-249. (Pl.'s Pet. ¶¶ 6-7.)

5. The City later became concerned when the sales tax revenue being collected within the STAR Bond District was not satisfying the debt associated with the Property. (Pl.'s Pet. ¶ 3.)

6. Accordingly, the City developed a plan to expand the STAR Bond District and acquire Jayhawk's interest. *Imming*, 51 Kan. App. 2d at 249. (Pl.'s Pet. ¶ 3.)

7. On June 23, 2014, the City and Jayhawk entered into a Memorandum of Understanding ("MOU") reflecting the plan. (Pl.'s Pet. ¶ 9.) (*See also* Ex. A, MOU.)

8. The MOU expressly conditioned the City's obligation to acquire Jayhawk's reversionary interest in the Property on the occurrence of several events,

including approval of the amended STAR Bond Project Plan by the Topeka City Council ("City Council") and the Kansas Secretary of Commerce and the issuance of full faith and credit STAR Bonds. (Ex. A, MOU at ¶ 8.)

9. Concurrently with the MOU, the City, Jayhawk, CoreFirst Bank & Trust ("CoreFirst"), and Raymond Irwin also entered into a Workout Agreement. (Pl.'s Pet. ¶ 26.)

10. The Workout Agreement reflects that Jayhawk was in default on certain loans with CoreFirst, and it required Jayhawk and the City to execute and place in escrow deeds conveying their interests in the Property to CoreFirst. (*Id.* at ¶ 27.)

11. Under the Workout Agreement, CoreFirst agreed to forbear collection of the loans and recording of the deeds until February 28, 2015, which was the anticipated outside date for the issuance of the STAR Bonds contemplated in the MOU, although the date could be extended with CoreFirst's consent. (*Id.* at ¶¶ 27, 29.)

12. Jayhawk and the City subsequently executed and delivered into escrow the deeds described in the Workout Agreement. (*Id.* at ¶ 84.)

13. On August 12, 2014, the City Council adopted Ordinance No. 19915, which approved the amended Star Bond Project Plan and called for the City to issue $5,000,000 in new full faith and credit STAR Bonds "in accordance with general bond law." *Imming*, 51 Kan. App. 2d at 249. (Pl.'s Pet. ¶¶ 39-43.) (*See also* Ex. B, Ordinance No. 19915.)

14. Ordinance No. 19915 includes notice of the sixty-day protest period required by Kansas law. (Pl.'s Pet. ¶ 44.) (Ex. B, Ordinance No. 19915.)

15. Prior to the expiration of the protest period, on October 8, 2014, Christopher Imming filed a document with the City Clerk titled "A Petition for a New City of Topeka, Kansas Ordinance Relating to Heartland Park Topeka Redevelopment District and Additional Bond Authority" ("Imming Petition"). *Imming*, 51 Kan. App. 2d at 249. (Pl.'s Pet. ¶ 49.)

16. The Imming Petition sought to repeal Ordinance No. 19915 or to submit the question of repeal to the voters at a municipal election. *Imming*, 51 Kan. App. 2d at 249. (Pl.'s Pet. ¶ 49.)

17. In response, the City filed a declaratory judgment action in this Court, Case No. 2014CV1069, asking the Court to declare the Imming Petition to be an invalid attempt at initiative and referendum. *Imming*, 51 Kan. App. 2d at 250. (Pl.'s Pet. ¶ 50.)

18. Jayhawk subsequently intervened in the litigation. *Imming*, 51 Kan. App. 2d at 251. (Pl.'s Pet. ¶ 51.)

19. On November 12, 2014, the Court issued a Memorandum Decision and Order ruling that the Imming Petition was invalid. (Pl.'s Pet. ¶ 52.)

20. Imming duly appealed to the Kansas Court of Appeals, which affirmed this Court's ruling on March 11, 2015. *Imming*, 51 Kan. App. 2d at 265. (Pl.'s Pet. ¶¶ 53, 68.)

21. In its decision, the Court of Appeals held that the Ordinance and the City's efforts to "purchase" the Property were legislative acts. *Imming*, 51 Kan. App. 2d at 259.

22. At the regular local election held on April 7, 2015, four new members were elected to the City Council. (Pl.'s Pet. ¶ 73.)

23. On April 9, 2015, Imming filed a Petition for Review of the *Imming* decision with the Kansas Supreme Court. (*Id.* at ¶ 74.)

24. Jayhawk filed a Response and a Cross-Petition for Review on April 23, 2015. (Ex. C, Jayhawk Response Pet. Review.)

25. In its Response, Jayhawk admits that, "The purchase of Jayhawk's interest "is entirely dependent upon the issuance of the full faith and credit bonds," such that "[i]f the bonds are not issued, the transaction does not go forward in any respect." (*Id.* at p. 3.)

26. On May 5, 2015, while the Petition for Review and Cross-Petition for Review were pending before the Kansas Supreme Court, the City Council considered a resolution that would have authorized the City to proceed with the amended Star Bond Project Plan, including steps towards issuing the STAR Bonds. (Pl.'s Pet. ¶ 80.)

27. After lengthy debate and taking public comment, the City Council voted 6-4 against the resolution. (*Id.* at ¶ 81.)

28. On August 7, 2015, CoreFirst acquired title to the Property pursuant to the Workout Agreement by recording the deeds placed in escrow by the City and Jayhawk. (*Id.* at ¶ 84.)

29. The Kansas Supreme Court thereafter denied review. (*Id.* at ¶ 86.)

30. Plaintiffs have now brought this action arguing that the City breached the MOU by failing to take appropriate steps to "close the transaction," that is, issuing the additional STAR Bonds and purchasing Jayhawk's reversionary interest in the Property. (*Id.* at ¶¶ 82, 84, 95.)

III. ARGUMENT AND AUTHORITIES.

A. Counts I and II Fail to State a Claim as the City at all Times had Complete Discretion to Take Legislative Action.

1. The City Council is a Legislative Body.

Article 12, § 5 of the Kansas Constitution grants legislative power to Kansas municipalities. In particular, the Constitution provides that cities are "empowered to determine their local affairs and government" and that the "[p]owers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government." Kan. Const. Art. 12, § 5 (b) and (d).

The Kansas Attorney General has interpreted Article 12, § 5 as vesting "a broad measure of self-government in Kansas cities" and, specifically, vesting in "city governing bodies general legislative authority to determine the 'local affairs and government' of the city." Donald E. Martin, Kan. Atty. Gen. Op. No. 78-317 (1978).

In *City of Topeka v. Imming*, 51 Kan. App. 2d 247, 252-253 (2015), the Kansas Court of Appeals stated:

> Municipal government authority in Kansas is exercised by council members voting, in open meetings, on the various ordinances, resolutions, and motions that the issues of the day bring before the council. Thus, through public debate, discussions, and voting at open meetings, the interests of the public are protected and promoted. Cities are often called municipal corporations for good reasons, for the city council is the functional equivalent of a corporation's board of directors. A city's power to act begins with the city council. The governing body of the City of Topeka consists of nine district Council members and one mayor. While authority to act is often delegated to various agents, their actions cannot bind the City to a particular position or action unless the Council has authorized the agent to so act or has ratified the agent's act after the action has taken place.

Additionally, City of Topeka Charter Ordinance 94, § 11, codified at § A2-25(a) of the Topeka Municipal Code, provides that "[t]he Council and Mayor shall be the governing body of the city" and shall "exercise the corporate powers of the city and . . . be vested with all powers of legislation in municipal affairs adequate to provide a complete system of local government consistent with the Constitution of the State of Kansas." It is without question that the City Council is a legislative body under Kansas law. *See Reiter v. City of Beloit*, 263 Kan. 74 (1997).

2. The City Council Cannot Contract Away Its Power and Discretion to Take Legislative Action.

"The established rule is that municipal corporations have no power to make contracts which will control them in the performance of their legislative powers and duties." 10 McQuillin Mun. Corp. § 29:11 (3d ed.) (citations omitted). A municipality cannot grant away by contract or otherwise "the authority to control the powers and functions properly pertaining to the municipal government." *Id.* (citations omitted). "Accordingly, the law is well-settled that a city cannot by contract deprive itself of any of its legislative powers or governmental powers." *Id.* (citations omitted).

Kansas follows this general rule that a "city cannot contract away its statutory duties and responsibilities." *Landau v. City of Leawood*, 214 Kan. 104, 108 (1974). Indeed, as far back as 1903, the Kansas Supreme Court determined that a legislative body cannot "contract away its power to exercise in the future the authority conferred upon it by the state for the administration of its public affairs." *Bd. of Educ. of City of Leavenworth v. Phillips*, 67 Kan. 549, 73 P. 97, 98 (1903).

In *Phillips*, the owner of bonds issued by a Board of Education ("School Board") sought an injunction prohibiting the issuance of additional bonds, arguing that the

School Board was contractually obligated not to issue further bonds until the outstanding bonds were paid in full. The Kansas Supreme Court rejected the argument, stating:

> No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.

Id. at 98 (citations omitted). The Court explained that even if the issuance of additional bonds "would in some degree be an impairment" of the owner's contract, he purchased the bonds knowing the School Board "could not contract away its power to exercise in the future the authority conferred upon it by the state for the administration of its public affairs." *Id.*

The Kansas Supreme Court addressed a similar issue in *Blevins v. Douglas County Board of County Commissioners*, 251 Kan. 374 (1992), where the plaintiffs sought injunctive relief to prevent a county from spending the proceeds of certain bonds on a trafficway project. In ruling on the matter, the Court considered whether the county was required to conduct a binding election regarding the spending or retirement of the bonds. *Id.* at 382. The plaintiffs asserted that the county breached an implied contract to hold a binding election relating to the bonds. *Id.* at 383. The Court rejected the argument and affirmed the trial court's dismissal of the case, holding that because the county "could not contract to hold a binding election, any promises regarding the election were political and not contractual." *Id.* at 385 (citing *Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41 (Iowa 1991) (holding that a contract between a city and a

developer was void because it constituted an ultra vires attempt by the city to bind itself in the exercise of its legislative functions).

All contracts that interfere with the legislative or governmental functions of a municipality are "absolutely void." 10 McQuillin Mun. Corp. § 29:11 (3d ed.); *see also Red Dog Saloon v. Sedgwick County Board of Comm'rs*, 29 Kan. App. 2d 928, Syl. ¶ 2 (2001) ("An attempt by a governmental agency to enter into a contract in violation of its authority will be considered void."). "Persons contracting with a municipal corporation must inquire into the power of the municipal corporation and must at their peril know the authority of the municipal corporation." *Red Dog Saloon*, 29 Kan. App. 2d at Syl. ¶ 1.

Thus, in *Red Dog Saloon*, the Kansas Court of Appeals ruled that a settlement agreement with a Board of County Commissioners ("County Board"), under which the County Board agreed to repeal a ban on nudity in certain establishments in exchange for the dismissal of a lawsuit, was ultra vires and unenforceable, such that the county could later enact such a ban affecting the parties to the contract. The Court reasoned:

> It is clear that a legislative body cannot bind its successor to the amendment or repeal of its laws. Yet that is exactly what the trial court would have condoned if it had agreed with Red Dog's interpretation of the settlement agreement. The Board, acting in 1990, did not have the authority to contract away all future actions under this portion of its police power. Accordingly, any contract which purported to make such an agreement would be ultra vires and unenforceable.

Id. at 931 (citation omitted).

3. The City's Conduct at Issue Involves Legislative Acts and Governmental Functions.

As a matter of law, all actions required to be taken by the City Council to issue full faith and credit STAR Bonds and purchase the Property as contemplated in the MOU are legislative acts and governmental functions. The Kansas Court of Appeals

squarely held in *City of Topeka v. Imming*, 51 Kan. App. 2d 247, 259 (2015), that the "purchase" of the Property was a "legislative act." Specifically, the Court ruled, "After applying the tests found in *McAlister* and considering all of these cases, our view remains that Ordinance No. 19915 is legislative and not administrative." *Id.* at 261. Hence, all acts of the City Council to implement Ordinance No. 19915 and complete the purchase of the Property are also legislative.

The legislative nature of Ordinance No. 19915 and all associated governmental action is also demonstrated by several relevant Kansas cases. First, in *State v. Charles*, 136 Kan. 875 (1933), the Kansas Supreme Court determined that a proposed referendum requesting the repeal of an ordinance authorizing the construction of a municipal gas plant and the issuance of bonds to finance the project "called for the exercise of legislative power." The Court specifically held that the question involved was "plainly a matter of public policy" and was "distinctively and mainly legislative in character." *Id.* The Court further explained that the proposition was "a subject of general and permanent character and the accomplishment of a public purpose." *Id.* (citation omitted). Second, in *Lewis v. City of South Hutchinson*, 162 Kan. 104 (1946), the Kansas Supreme Court described an ordinance concerning the issuance of bonds to fund the construction and equipment of an electric light plant as obviously "legislative in character." (citing *State v. Board of Comm'rs of City of Pratt*, 92 Kan. 247 (1914)).

4. The City Council Could Not Contractually Bind Itself to Issue the STAR Bonds or Purchase the Property.

Because the issuance of full faith and credit STAR Bonds and the purchase of the Property are clearly legislative acts, the City could not contractually obligate itself to take them or any associated steps. Simply put, the City Council could not bind itself or its

successors to take legislative action to issue the STAR Bonds and purchase the Property. Therefore, as a matter of law, Plaintiffs have no valid claims against the City related to the MOU, and Counts I and II must be dismissed.

Plaintiffs apparently concede that the City could not contractually obligate itself to issue the Bonds or purchase the Property by admitting that the MOU "did not bind the City to issue new STAR Bonds" and that the City's contractual obligation to purchase Jayhawk's interest was conditioned upon a number of factors. (Pls.' Pet. 3.) However, Plaintiffs seek to sidestep this hurdle by asserting that the City expressly agreed to "make commercially good faith reasonable efforts" to complete the transaction and arguing that if the City had done so, the purchase would have occurred. (*Id.* at 3, ¶¶ 91, 93.) This argument has no merit because it ignores the fact that Plaintiffs' fundamental complaint in this action is that the City did not proceed to "close the transaction" and purchase the Property, which is plainly a legislative act. (*Id.* at ¶¶ 82, 84, 92, 95-97.)

A legislative body may not impose upon itself a duty of "good faith and fair dealing" or to "make commercially good faith reasonable efforts" to take legislative action. These are concepts related to private contracts and do not apply to the political exercise of judgment and discretion by legislative bodies.

Legislative action by its very nature involves the exercise of discretion and judgment by the members of the legislative body. Those members have the complete discretion to take and to refrain from taking legislative action. Therefore, enforcing a contract that attempts to impose a duty of "good faith and fair dealing" or to "make commercially good faith reasonable efforts" in taking such action would impermissibly restrict the political judgment and discretion that those officials have been elected to

exercise. The politics, prudence, and advisability of legislative acts must at all times remain solely with the legislative body. As a result, any contract interfering with the legislative or governmental functions of a municipality is "absolutely void." 10 McQuillin Mun. Corp. § 29:11 (3d ed.); *see also Red Dog Saloon v. Sedgwick County Board of Comm'rs*, 29 Kan. App. 2d 928, Syl. ¶ 2 (2001) ("An attempt by a governmental agency to enter into a contract in violation of its authority will be considered void.").

Notably, Plaintiffs' Petition fails to recognize the numerous steps that were necessary and had yet to be completed for the issuance of the STAR Bonds required for the City's purchase of the Property. The adoption of Ordinance No. 19915 on August 12, 2014, was just one step, and a series of actions were still left to be taken before the Bonds could be issued under Kansas law. (*See* Ex. B, Ordinance No. 19915 (noting the additional steps that were taken for the issuance of the STAR Bonds in 2006).) Those steps would have included: (a) the City's certification that there were no pending challenges to its authority to issue the STAR Bonds; (b) a public bid sale; (c) the City's approval of a Preliminary Official Statement and a Final Official Statement specifically describing the STAR Bonds; (d) the City Council's acceptance of any bids received; (e) the passage of an Ordinance by the City Council authorizing and directing the issuance of the STAR Bonds; (f) the adoption of a Resolution by the City Council prescribing the terms of the Bonds; (g) approval of the STAR Bonds by the Secretary of the Kansas Department of Commerce; and (i) approval of the Bonds by the Kansas Attorney General. *See* K.S.A. 10-106 and K.S.A. 12-17,169.

As a matter of law, Plaintiffs cannot rely on the "good faith" provisions of the MOU to argue that the City Council was required to take any action whatsoever to complete the steps required for issuing the STAR Bonds and proceeding to purchase the Property. Those provisions are void and have no legal force or effect, as they attempt to impinge upon the political judgment and discretion of the City Council in taking legislative action.

Because the City Council could not "bargain away the public health or the public morals," *Bd. of Educ. of City of Leavenworth v. Phillips*, 67 Kan. 549, 73 P. 97, 98 (1903), and had no power to enter into a contract that "would control [it] in the performance of [its] legislative powers and duties," 10 McQuillin Mun. Corp. § 29:11 (3d ed.) (citations omitted), Plaintiffs have no claim that the City was required to take any action to issue the STAR Bonds and purchase the Property under the MOU.[1] The sole and absolute discretion to act (or not to act) with regard to the Bonds and the Property remained at all times with the City Council. Thus, Counts I and II should be dismissed, with prejudice.

B. Counts I and II Also Fail to State a Claim as the City Council Could Not Bind a Subsequent Governing Body to Issue the STAR Bonds and Purchase the Property.

Plaintiffs' claims for declaratory judgment and breach must also be dismissed under the principle that one legislative body may not bind a future legislative body. This rule has long been recognized in Kansas. In *Gilleland v. Schuyler*, 9 Kan. 569, 580

[1] Plaintiffs also have no claim that the City breached the MOU by failing to pay their attorneys' fees. (Pl.'s Pet. ¶ 98.) Given that the MOU was expressly contingent upon the City's issuance of the STAR Bonds—an unmistakable legislative act, Plaintiffs cannot claim that a duty to pay their attorneys' fees ever arose or was breached. (Ex. A, MOU ¶¶ 6, 8; Ex. C, Jayhawk Response Pet. Review p. 3.)

(1872), the Kansas Supreme Court made clear that "[o]ne legislature cannot abridge the powers of a succeeding legislature."

The rule was discussed and applied by the Kansas Supreme Court in *State ex rel. Hawks v. City of Topeka*, 176 Kan. 240 (1954). In *Hawks*, the City entered into a contract with a private entity to manage a public parking facility. The contract provided that in the event any of the parking facilities were totally destroyed or damaged beyond use, the City would rebuild or restore the premises within a reasonable time within its financial ability to do so. The Court held that the contract was invalid and unenforceable. *Id.* at 253. It reasoned:

> This provision is unreasonable in that should the property be destroyed at some future date it would require the City to rebuild or repair, even though subsequent governing bodies might determine that it could no longer serve a public use and that it would not be advantageous to the general public to rebuild or repair. Under the authority delegated to a city by the statute, the matter of rebuilding or repairing would be a question to be determined by the then governing body of the city. The present governing body may not bind future bodies with the advisability of rebuilding or repairing such structures.

Id. at 252-253.

The rule was also applied in *Red Dog Saloon v. Sedgwick County Board of Comm'rs*, 29 Kan. App. 2d 928 (2001), *supra*, where the Kansas Court of Appeals rejected an argument that a subsequent county board of commissioners was prohibited from passing and enforcing a law that was contrary to a settlement agreement entered into with a prior governing body. The Court stated, "It is clear that a legislative body cannot bind its successor to the amendment or repeal of its laws." *Id.* at 931.

A governing body "exercising legislative authority lacks the power to bind its successors with regard to governmental functions." 56 Am. Jur. 2d Municipal

Corporations, Etc. § 137 (2016). A contrary rule would undermine the policymaking duties, judgment, and absolute discretion of newly-elected legislative bodies and frustrate, if not defeat, the democratic process.

The principle that one legislative body may not bind a future legislative body bars Plaintiffs' claims under Counts I and II, as the steps that needed to be taken to issue the STAR Bonds and proceed with the purchase of the Property were legislative actions requiring the exercise of political judgment and discretion by a subsequent City Council.

Plaintiffs erroneously allege that Resolution 8658, adopted on December 2, 2014, "authorized the issuance of STAR Bonds." (Pls.' Pet. ¶ 88.) However, instead of authorizing "the issuance" of the Bonds, the Resolution authorized and directed that the STAR Bonds be "sold at public sale and in the manner provided by law, on Tuesday, December 16, 2014." As noted above, numerous legislative steps were still left to be taken, including, without limitation, the exercise of the City Council's discretion to accept or reject any bids received and the passage of an Ordinance directing that the STAR Bonds be issued pursuant to the accepted terms.

The "failure" of the subsequent City Council to pass the resolution proposed on May 5, 2015, to issue the Bonds, and to purchase the Property were all legislative acts subject to its complete discretion and control. As a matter of law, the MOU cannot be interpreted to restrict or limit the future governing body's absolute judgment and responsibility to take such legislative action. *Schuyler*, 9 Kan. at 580 ("One legislature cannot abridge the powers of a succeeding legislature."); *see also State ex rel. Stephan v. Williams*, 246 Kan. 681, 688 (1990) ("One legislature, however, cannot bind a later legislature.") (citation omitted). Indeed, the ability of the City's taxpayers to elect new

council members that might approve a course of action different from that contemplated in the MOU is the cornerstone of the democratic process.

C. The Court Should Further Dismiss Count I as Declaratory Judgment is Not Proper in This Action.

Kansas courts have long held that in the absence of unusual circumstances or emergency features, "the declaratory judgment statute should not be used in pending actions to resolve questions of law or procedure, or as a substitute for ordinary actions which afford reasonably adequate remedies." *Junction City Educ. Ass'n v. Board of Education of Geary County*, 264 Kan. 212, 224 (1998) (citation omitted). In *Coates v. Camp*, 161 Kan. 732, 741 (1946), the Kansas Supreme Court stated:

> The Declaratory Judgment Act declares 'its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights' and that 'it is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.' We have repeatedly said that the act may not be invoked where no actual controversy exists and that it is not to be used merely as a substitute for ordinary actions or pending actions where the issues are being litigated.

Accordingly, a request for declaratory judgment should be rejected where it seeks a declaration regarding past liability, not future rights. *Lawrence v. Kuenhold*, No. 06-1397, 2008 WL 822458, at *766 (10th Cir. March 27, 2008). In such a case, it would serve no useful purpose. *Id.* (citing *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 730 (10th Cir. 1997)). And that is particularly true where there is a more suitable action. *Id.* (citing *State Farm Fire & Casualty v. Mhoon*, 31 F.3d 979, 983 (10th Cir. 1994)).

Here, Count I would serve no useful purpose, as it would primarily amount to a finding of breach of contract, which Plaintiffs have already asserted in Count II. Therefore, for this reason also, Count I should be dismissed, with prejudice. *Umbach v. Carrington Investment Partners*, No. 3:08CV484(EBB), 2009 WL 413346, at *4

(D. Conn. Feb. 18, 2009 (affirming the trial court's dismissal of a request for declaratory judgment where the plaintiff had brought other charges, "any of which could provide a remedy"); *see also Atlanta Nat'l League Baseball Club, Inc. v. F.F.*, 761 S.E.2d 613 (Ga. Ct. App. 2014) (holding that "[a] declaratory judgment action will not lie where the rights between the parties have already accrued, because there is no uncertainty as to the rights of the parties [or] the risk as to taking future action") (citation omitted).

III. CONCLUSION.

For the above and foregoing reasons, the Court should grant the present Motion, dismissing Counts I and II of Plaintiffs' Petition, with prejudice, and granting summary judgment to Defendant thereon. Plaintiffs' claims are premised upon the City's failure to take legislative action by issuing the STAR Bonds and purchasing the Property, and they seek the same compensation that Jayhawk would have received under the MOU. Counts I and II cannot prevail in light of the City Council's sole and absolute discretion to take legislative action, and they must be dismissed and summary judgment granted thereon as a matter of law.

REQUEST FOR ORAL ARGUMENT

Pursuant to Kan. S. Ct. Rule 133, Defendant, City of Topeka, Kansas, hereby requests oral argument on the instant Motion.

Respectfully submitted,

LATHROP & GAGE LLP

By: */s/ Thomas V. Murray*
Thomas V. Murray, KS #07591
tmurray@lathropgage.com
Melissa Hoag Sherman, KS #20278
msherman@lathropgage.com
Building 82, Suite 1000
10851 Mastin Boulevard
Overland Park, KS 66210-1669
Telephone: (913) 451-5100
Telecopier: (913) 451-0875

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served, by facsimile transmission, on the following counsel of record this 7th day of July 2016:

Wesley A. Weathers
Patricia E. Riley
Cynthia J. Sheppeard
Goodell, Stratton, Edmonds & Palmer, LLP
515 S. Kansas Ave.
Topeka, KS 66603
(785) 233-8870 (facsimile),

ATTORNEYS FOR PLAINTIFFS.

/s/ Thomas V. Murray
Thomas V. Murray