

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

JAYHAWK RACING PROPERTIES, LLC, and)
HEARTLAND PARK RACEWAY, LLC)
)
)
Plaintiffs,)
)
v.)
)
CITY OF TOPEKA)
)
)
Defendants.)
_____)

Case No. 2016-CV-5
Division 5

TOPEKA CITY ATTORNEY'S OFFICE
2016 JUN - 6 P 3:17
RECEIVED CITY CLERK
2016 JUN - 6 P 12:55
TOPEKA, KANSAS

SUMMONS

To: City of Topeka

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached petition or a motion under K.S.A. 60-212. The answer or motion must be served on the plaintiff's attorney at the following address:

Wesley A. Weathers
Goodell, Stratton, Edmonds & Palmer, LLP
515 S. Kansas Ave.
Topeka, KS 66603-3999

If you fail to file an answer or motion as described above, judgment by default will be entered against you for the relief demanded in the petition. You also must file your answer or motion with the court.

If you file an answer, any related claim which you may have against the plaintiff must be stated as a counterclaim in your answer. If you fail to do so you will thereafter be barred from making such claim in any other action.

Date June 2, 2016

Clerk's Seal



Clerk of the District Court.

By [Signature]
Deputy

FILED BY CLERK
KS. DISTRICT COURT
THIRD JUDICIAL DIST.
TOPEKA, KS

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

2016 MAY 26 P 3:43

JAYHAWK RACING PROPERTIES, LLC, and)
HEARTLAND PARK RACEWAY, LLC)

Plaintiffs,)

v.)

CITY OF TOPEKA)

Defendants.)

Case No. 2016-CV-424
Division 5

PETITION

Pursuant to K.S.A. Chapter 60

Plaintiffs, Jayhawk Racing Properties, LLC, and Heartland Park Raceway, LLC, for their cause of action against the City of Topeka, state and allege the following:

PARTIES

1. Plaintiff Jayhawk Racing Properties, LLC (“Jayhawk”), is a Kansas limited liability company with its headquarters in Topeka, Kansas.
2. Plaintiff Heartland Park Raceway, LLC (“Heartland”), is a Kansas limited liability company with its headquarters in Topeka, Kansas.
3. Defendant City of Topeka (the “City”) is a Kansas municipality located in Shawnee County, Kansas, and can be served with process by service on the Clerk of the City of Topeka, City Hall, 215 S.E. 7th St., Topeka, Kansas 66603.

NATURE OF THE CASE¹

From 2003 to August 7, 2015, the City and Jayhawk shared substantial financial interests in Heartland Park Topeka ("HPT"). In 2014, the City concluded that it would be in its best interest to purchase Jayhawk's interest, describing HPT as "an important economic driver for both the State of Kansas and the City" which by some estimates brought as many as 200,000 guests to Topeka each year generating an annual economic impact of roughly \$160,000,000 for the area. To that end, on June 23, 2014, the City entered into a purchase contract with Jayhawk (defined, *infra*, as "the MOU") to acquire its interest. Other parties to the MOU were the Kansas Department of Commerce ("KDOC") and Visit Topeka, Inc. ("VTI"). The need for the MOU actually dated back to late 2005 when the City first designated HPT as a major motorsports complex thus making it eligible for financing under the Kansas Sales Tax and Revenue Bond law ("STAR Bonds")². The City then established the Heartland Park Redevelopment District (the "2005 District") for STAR Bond purposes, with the boundaries being co-extensive with the geographical area of HPT. In 2006, the City issued \$10,405,000 in STAR Bonds to finance HPT improvements (the "2006 Bonds"), all with the approval of KDOC as being in accord with Kansas law. The City intended that the 2006 Bonds would be paid off by sales tax revenue from the 2005 District, but that district proved to be too small to support the annual bond payments, a situation made worse by, *inter alia*, the global economic recession which began in 2008 and untimely weather at major HPT events, so the City had been required to periodically contribute to the debt

¹ This section is intended to give the Court a summary of the rather complicated background which led to this litigation, all of which is then covered in detail in separate numbered paragraphs, *infra*. We acknowledge that under K.S.A. 60-210(b) a response is only required to the numbered paragraphs which follow this section.

² STAR Bonds are, generally speaking, economic development tools whereby municipalities can raise funds for local attractions with the bonds to then be paid off by diversion of incremental state sales tax revenue from the area deriving the most economic benefit from the attraction.

service on the Bonds from its general revenue, primarily property tax levies, and as of August 31, 2014 those payments totaled \$2,028,007. The 2014 MOU was intended to remedy that problem. In order for the City to obtain the funds needed to purchase Jayhawk's interest in HPT, the City decided to seek authority from KDOC to issue new STAR Bonds and to also expand the size of the 2005 District to include additional businesses that would benefit from the economic activity created by HPT. The parties to the MOU estimated it would take between \$4,800,000 and \$5,500,000 to cover the acquisition and the associated costs of issuing the bonds. The City's feasibility study had demonstrated that the incremental sales tax revenues from that enlarged STAR Bond district would "exceed or be sufficient" to pay off *both* the unpaid portion of 2006 Bonds and up to \$5,500,000 in new STAR Bonds. The MOU did not bind the City to issue new STAR Bonds and its contractual obligation to purchase Jayhawk's interest was expressly made contingent upon, *inter alia*, the City being successful in obtaining KDOC approval of both the expansion of the 2005 District and of the City issuing new STAR Bonds in an amount sufficient to satisfy the financial obligations of the MOU. However, under the MOU, the City expressly agreed to "make commercially good faith reasonable efforts to accomplish (those) objectives. . . and. . .to comply with the requirement of good faith and fair dealing". During the last half of 2014, the City did take substantial action toward achieving those goals, but following December 2, 2014, for what we assert were purely political reasons and without just cause, the City repeatedly failed to take steps required to comply with its duty under the MOU despite having all the necessary authority and ability to do so. That failure has resulted in dire financial consequences for both Jayhawk and the City. As of August 7, 2015, they both lost their financial interests in HPT without receiving any

compensation and the City remains obligated to repay the 2006 Bonds with sales tax revenue from the insufficiently sized 2005 District, to be supplemented by the City's own general revenue.

JURISDICTION AND VENUE

4. The Court has plenary jurisdiction to decide all issues raised in this Petition and specific jurisdiction pursuant to K.S.A. 60-1701 and 60-1704 to construe and declare Plaintiffs' rights under the municipal contracts of the City hereinafter discussed and to determine damages.

5. Venue is proper in Shawnee County, Kansas, where the actions at issue in this case occurred and the cause of action arose.

BACKGROUND

6. At all relevant times prior to June 17, 2014, HPT was a major motorsports complex operated by Jayhawk pursuant to a "Development and Management Agreement" ("1988 DMA"³) originally entered into on January 12, 1988 between the City and Lario Enterprises, Inc. ("Lario"), and assigned to Jayhawk in an "Assignment of Development Agreement" effective March 12, 2003 ("2003 Assignment of DMA") and amended in the "Amendment to the Development and Management Agreement" entered into between the City and Jayhawk on January 31, 2005 ("2005 Amendment to DMA").

7. The 1988 DMA, as assigned to Jayhawk in 2003 and amended in 2005, granted the City fee title in the HPT property—which had originally been owned in fee simple by Lario—for a term of years, subject to a reversion of that title to Jayhawk at the end of the term or upon payment in full of the City's general obligation bonds financing the

³ This and later documents identified in this Petition are all common to or available to both parties. We will not attach them to this Petition, but they will be produced in due course or upon request of the Court.

property, whichever occurred later. (1988 DMA, Art. I, read with 2003 Assignment of DMA and 2005 Amendment to DMA, §§ 1 and 4). This right to a reversion of fee simple title upon expiration of the term or full payment of the City's bonded indebtedness for the property is referred to hereinafter as Jayhawk's "reversionary interest" in the property.

8. On June 17, 2014, the Topeka City Council (the "City Council") approved the terms of a Memorandum of Understanding ("MOU") previously negotiated between representatives of the City, KDOC, Jayhawk, and VTI.

9. Pursuant to the City Council's June 17th authorization of the MOU, the City, together with KDOC, Jayhawk and VTI executed the MOU on June 23, 2014, which then became City of Topeka Contract No. 43733. (MOU, pp. 1, 7-9).

10. In the preliminary statement to the MOU, referred to therein as the "Recitals", the City and the other parties set forth and explained the relevant background facts and history of the City's and Jayhawk's involvement with and ownership of HPT (MOU at pp. 1-2) leading up to the following individual Recital:

"Whereas, the parties have concluded that it is in the best interests of the City of Topeka and the State of Kansas for the City to own both the fee simple interest in the property and the reversionary interest owned by Jayhawk; and accordingly the City desires to purchase from Jayhawk all right, title and interest of Jayhawk [therein]... and Jayhawk desires to sell the same to the City." (MOU at p. 2).

11. In the last Recital of the MOU, the City announced that in connection with its obligations under the MOU, it "will commence the process of expanding the District, amend the project plan, seek approval of the Secretary of Commerce for the issuance of additional Star Bonds and issue bonds sufficient to acquire Jayhawk's reversionary interest and pay certain security interests." (MOU at p. 2).

12. As one of the actual contractual obligations of the MOU, the City then agreed to purchase Jayhawk's reversionary interest in the HPT property for the sum of \$2,392,117 (the "Purchase Price"). (MOU ¶ 3).

13. As another contractual obligation, the City "agrees to pay the balance of the indebtedness listed in Exhibit B [to the MOU], including principal and interest and associated costs." (MOU ¶ 4).

14. Heartland was co-obligor with Jayhawk on the notes and mortgages listed on Exhibit B and was the sole obligor on the loan from KDOC in the principal amount of \$500,000 listed on Exhibit B, thereby making Heartland a third party beneficiary of the MOU.

15. The City further agrees in the MOU to pay the Purchase Price and the Exhibit B indebtedness "by February 1, 2015 or within 90 days of the approval by the Topeka City Council of the STAR Bond Project Plan" (MOU ¶ 5).

16. Pursuant to Paragraph 6 of the MOU, the City agrees to "pay its own costs associated with the issuance of the STAR Bonds, including payment of reasonable attorney fees and bond counsel fees".

17. In partial performance of Paragraph 6, the City agreed to reimburse Jayhawk for the attorney fees of its corporate counsel for professional services relating to the obtaining of KDOC's approval of the expanded STAR Bond Redevelopment District Plan and the City's issuance of additional STAR Bonds. In reliance on that agreement, Jayhawk and Heartland authorized their corporate counsel to proceed accordingly. The legal work was successfully performed during June, July, August and September of 2014 resulting in a

total attorney fee bill in the amount of \$78,892.00 for which Jayhawk and Heartland timely billed the City, but no payments thereon have been made by the City.

18. Paragraph 8 of the MOU states,

Agreement Contingency. The parties acknowledge that this Agreement is contingent on fulfillment of the current contract between NHRA and Jayhawk and increasing the size of the Star Bond district to include the area shown in Exhibit "C" [to the MOU], the approval of the Secretary of Commerce of the State of Kansas approving the redevelopment project plan for the Heartland Park of Topeka Major Motorsports Complex and authorization by the City of the issuance of Star Bonds in an amount equal to the financial obligations set forth in this Agreement including all costs associated therewith. It is estimated that approximately \$4.8M-\$5.5M of Star Bonds will be issued to cover the acquisition and associated costs of issuance. (MOU, pp. 3-4).

19. Paragraph 10 of the MOU states,

Parties Cooperation. The City and Jayhawk agree that they will make commercially good faith reasonable efforts to accomplish the objectives set forth in paragraph 8 of this Agreement in a cooperative manner and the City further agrees to comply with the requirement of good faith and fair dealing. (MOU, p. 4).

20. Paragraph 17 of the MOU provides, in relevant part:

Unless otherwise modified by mutual agreement of the parties, this agreement shall remain in full force and effect. (MOU, p. 5).

21. In the MOU, the City and all other parties agreed that if any of its provisions are declared by a court of competent jurisdiction to be "illegal, invalid or unenforceable . . . the validity of the of the remaining parts, terms, provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement." (MOU, ¶19).

22. In the MOU, the City and all other parties agreed that the MOU "shall be binding upon and inure to the benefit of the . . . successors and assigns of the parties". (MOU ¶ 20).

23. Prior to execution of the MOU, the City was already obligated on Star bonds in the original principal amount of \$10,405,000.00 issued in 2006 for improvements at HPT for which the original STAR bond district included only HPT and the immediately adjoining properties (the "2005 District"), but that 2005 District did not generate enough sales tax revenue to cover the debt service on those STAR bonds. Those bonds were issued as a full faith and credit indebtedness of the City and it was obligated to pay the difference out of its own revenues. Because the City refused to abide by the terms of the MOU, the City remains obligated to pay the shortfall on the 2006 Bonds solely out of its own revenues and, as of August 31, 2014, the City had already so paid the sum of \$2,028,007. (City's "Annual Report to the Kansas Secretary of Commerce for the Major Motor-Sports Complex Redevelopment Project", dated October 1st, 2014, at page 5.)

24. If the MOU had been implemented, the City would have purchased Jayhawk's interest in HPT and would have been free to contract with another racetrack operator in time for HPT to operate a full racing season in 2015, thereby avoiding the loss of a substantial portion of the business revenue that would have been generated for the Topeka metropolitan area by the 2015 HPT racing season.

25. On June 17, 2014, the City Council also approved the terms of a Workout Agreement ("Workout Agreement") previously negotiated between CoreFirst Bank & Trust ("CoreFirst"), Jayhawk, Heartland, Raymond S. Irwin ("Irwin") and the City.

26. On June 23, 2014, as authorized by the City Council on June 16, 2014, the City, CoreFirst, Irwin, Jayhawk, and Heartland executed City of Topeka Contract No. 43732, the Workout Agreement referred to in paragraph 23, above. (Workout Agreement, pp. 1, 11).

27. In the Workout Agreement, Jayhawk and the City acknowledged that Jayhawk was indebted to CoreFirst on various notes and mortgages upon which Jayhawk was in default and the parties agreed upon a procedure for allowing those debts to persist and continue to accrue interest without CoreFirst starting collection on the notes or foreclosure of the mortgages for a specified period of time while the goals of the MOU were achieved, thus allowing those debts to be paid in full and the City to purchase Jayhawk's reversionary interest in HPT. (Workout Agreement, pp. 1-3).

28. In the preliminary statement to the Workout Agreement, referred to therein as a "Whereas" clause, the City also acknowledged that it intended "to issue additional STAR Bonds and use the STAR Bond proceeds for the purpose of assuring the continued economic development of Heartland Park Topeka and the acquisition of Obligors' interest in the real property"—*i.e.*, the acquisition by the City of Jayhawk's reversionary interest. (Workout Agreement, pp. 2-3).

29. In the Workout Agreement, as one of the terms, conditions and covenants, Jayhawk and the City agreed to "execute and deliver into escrow separate quitclaim deeds... under which Obligors and the City transfer any interest they may have" in the real property of HPT to CoreFirst. (Workout Agreement, pp. 4-5, ¶2A).

30. In return for the delivery of the quitclaim deeds into escrow, as another of the terms, conditions and covenants, CoreFirst agreed to forbear collection of the Notes until February 28, 2015, on the conditions that, 1) the City initiated the process to issue STAR bonds on or before July 1, 2014 and 2) that monthly status reports were made showing progress toward issuance of the STAR bonds. (Workout Agreement, pp 4-5).

31. Paragraph 2A of the Workout Agreement further provided that,

If, prior to February 28, 2015, all amounts due under the Notes are paid to the Lender, Lender will direct the Escrow Agent to return the Deeds to Obligors and the City. However, in the event that all amounts due under the Notes have not been paid by February 28, 2015, Obligors and the City agree that on or after March 1, 2015, Lender has the discretion to direct the Escrow Agent to file the Deeds with the Shawnee County Register of Deeds office. (Workout Agreement, p. 5.)

32. Paragraph 2B of the Workout Agreement provided, in relevant part,

The filing of the Deeds will constitute a complete release and satisfaction of all of Obligors' and the City's personal liability under the Notes, but the indebtedness represented by the Notes shall not be extinguished or released. Should such Deeds be filed, Obligors, Guarantor and the City promise to vacate the Property within 30 days from the date the Deeds are filed with the Shawnee County Register of Deeds. Lender, Obligors, Guarantor and the City further agree that the delivery of the Deeds and the filing/recording of the Deeds do not, and will not, constitute a merger of the lien and security interests of the Security Documents with the fee estate in the Property, and that Lender may proceed with a foreclosure or other action to enforce the liens and security interests under the Security Documents should Lender, in its sole discretion, decide that such a foreclosure or other action is needed for Lender to acquire clear title to the Property and other property encumbered by the Security Documents. (Workout Agreement, p. 5).

33. Paragraph 3 of the Workout Agreement states,

Notwithstanding the terms hereof, all prior collateral interests granted by Obligors in favor of Lender under the Security Documents shall remain in full force and effect, and secure all amounts due under the Notes or this Agreement. (Workout Agreement, p. 6).

34. Paragraph 4 of the Workout Agreement states,

Obligors and Guarantor agree that the Notes, Guaranty and Security Documents are in full force and effect and shall remain in full force and effect until all of the indebtedness of Obligors and Guarantor to the Lender and related to the Agreement, Notes, and Guaranty and Security Documents is paid in full. (Workout Agreement, p. 6)

35. Some of the notes at issue in the Workout Agreement were also secured by personal property of Jayhawk located at the HPT facility.

36. On July 1, 2014, the City Council passed Resolution No. 8637, which set a public hearing for August 12, 2014, on the City's proposal to amend the Heartland Park Redevelopment Plan and to issue additional STAR bonds for redevelopment of HPT.

37. At its meeting on July 21, 2014, the Shawnee County Commission passed Resolution No. 2014-57 setting a public hearing on August 21, 2014, regarding the City's proposed addition to the Heartland Park Redevelopment District.

38. In a letter dated August 5, 2014 the Kansas Secretary of Commerce conditionally approved the City's request to expand the Heartland Park Redevelopment District, finding "the proposed Heartland Park STAR Bond Project District" to be a "major motorsports complex" as defined by K.S.A. 12-17,162 and an 'eligible area' for the purpose of establishing a STAR Bond Project District as contemplated by K.S.A. 12-17,165."

39. On August 12, 2014, after a public hearing on that date, the City Council enacted Ordinance No. 19915 ("Ordinance 19915").

40. Section 4 of Ordinance No. 19915 provided,

Pursuant to the Act, and subject to the written consent of the Board [of County Commissioners], the boundaries of the Redevelopment District, established by the City in Ordinance No. 18515, shall be expanded to add area including land outside the boundaries of the City. Upon the Board's written consent, as set forth in the Act, the boundaries of the Redevelopment District shall be as described and depicted in Exhibit A [to the Ordinance], attached hereto and incorporated herein by reference. (Ordinance 19915, p. 5, ll. 122-126).

41. Section 5 of Ordinance No. 19915 found as follows,

The Governing Body hereby finds and determines that the Amendment, set forth in Exhibit B [to the Ordinance], attached hereto and incorporated herein by reference, supplements, but does not replace, the existing Project Plan, also set forth in Exhibit B, adopted by the City in Ordinance No. 18541. Together with the existing Project Plan, the Amendment identifies all of the STAR bond project areas. (Ordinance 19915, p. 5, ll. 127-131).

42. Section 9 of Ordinance No. 19915 adopted the proposed Amendment to the STAR Bond Project Plan, as follows,

The Amendment, set forth in Exhibit B, attached hereto and incorporated herein by reference, is hereby adopted and approved. Together with the existing Project Plan the Amendment supplements, also set forth in Exhibit B, the Amendment is the STAR bond project plan for the expanded Redevelopment District. (Ordinance 19915, p. 6, ll. 146-149).

43. Section 11 of Ordinance No. 19915 authorized the issuance of additional STAR Bonds, as follows,

The City is hereby authorized to issue full faith and credit tax increment bonds in the estimated amount of \$5,000,000.00 to finance the undertaking described in the Amendment, set forth in Exhibit B [to the Ordinance], attached hereto and incorporated herein by reference, in accordance with the provisions of the Act; provided, however, that such financing shall not exceed 50% of the Project's project costs, as described in the Amendment. Such full faith and credit tax increment bonds shall be issued in accordance with the general bond law, shall be made payable, both as to principal and interest, from a pledge of certain incremental sales and use tax revenue sources identified in KSA 12-17,169 and from a pledge of the City's full faith and credit to use its ad valorem taxing authority for repayment thereof in the event all other authorized sources of revenue are not sufficient, and shall have a maximum maturity that does not exceed 20 years. These bonds shall be known as sales tax and revenue ("STAR") bonds. (Ordinance 19915, p. 6, ll. 152-162).

44. Section 12 of Ordinance No. 19915 sets forth the statutory requirements applicable to a protest petition that would require submission of the STAR Bond issue to the voters at the next election, as follows:

The City may issue such STAR bonds pursuant to the Amendment, set forth in Exhibit B, attached hereto and incorporated herein by reference, unless, pursuant to the Act, within sixty (60) days following August 12, 2014, the date of the public hearing on the proposed amendment, a protest petition signed by three percent ("3%") of the qualified voters of the City is filed with the City Clerk in accordance with the provisions of KSA 25-3601, et seq. and amendments thereto. (Ordinance 19915, p. 6, ll. 163-168).

45. Section 14 of Ordinance No. 19915 authorized the City Manager "to apply to the Secretary for STAR bond issuance authority to issue additional STAR bonds in excess of

the amount previously approved by the Secretary in relation to the Project.” (Ordinance 19915, pp. 6-7, ll. 174-178).

46. Ordinance No. 19915 has not been amended, repealed, rescinded or vacated by the City. It remains in full force and effect to this date.

47. At its meeting on August 21, 2014, after a public hearing, the Shawnee County Commission passed Resolution No. 2014-66 consenting to the City’s proposed addition to the Heartland Park Redevelopment District.

48. In a letter to the City Manager dated September 24, 2014, the Secretary of Commerce made the following determinations with respect to the City’s application to issue additional STAR bonds:

Based on all of the above, it is my determination that the Heartland Park Topeka STAR Bond District constitutes a “major motorsports complex” and is therefore an “eligible area” within the meaning of K.S.A. 12-17,162, as amended. I hereby approve and designate the Heartland Park Topeka as a STAR Bond Project Plan Project as submitted in the amended project plan dated August 28, 2014, provided that: 1) the City takes all lawfully required actions to implement the STAR Bond Project Plan; 2) the City implements the approved “sources and use” allocation of costs and Commerce approves a final line item budget for all STAR Bonds; 3) the amount of STAR Bond financing for the Project does not exceed 50% of total project costs for the project upon completion; 4) project expenses to be financed or reimbursed with STAR Bond proceeds to be submitted to and approved by me prior to payment; 5) revenue for the Project from the Expanded District shall include only “incremental revenue” in excess of the “base year” revenue. The base shall be calculated using calendar year 2005; and 6) the Secretary of Commerce approves the terms and conditions of the STAR Bonds. (Secretary of Commerce 2014-09-24 determination letter, p. 2).

49. As is reflected on page 3 of the October 21, 2014, Minutes of the City Council on October 8, 2014, Christopher Imming (“Imming”) filed with the City Clerk an initiative petition (the “Imming petition”), purportedly pursuant to K.S.A. 12-3103, bearing 3,587 valid signatures, calling for either the repeal of Ordinance No. 19915 in its entirety or its submission to the voters at a municipal election.

50. On October 22, 2014, the City filed its Petition in *City of Topeka, Kansas v. Christopher Imming*, Shawnee County District Court Case No. 2014 CV 1069 (the “*Imming*” suit), seeking a judicial declaration that the Imming petition was invalid.

51. Jayhawk was subsequently permitted to intervene in the *Imming* suit.

52. On November 12, 2014, the District Court entered its Memorandum Decision and Order (“*Imming* Memorandum Decision”) granting in part and denying in part the City’s and Jayhawk’s motions for summary judgment in *Imming*, with the overall result being a determination that the Imming Petition was invalid and neither rendered Ordinance 19915 invalid nor did it require submission on the matter for a vote at a municipal election.

53. On November 26, 2014, Imming timely filed a notice of appeal from the District Court’s judgment in the *Imming* suit.

54. Imming did not seek from the District Court or obtain a stay of that Court’s judgement pending the appeal so the finding that the Imming Petition was invalid remained binding on the parties.

55. As reflected on pages 2 through 5 of the minutes of the City Council meeting on December 2, 2014, on that date City Council passed Resolution No. 8658 (“City Resolution 8658”).

56. City Resolution 8658 resolved, in relevant part:

That it is hereby determined to be necessary and it is hereby authorized, directed and ordered, that Taxable Full Faith and Credit STAR Bonds, Series 2014-A (Heartland Park), (the “Bonds”) of the City of Topeka, Kansas (the “City”) shall be sold at public sale and in the manner provided by law, on Tuesday, December 16, 2014, at 9:30 a.m. C.S.T. The Bonds shall be in the maximum principal amount of Five Million Dollars (\$5,000,000) and shall be dated on or about December 30, 2014. (City Resolution 8658, p. 1, §1).

57. The remaining operative sections of Resolution No. 8658 authorized and directed various officers and representatives of the City to take the actions necessary to lawfully issue the Bonds. (City Resolution 8658, pp. 1-2, §§2-5).

58. The City Council minutes for December 2, 2014 reflect the following exchange between Councilmember Harmon and City Attorney Sublet regarding the effect of Imming's appeal of the district court decision in *Imming* on the City's proposal to adopt Resolution No. 8658:

Councilmember Harmon questioned what would happen if the appeal is successful and the bonds have been issued.

Chad Sublet reported state statute outlines in order to prevent the City from moving forward with issuing the bonds, there would have to be a Stay in Proceedings issued by the Shawnee County District Court, which has not yet been filed. He noted the appeal filed by Mr. Imming's attorney does not have any effect on the City moving forward with the bond sale. (City Council Minutes 2014-12-02, p. 440)

59. On December 9, 2014, Imming filed with the Kansas Court of Appeals a motion for stay of the district court's decision in *Imming*.

60. No sale of STAR bonds pursuant to the MOU, City Ordinance No. 19915 and City Resolution 8658 was held on December 16, 2014, or at any other time.

61. On January 8, 2015, the Court of Appeals stayed the District Court's decision in *Imming* until ten days after the filing of Appellant's and Appellees' briefs on appeal.

62. Imming filed his Brief of Appellant in *Imming* on January 15, 2015, and the City and Jayhawk filed their Appellees' briefs on January 26, 2015, thereby extending the stay entered by the court of appeals until February 5, 2015.

63. On February 4, 2015, the court of appeals denied Imming's motion to extend the stay of the district court's decision in *Imming*. Thus, the only time period during which the City was prohibited from fulfilling its contractual obligations under the MOU by the

judicial proceedings concerning the Imming Petition was from January 8, 2015 until February 5, 2015.

64. On March 4, 2015, the Legislative Division of Post Audit issued to the public its Performance Audit Report entitled "Sales Tax and Revenue Bonds: Evaluating the Heartland Park STAR Bond Project" (Legislative Post Audit Report). However, as is customary, the Performance Audit Report was made available to KDOC and the City before it was made public. KDOC received the report on or about February 20, 2015 and shared a copy with the City.

65. On February 25, 2015, in a letter to the Legislative Post Auditor, City Manager Colson described HPT as "an important economic driver for both the State of Kansas and the City of Topeka," and described the Heartland Park STAR bond project as "an exciting ongoing project."

66. The Division of Post Audit's summary of its conclusions regarding the six questions it was asked to address was as follows: 1) "amending the original STAR bond project plan appears to meet the requirements of the STAR Bond Financing Act" (Legislative Post Audit Report, p. 9); 2) "using STAR bonds to purchase Jayhawk's reversionary interest and secure clear title to Heartland Park appears to meet the requirements of the STAR Bond Financing Act" (Legislative Post Audit Report, p. 10); 3) "the current proposal includes a study of Heartland Park's economic impact that appears to meet the requirements of the STAR Bond Financing Act" (Legislative Post Audit Report, p. 12); 4) "expanding the boundaries of an existing STAR bond district appears to meet the requirements of the STAR Bond Financing Act" (Legislative Post Audit Report, p. 15); 5) "using 2005 as the base year for sales tax increment calculations appears to meet the

requirements of the STAR Bond Financing Act” (Legislative Post Audit Report, p. 18); and 6) “the current proposal includes an analysis of the Heartland Park expanded STAR bond district’s ability to pay off bond debt which appears to meet the requirements of the STAR Bond Financing Act.” (Legislative Post Audit Report, p. 20).

67. In response to an advance copy of the Legislative Post Audit report, on February 24, 2015, the Secretary of KDOC wrote a letter to the Post Auditor in which he said, “(w)e agree with LPS’s finding of compliance with the STAR Bond process and pertinent legal requirements.”

68. On March 11, 2015, the Kansas Court of Appeals issued its opinion in *City of Topeka v. Imming*, 51 Kan.App.2d 247, 344 P.3d 957 (2015), affirming the district court’s decision declaring the Imming Petition invalid.

69. On March 17, 2015, corporate counsel for Jayhawk sent a letter to City Manager Colson noting that “the City has agreed to make ‘commercially good faith reasonable efforts’ to expand the Heartland Park Topeka STAR bond district, to obtain from the Kansas Secretary of Commerce approval of the amended STAR bond district project plan, to secure authorization by the City to issue STAR bonds and to issue STAR bonds in order to close the acquisition,” further noting the Court of Appeals’ decision in *Imming*, and further stating:

It has been recently suggested that City management may no longer consider the MOU to be effective. While we have not been formally advised that the City no longer believes the MOU is effective, the suggestion raises a serious question in our mind about whether the City is proceeding in good faith. We have also been advised that the City Manager does not intend to move the process forward until the latter part of April 2015. The reason provided us for the delay is purely political. We do not consider political considerations to meet the criteria set forth in the MOU, which requires the City to use “commercially good faith reasonable efforts” in issuing the bonds and to comply with the legal requirement “good faith and fair dealing.”

It is important that we know by March 19, 2015 if the City intends to take the position that the MOU is no longer effective and it is also important that we be assured that the City intends to move the process along in a timely manner.

70. As shown in the official minutes of the City Council meeting on March 17, 2015, on that date the City Council discussed Heartland Park at length without taking any action.

71. During the discussion of Heartland Park at the March 17, 2015 City Council meeting, the City Attorney offered the following advice concerning the question whether the City was free to go forward with the process:

Chad Sublet gave a brief overview of the process regarding Heartland Park Topeka and the petition submitted by Mr. Chris Imming. He reported the Third Judicial District Court of Shawnee County ruled the City could move forward because the petition was invalid and there could not be a legally binding vote based on the petition. He stated the ruling by the District Court was forwarded to the Kansas Court of Appeals which also ruled in favor of the City; therefore, there was nothing in place that would prevent the City from moving forward at this time... Chad Sublet stated he foresees nothing that would hinder the City from moving forward and the Governing Body will be notified when new information was obtained from the courts. (City Council Minutes, 2015-03-17, p. 77, 78).

72. Nevertheless, during the March 17, 2015 City Council meeting, Councilmember Hiller expressed the opinion that the MOU had "expired on February 1, 2015," and "commented on the importance of providing public hearings" before taking any further action, and the City Manager responded that "it was the City's objective to provide public engagement for those who want a public vote outside the confines of the Memorandum of Understanding." (City Council Minutes, 2015-03-17, p. 78).

73. On April 7, 2015, a municipal general election was held, and several members of the previous City Council were replaced.

74. On April 9, 2015, Imming filed a petition for review of the Court of Appeals *Imming* decision with the Kansas Supreme Court. Imming did not request a stay of the decisions below.

75. As reflected in the official minutes of the City Council meeting on April 21, 2015, the City Council once again discussed HPT at length, without taking any action.

76. During the City Council's discussion of HPT on April 21, 2015, "Councilmember Jensen asked if there were other options that could be used other than a cash buyout to eliminate the reversionary interest" as required by the MOU. The minutes reflect no direct answer to this question. (City Council Minutes, 2015-04-21, p. 101).

77. On April 25, 2015, corporate counsel for Jayhawk sent City Attorney Sublet an e-mail requesting confirmation that, *inter alia*, "the Memorandum of Understanding is in full force and effect" and that "Jayhawk owns all of the personal property on the Heartland Park premises, except for items of Personal property purchased with Star Bond proceeds."

78. City Attorney Sublet, speaking on behalf of his client, the City, responded to Jayhawk's April 25, 2015 e-mail with a memorandum of the same date in which he and thus the City gave Jayhawk certain assurances, including that the MOU was still in full force and effect, as follows:

The City confirms that the MOU is in full force and effect and if all approvals contemplated in the MOU and required by the STAR Bond financing Act are met, we intend to fulfill all obligations under the MOU. Additionally, we expect Jayhawk Racing, the Department of Commerce and Visit Topeka to fulfill the requirements of the MOU... The City intends to pursue all judicial remedies if any party does not fulfill the obligations as outlined in the MOU... The City confirms that Jayhawk owns all personal property located on the Heartland Park premises; except for items purchased with STAR Bond proceeds.

79. When City Attorney Sublet wrote his April 25, 2015, memorandum all required hearings had been held and all required approvals to which he referred had already

been met, as set forth in paragraphs 34 through 46, 53 through 56, 64, 65, 69 and 76, *supra*, and the City Council had already authorized and directed the issuance of STAR bonds to fund the MOU, subject only to certain provisos that were all within the control of City as set forth in paragraphs 7, 8, 11 through 13; 16, 41, 46 and 54 through 56, *supra*.

80. At the City Council meeting on May 5, 2015, the City Manager presented a proposed resolution authorizing him “to proceed with the implementation of the Heartland Park Redevelopment Project Plan including, but not limited to the sale of additional STAR Bonds estimated to be between \$4.8 and \$5.5 million.”

81. As reflected in the official minutes of the City Council meeting on May 5, 2015, the City Manager’s proposed resolution authorizing him to proceed with the implementation of the Heartland Park Redevelopment Project Plan was defeated.

82. On May 19, 2015, corporate counsel for Jayhawk sent City Manager Colson a letter “Re: Demand to Immediately Cure Material Breach of City of Topeka Contract No. 43733 or Pay Consideration Due” (“Frieden Demand Letter”) which demanded, *inter alia*, that the City “immediately cure its material breach of the MOU and promptly proceed to close the transaction or pay Jayhawk Racing the sum of \$5,490,000 as damages for breach of contract.”

83. The City did not respond to the demands in the Frieden Demand letter, and never closed the transaction contemplated by the MOU.

84. As a result of the City’s failure to close the transaction contemplated by the MOU, on August 7, 2015, CoreFirst instructed the Escrow Agent to file Jayhawk’s and the City’s quitclaim deeds to the Heartland Park Property pursuant to the Workout Agreement,

whereby CoreFirst acquired fee simple title to the property and destroyed the City's ownership interest and Jayhawk's reversionary interest in HPT.

85. Prior to entering into the MOU, Jayhawk had been attempting to sell its reversionary interest to third parties, but once the MOU was in place and binding Jayhawk could no longer pursue such options and instead was forced to rely to its detriment on the contractual obligations of the City under the MOU.

86. On October 7, 2015, the Kansas Supreme Court denied Imming's petition for review in the *Imming* case.

**COUNT I
DECLARATORY JUDGMENT RELATING TO THE MOU**

87. Jayhawk and Heartland incorporate by reference all previous paragraphs of its Petition as though fully set forth herein.

88. Pursuant to the Kansas Declaratory Judgement Act, K.S.A. 60-1701 et. seq., ("the Act") and specifically K.S.A. 60-1704, Jayhawk and Heartland seek a declaration of their rights under the MOU as follows:

- a.) That the MOU was binding on all parties from and after June 23, 2014 and remained in full force and effect as of May 5, 2015.
- b.) That in keeping with the City's obligations under the MOU, including the City's express agreement to "make commercially good faith efforts to accomplish the objectives set forth in Paragraph 8 of this Agreement" and the further express agreement to "comply with the requirement of good faith and fair dealing", the City was obligated to proceed in good faith with attempting to accomplish the Paragraph 8 objectives as quickly as practical under the circumstances.

- c.) That at the time of the City Council's adoption of Resolution 8658 on December 2, 2014, all of the conditions set forth in Paragraph 8 of the MOU had been fulfilled, except for the "authorization by the City of the issuance of Star Bonds in an amount equal to the financial obligations set forth in this Agreement" and the actual issuance of the bonds.
- d.) That City Council Resolution 8658, adopted December 2, 2014, authorized the issuance of STAR Bonds.
- e.) That following December 2, 2014, the City made no further good faith efforts to comply with Paragraph 8 of the MOU, thereby breaching its contractual duty under Paragraph 10.
- f.) That on April 25, 2015, the City, acting through its City Attorney who has the power to bind his client, provided Jayhawk with written confirmation that the MOU was in full force and effect.
- g.) That the MOU remained in full force and effect following the City Council's failure to pass the resolution proposed by the City Manager on May 5, 2015, and it continued to be binding on the City and other parties thereto until August 7, 2015 when CoreFirst took action to cause the filing of the quitclaim deeds, after which time compliance with the terms of the MOU was thereby rendered impossible.
- h.) That, alternatively, if any of the conditions stated in Paragraph 8 of the MOU, or any other conditions precedent to the City's obligation to issue STAR bonds to fund the MOU and discharge the Workout Agreement, failed, their fulfillment

was prevented only by the actions and omissions of the City in breach of Paragraph 10 of the MOU.

89. Pursuant to K.S.A 60-1703 of the Act, Jayhawk and Heartland are entitled to further relief in the nature of a money judgment for the damages suffered as the result of the City's breach of the MOU.

WHEREFORE, Plaintiffs respectfully request that this Court enter orders declaring their rights under the MOU, that the City repeatedly violated those rights and that the City breached the MOU thereby making further relief in the form of a money judgement appropriate in an amount sufficient to put Jayhawk and Heartland in the positions they would have occupied if the City had completed the purchase of Jayhawk's reversionary interest in HPT and paid it the Purchase Price and the other amounts it agreed to pay on Jayhawk's behalf, as set forth in paragraphs 11 through 16, *supra*, and awarding Plaintiffs their costs and any other and further relief the Court deems just and equitable.

COUNT II BREACH OF CONTRACT

90. Jayhawk and Heartland incorporate by reference all previous paragraphs of their Petition as though fully set forth herein.

91. From and after the time the City Council adopted Resolution 8658 on December 2, 2014, all of the contingencies set forth in paragraph 8 of the MOU had been satisfied and/or authorized or the necessary authorizations could have been obtained by the City in fulfillment of its obligations under Paragraph 10 of the MOU.

92. The City's failure following December 2, 2014, to take appropriate steps to fulfill its obligations under the MOU, including those set forth in Paragraphs 3, 4, 5, 6, 8 and

10 thereof, at any time prior to August 7, 2015 when CoreFirst caused the quitclaim deeds to be filed, was a continuing breach of the MOU.

93. At the time the City Council attempted to repudiate the MOU by defeating the City Manager's May 5, 2015, proposed resolution authorizing him to proceed with the implementation of the Heartland Park Redevelopment Project Plan, all conditions precedent to the City's obligations under Paragraph 8 had either been authorized or, with only a good faith effort, the necessary authorizations could have been obtained by the City in fulfillment of its obligations under Paragraph 10 of the MOU.

94. Alternatively, if any of the conditions stated in Paragraph 8 of the MOU, or any other conditions precedent to the City's obligation to fund the MOU and thereby discharge the Workout Agreement, at any time failed, their fulfillment was prevented by only the actions and/or omissions of the City in breach of Paragraph 10 of the MOU.

95. As a result of the City's breach of the MOU, including the City's failure to purchase Jayhawk's reversionary interest in the HPT property for the sum of \$2,392,117 and its failure to pay off Jayhawk's indebtedness to CoreFirst and Heartland's indebtedness to KDOC, Jayhawk was forced to forfeit its reversionary interest in HPT to CoreFirst without receiving any compensation.

96. As a result of the City's breach of the MOU, Jayhawk and Heartland remained indebted to KDOC in the amount of \$500,000, plus interest thereon at the contract rate of 4% per annum from and after September 27, 2011.

97. As a result of the City's refusal to meet its obligations under the MOU, including the payment of Jayhawk's indebtedness to CoreFirst as provided under the MOU, Jayhawk was required to forfeit to CoreFirst all of its personal property at the HPT facility,

valued at \$875,000, which had secured various loans from CoreFirst that were incorporated in the Workout Agreement.

98. The City breached Paragraph 6 of the MOU by failing to pay Jayhawk and Heartland the \$78,892.00 for the professional services of its corporate counsel related to assisting the City in gaining KDOC approval of the STAR Bond Development District Plan.

99. The City's attempted repudiation of the MOU at the City Council meeting on May 5, 2015, also breached the MOU.

WHEREFORE, Plaintiffs respectfully request damages in the amount of \$3,846,009 plus interest on the KDOC loan to the date of payment plus statutory pre-judgment interest from the date of breach on the Purchase Price, post-judgment interest, and such other and further relief as the Court deems just and equitable.

**COUNT III
DECLARATORY JUDGMENT REGARDING STORMWATER UTILITY
CHARGES**

100. Jayhawk and Heartland incorporate by reference all previous paragraphs of their Petition as though fully set forth herein.

101. During the term of Jayhawk's ownership interest in and management of HPT from March 2003 to July 2015, the City charged Jayhawk monthly for stormwater utility service to HPT and in response, over the years, Jayhawk paid the City \$181,520.18.

102. A stormwater utility fee "is paid for services actually furnished and necessary for the quiet enjoyment of the property rights of each plaintiff landowner." *Regency Park, LP v. City of Topeka*, 267 Kan. 465, 472, 981 P.2d 256 (1999).

103. However, the City has never furnished, or offered to furnish, stormwater utility service to HPT during the time that Jayhawk operated it.

104. Jayhawk never consented in writing or otherwise to the assessment of stormwater utility fees.

105. Jayhawk raised this issue many times with the City over the years and complained that it should not be charged a stormwater utility fee, but the City persisted in making the monthly charge despite never providing Jayhawk with the service.

106. In a letter dated July 14, 2014, Raymond Irwin, owner of Jayhawk, formally protested the City's "incorrect billing" of HPT for a "non-existent service from 2003 through the July 2014 Topeka Water Department invoice," requesting the elimination of the stormwater utility charge from future invoices and a refund of the past overpayments.

107. The City did not respond to Irwin's letter and continued to charge stormwater utility fees.

108. On July 30, 2015, Jayhawk paid a water, sewer and stormwater utility service bill, alleged by the City to be past due, under written protest, again requesting a refund or offset of improperly charged stormwater utility service fees.

109. The City subsequently denied Jayhawk's request for a refund or offset of the stormwater utility fees previously paid, including those paid under protest on July 30, 2015.

110. The City charging Jayhawk for stormwater utility service that it did not provide was unauthorized and improper as well as being a breach of the 1988 DMA as amended in 2005.

111. Section 3.9 of the 1988 DMA provided, in relevant part, that

Essential Services. The City and Lario agree that certain services and facilities are essential to effective operation of the Project said essential services attached hereto as Exhibit "F" [to the 1988 DMA]. To the extent that such essential services or facilities are within the jurisdiction of the City, the City hereby agrees to provide, or cause to be provided, such essential services and improvements, as provided below...

b. **Sewer Services.** The City and Lario acknowledge and recognize that Sanitary Sewer Services are not available to the Project or the Lario site... Notwithstanding anything contrary herein contained, Lario shall not be obligated to pay for any assessments that are not determined in accordance with applicable laws, ordinances, statutes and regulations... (1988 DMA, pp. 18, 19).

112. Stormwater utility service was not one of the "essential services" listed in Exhibit F to the 1988 DMA. (1988 DMA, last four pages).

113. Paragraph 4.1 of the 1988 DMA provided, in relevant part, that

Lario shall, during the Term, bear, pay and discharge, before the delinquency thereof, all taxes and assessments, general and special, if any, which may be lawfully taxed, charged, levied, assessed or imposed upon or against or be payable for or in respect of the Project, or any part thereof, or any improvements at any time thereon or Lario's interest in the Project under this Contract, including any new lawful taxes and assessments not of the kind enumerated above to the extent that the same are lawfully made, levied or assessed in lieu of or in addition to taxes or assessments now customarily levied against real property, and further including all water and sewer charges, assessments and other governmental charges whatsoever, foreseen or unforeseen, which if not paid when due will impair or encumber the City's title to the Project (all of the foregoing herein being referred to as "**IMPOSITIONS**")... City covenants that without Lario's written consent it will not, for the Term, unless required by law, take any action which may reasonably be construed as tending to cause or induce the levying or assessment of any Imposition (other than special assessments levied on account of special benefits or general ad valorem tax levy) which Lario would be required to pay under this Article and that should any such levy or assessment be threatened or occur, City shall, at Lario's request, fully cooperate with Lario in all reasonable ways to prevent such levy or assessment. (1988 DMA, pp. 24-25).

114. Paragraph 10 of the 2005 Amendment to the DMA amended Article III, Section 3.9(b) of the 1988 DMA, as quoted above, by deleting the first sentence and

substituting the following: “The City shall provide, or exercise its best efforts to provide, sewer service to the Project with the capability and capacity to serve the immediate needs and projected future needs of the Project, subject to the City of Topeka sewer extension policies.” (2005 Amendment to DMA, p. 6).

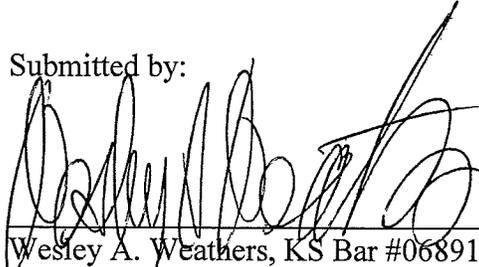
115. Other than as set forth in paragraph 112, above, the 2005 Amendment to the DMA made no changes to Sections 3.9 or 4.1 of the 1988 DMA.

116. The City was first authorized to impose stormwater utility service charges by Ordinance No. 16472, adopted July 10, 1992.

117. Ordinance No. 16742 was repealed by Ordinance No. 17059, adopted December 17, 1996, now codified, as subsequently amended, as Topeka City Code, Chapter 13.25.

WHEREFORE, Plaintiffs respectfully request that this court enter orders declaring that that the City’s charges for stormwater utility services not actually offered or provided were unauthorized under *Regency Park, LP v. City of Topeka*, 267 Kan. 465, 472, 981 P.2d 256 (1999), and cases following it, and further violated sections 3.9 and 4.1 of the 1988 Development and Management Agreement, as subsequently amended, and awarding Jayhawk a refund of said stormwater utility charges in the amount of \$181,520.18 and any other and further relief the Court deems just and equitable.

Submitted by:



Wesley A. Weathers, KS Bar #06891

Patricia E. Riley, KS Bar #09506

Cynthia J. Sheppard, KS Bar #12039

GOODELL, STRATTON, EDMONDS &
PALMER, LLP

515 S. Kansas Ave.

Topeka, KS 66603-3999

(785) 233-0593 - Telephone

(785) 233-8870 - Telefax

WWEATHERS@GSEPLAW.COM

PRILEY@GSEPLAW.COM

CSHEPPEARD@GSEPLAW.COM

ATTORNEYS FOR PLAINTIFFS