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Reply of the Appellant

In her opening brief, Appellant Judith Sites explained how City of Sullivan Ordinance No. 2581's carving out a specific geographical subclass from its general class of all new sewer connectors in Sullivan, which it charges 750% more to receive the same permission, materials, and service as the general class, violates Mo. Const. art. III, § 40(30) (the "Special Laws Clause"). The subclass is facially special, and the City lacks a substantial justification for enacting it, rather than a general law applying to all new sewer connectors in Sullivan.

In response, the City argues because Missouri law allows it to impose sewer connection fees and imposes a "mandatory duty" on it to impose those fees so as to repay any outstanding sewer revenue bonds, it has unfettered discretion to create a geographically and historically fixed sewer connection fee subclass. It argues the higher sewer connection fee, to which it seeks to hold Ms. Sites, is tied to repaying the revenue bonds it issued to construct the new sewer. It states its need to repay the revenue bonds is a "reasonable basis" for its subclass, curing any specialness. It says because only new connectors in the subclass's area are subject to the $3,750 higher fee, the subclass includes all similarly-situated persons and cannot be special. Finally, it argues the subclass is analogous to individualized assessments for public improvements.

The City's arguments are without merit. No evidence in the record establishes $3,750 fee subclass is tied to the existence of the City's sewer revenue bonds or is connected in any greater way to repaying the bonds than any other sewer charges in Sullivan. The subclass will not sunset when the revenue bond is repaid. While Chapter

250, R.S.Mo., does require the City to repay its sewer revenue bonds through fees and charges, even if the connection fee were tied to the existence of the bonds, the City can do so in a general law without creating a special, fixed subclass.

Individualized tax assessments are general laws bearing no resemblance to the City's ordinance. The ordinance does not individualize all the City's sewer connection fees based on the costs of construction, but rather sets a blanket, permanent, 750% higher fee for new sewer connectors in a particular geographical area to receive the same materials and permission as all others. Whatever the City's rationale for imposing the higher connection permit fee, a general law could have sufficed to meet the ordinance's purpose.

The City also responds that *res judicata* by "virtual representation" bars Ms. Sites from litigating her Special Laws Clause claim, due to the case of *Larson v. City of Sullivan*, 92 S.W.3d 128 (Mo. App. 2002). The City admits Ms. Sites was not a party in *Larson*, and *Larson* concerned no claim involving the Special Laws Clause.

The City's attempt now to inject *res judicata* into this case is improper. *Res judicata*, an affirmative defense, must be pleaded specifically before the trial court and cannot be raised for the first time on appeal. The City did not raise *res judicata* at any time below. Its pleadings referred only to collateral estoppel, an entirely different theory. Moreover, the trial court denied the City's affirmative defenses and reached the merits of Ms. Sites's Constitutional claim. Because the City did not cross-appeal that denial, it cannot now reassert any of its denied affirmative defenses.

Even if the City could raise *res judicata* by "virtual representation," its argument fails under modern Due Process principles. Today, with established, codified procedures for class actions, a litigant cannot be bound by a non-class-action judgment to which she was not a party – either for claims raised in the earlier case or not. In three recent unanimous decisions, the Supreme Court of the United States held binding a litigant to a previous non-class-action judgment to which she was not a party violates Due Process. The Court finally abolished federal virtual representation for good in *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008), because it violates Due Process. If Missouri's doctrine of virtual representation somehow still is what the City purports, this Court, too, should abolish it.

I. The ordinance's $3,750 fee subclass violates the Special Laws Clause.

Missouri's two-part Special Laws Clause analysis is this: (1) does the challenged law single out a fixed (i.e. close-ended) subclass, and (2), if so, is there a substantial justification for enacting a special law, rather than a general law (Br. of Appellant 15).

In her opening brief, Ms. Sites established the ordinance's subclass of new sewer connectors in post-1996 sewered areas, charged 750% more for the same permission and materials than those in the rest of Sullivan, is close-ended and thus facially special because it is based on immutable characteristics of historical and geographic facts. She further showed the City can have no substantial justification – which is more than merely a reasonable basis – for using a special subclass rather than one general class.

The City's counterarguments do not tenably refute any of this. The 750% higher fee subclass in Ordinance No. 2581 to which the City seeks to hold Ms. Sites is an unconstiutional special law where a general law could have been made applicable.

A. There is no evidence that the $3,750 sewer connection fee is tied to repaying the City's 1996 revenue bond.

The City spends the first part of its argument detailing the revenue bonds it issued to construct the 1996 addition to its sewer system, which it chose to repay from "the Net revenues of the sewer system," including "a monthly user fee paid by all users based on water usage and a connection fee to be paid by the properties connecting to the system for the first time," as the law allows (Br. of Respondent 9-12). It has "pledged all revenue from the sewer system … to pay the principal and interest on the revenue bonds" (Br. of Respondent 12) (emphasis in the original).

Ms. Sites takes no issue with these general statements. She explained as much in her opening brief (Br. of Appellant 26-27). But then, without any citation to the record, the City states the purpose of "the connection fees at issue" in this case – i.e. the 750% higher fee subclass – is specifically to repay "the principal and interest of the revenue bonds issued for construction of the new sewer system," as if other sewer revenues do not (Br. of Respondent 11). But it already had stated *all* sewer fees and charges in Sullivan go to this same end.

Ordinance No. 2581 is a single ordinance with a single purpose: to set the manner of obtaining permission to connect to the City's sewer system. All the evidence was that this permission and its corresponding materials are the same for all new sewer connectors in Sullivan, regardless of where in the town they live.

The City ignores this entirely. Instead, it pretends as if the ordinance's special, post-1996 subclass is some separate, independent ordinance with some specifically-stated purpose to repay revenue bonds, as if none of its other sewer revenues do so.

But Ordinance No. 2581 mandates one "written permit" authorizing a person to connect his property to the sewer system, regardless of location (Appendix to Br. of Appellant A32-33, § 1). New connectors in both the post-1996 subclass and the rest of town face the same application (§ 3), indemnification of the City (§ 4), rules for connecting (§§ 5-10), required inspection (§ 11), required warnings during construction (§ 12), and construction licensing requirements (§ 13). The permission to connect, sewer taps, and connection materials themselves are the same (Tr. 38-40). Only one single thing differs between the general class of all new connectors in Sullivan and the post-1996 subclass: the fee charged for the permit (§ 2).

On cross-examination, the City's Code Administrator, Dan King, was asked, "If Ms. Sites were to pay the City $3,750.00 for the tap would she get anything more or anything different than a resident would receive in the area, the other areas in Sullivan that are not part of this particular project, the $500.00 tap areas?" (Tr. 40). He responded:

A. No, sir, she gets the connection fee.

Q. Same connection as in the other areas?

A. That's correct.

(Tr. 40). The only evidence was that new connectors in the subclass receive the same permission, service, tap, and materials as those in the general class.

There was no evidence that the $3,750 fee is specially "used for the repayment of the principal and interest of the revenue bonds issued for the construction of the new sewer system" (Br. of Respondent 11). When the City's counsel asked Mr. King, "do you have any idea … how" the $3,750 or $4,250 "amounts were arrived at?" he responded, "I was not employed by the city whenever that was determined." (Tr. 28). The City offered no evidence that the purpose of the 750% higher fee for new connectors in the post-1996 area subclass was to pay off the revenue bond, whereas the $500 fee all other new connectors in Sullivan pay was not. The only evidence was that both fees are for the same sewer connection permit, tap, and materials (Tr. 38-40).

The subclass's higher fee is not tied to the existence of the revenue bonds. The ordinance includes no sunset language. Even once the bond is entirely repaid, a new connector in the post-1996 subclass *still* will pay a connection fee of $3,750. In creating the permanent, fixed subclass, the ordinance is facially special (Br. of Appellant 21-23). There is no evidence that a general law could not meet the ordinance's purpose of setting the conditions of obtaining a sewer connection permit and tap materials.

The City's "mandatory duty" under § 250.120, R.S.Mo., "to impose adequate fees and charges in order to pay the cost of maintenance and operation of the system and pay the principal of and the interest on all revenue bonds," does not authorize it to enact a special law where a general law could be made applicable. Even if the ordinance's $3,750 fee subclass were tied to the existence of the bonds, that statute is irrelevant to whether the ordinance violates the Constitution's Special Laws Clause.

This is for two reasons. First, the City "could have enacted a generally applicable law that" operated to meet § 250.120. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 187 (Mo. banc 2006). The ordinance does not provide the $3,750 subclass is only to repay the revenue bonds, and will rejoin the general class once the revenue bonds are repaid. If it had, there would be one general sewer connection fee class, with an extra, temporary fee tacked on for the express purpose of repaying the bonds. Alternatively, the Ordinance could have been written so *all* sewer fees in Sullivan would be one higher charge, lowering when the bonds are paid.

Second, the City would read § 250.120 (and *Amicus Curiae* Missouri Municipal League would read Mo. Const. art. VI, § 27 (Br. of *Amicus* 9-15)) as an express authorization for it to enact a special law where a general law could be made applicable. Section 250.120 certainly does not provide this, as a statute cannot override the Constitution. Art. VI, § 27, which merely authorizes issuing revenue bonds after a vote, which need to be repaid, does not authorize repayment through a prohibited special law.

In mandating cities to repay sewer revenue bonds through appropriate fees, these provisions do not contemplate creating special, permanent sub-classifications where a general classification could suffice. They plainly envision general laws. The City could have met these provisions by raising all sewer fees in Sullivan so as to repay the bond, especially as residents of both its subclass and general class receive the same service using the same materials, or by levying individualized tax assessments throughout the City (see pp. 11-13, below). A general law could meet the requirements of § 250.120 and Mo. Const. art. VI, § 27.

B. The $3,750 subclass does not include all who are similarly situated.

Both the City and *Amicus* insist the $3,750 subclass "includes all who are similarly situated," because it includes all whose properties first had the possibility of sewer service after 1996, and thus cannot be special (Br. of Respondent 16-18; Br. of *Amicus* 19-20). The City states the subclass includes only persons "who have chosen to use [their] property in such a manner as to require a sanitary sewer system," and does not apply to vacant lots (Br. of Respondent 16). It says the subclass's "qualifying features" are "(i) whether the property is improved; (ii) whether the property abuts any … public sanitary or combined sewer of the City; and (iii) the public sewer is within one hundred (100) feet (30.5 meters) of the property line" (Br. of Respondent 18).

But these are the *same* qualifications necessitating new sewer connections by the *general class*, too. No owners of vacant lots anywhere in Sullivan are required to connect to the City's sewer system, either (Tr. 31). No properties in Sullivan need to connect to the sewer and pay a connection permit fee unless the property is improved and is within 100 feet of a sewer line (L.F. 14). These characteristics apply to all new connectors in Sullivan, regardless of location. Only those in the subclass pay 750% more.

The Ordinance applies generally to all new sewer connectors in Sullivan, and then carves out a special subclass of those in the pre-1996 unsewered area of the City and charges them 750% more for the same permission, tap, and materials. The question the Special Laws Clause poses is not whether members of a special subclass are similarly situated to *each other*, but whether they are similarly situated to the *general* class, given

the purpose of the law at issue. If a law places fixed members of a general class in an excluded, differently-treated, fixed subclass, it is special. *Sprint Spectrum*, 203 S.W.3d at 184. Otherwise, the Special Laws Clause would be a nullity.

For example, in *Harris v. Mo. Gaming Comm'n*, 869 S.W.2d 58, 60 (Mo. banc 1994), the question was not whether the members of the excluded subclass of riverboats were similarly situated to each other, but whether they were similarly situated to the general class of riverboat casinos throughout Missouri. In *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997), the question was not whether the members of the subclass of certain cities in counties bordering Arkansas were similarly situated to each other, but whether they were similarly situated to the general class of those cities throughout the state.

In *Sch. Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 220-21 (Mo. banc 1991), the question was not whether the members of the excluded subclass of St. Louis City and County were similarly situated to each other, but rather whether they were similarly situated to all other political subdivisions of Missouri with the power to levy *ad valorem* taxes. While the statute at issue applied to a general class of all political subdivisions in the state, it carved out an exempted subclass to which its general tax-setting procedures "could apply equally well" but were not so applied.

Neither the City nor *Amicus* address *Riverview Gardens*. By far, it is the most similar Special Laws Clause case to this. The ordinance carves out of its general class of all property owners in Sullivan who need to connect to the City's sewer a subclass of persons similarly situated to the general class as new connectors but who merely own

property within a specific geographic area, and sets a different procedure for them to obtain the same connection permit as the general class: a 750% higher fee. But a general law could have been enacted, because "the procedures for [connecting to the City's sewer] imposed generally under the [ordinance] could apply equally well to the [new connectors] located in" the excluded subclass. 816 S.W.2d at 222.

C. The $3,750 subclass is fixed, immutable, and close-ended.

The City argues the $3,750 subclass is "not fixed and closed," because "future users, who are currently not known or members of the [sub]class," "are not foreclosed from inclusion within" it (Br. of Respondent 18). Thus, it argues, the subclass is not "fixed or unchanging" (Br. of Respondent 19).

But the question the Special Laws Clause poses is not whether there might be new members of the subclass *at all*, but rather whether any members of the general class someday could join the differently-treated subclass – whether they "may fall into the classification." *Jefferson County Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. banc 2006).

The $3,750 subclass is not open-ended in this manner. It would be open-ended if new sewer connectors in the $500 general class ever could have to pay the $3,750 fee. Close-ended classifications "focus on immutable characteristics." *Harris*, 869 S.W.2d at 65. The subclass is based on geographical and historical characteristics, a fixed, immutable subset of all areas in Sullivan with properties that might need to connect to the City's sewer. It is "closed to everyone but those who had [municipal sewer service prior to 1996], making it a special law" (Br. of *Amicus* 20).

D. The $3,750 subclass bears no resemblance to individualized tax assessments to pay for public improvements, which are general laws.

The City argues the ordinance's $3,750 subclass is similar to "special tax bills" under § 88.812, R.S.Mo., and Neighborhood Improvement Districts under §§ 67.453 through 67.459, R.S.Mo. (Br. of Respondent 20). It intimates if the ordinance's subclass is an invalid special law, so must be these provisions.

Sections 88.812 and 67.453, however, are general laws with no fixed subclasses. The ordinance bears no resemblance to them – especially considering there is no evidence, as discussed above, that the subclass is tied to repaying the City's 1996 revenue bond. The ordinance does not create a special tax district in which the costs of constructing the sewer or repaying the bond are levied as individualized tax assessments against the subject properties. Rather, it provides that all property owners in Sullivan who need to connect to the sewer, regardless of location, must obtain a permit and tap materials to do so. Those located in the special subclass, however, pay 750% more forever.

Unlike the ordinance, the uniform assessments authorized by §§ 88.812 and 67.453 are general laws with no classes. As the City attests, they authorize taxes on all subject properties, regardless of location, in specific proportion to the benefit each property individually received. Under § 88.812, each specific property's assessment is based on the individual "portion of the total cost to be assessed against each property to be benefited by the project." The tax bill "must conform strictly" to the statute, *City of Kirkwood v. Martin*, 282 S.W. 542, 545 (Mo. App. 1926), and is invalid if it is *not*

individualized to each specific property based on the portion of the improvement received. *City of Westport v. Mastin*, 62 Mo. App. 647, 652 (1895). Moreover, levies under § 88.812 are property taxes, not fees for a permission that non-benefitted properties *also* receive. *Crittendon v. Reed*, 932 S.W.2d 403, 406 (Mo. banc 1996).

Similarly, under § 67.459, "The portion of the cost of any improvement to be assessed against the real property … shall be apportioned against such property in accordance with the benefits accruing thereto," individually, "per front foot or per square foot." This individualized apportionment applies to all properties within the neighborhood improvement district. *Id.* Like § 88.812, the neighborhood improvement district statutes create a general class of all properties receiving a benefit, among whom the costs are individualized.[1]

The ordinance does not do this. It does not make all new sewer connection fees in Sullivan individually proportional to some factor among a general class. Instead, it creates a permanent, fixed subclass that pays a blanket 750% more in perpetuity to receive the same permission to connect to the sewer, tap, and materials as its general class. That the ordinance violates the Special Laws Clause has no ill effect on the "time honored method" (Br. of Respondent 21) of funding public improvements through individualized tax assessments, which are general laws.

[1] Any city can create neighborhood improvement districts. § 67.457. The City could have created one to levy on the properties in the previously unsewered area the costs of repaying the 1996 bond.

E. *Larson* is irrelevant: a "reasonable basis" for a fixed subclass is insufficient to prove a substantial justification for enacting a special law.

The City argues that *Larson v. City of Sullivan*, 92 S.W.3d 128 (Mo. App. 2002), a previous challenge to Ordinance No. 2581, vitiates Ms. Sites's argument in this case (Br. of Respondent 13-15). Ms. Sites was not a party to *Larson*, and *Larson* did not involve any Special Laws Clause claim. Rather, *Larson* decided: (1) the Ordinance was not subject to the Hancock Amendment, Mo. Const. art. X, § 22, 92 S.W.3d at 131-33; (2) the City had "the legal authority to increase [its sewer] connection fees without voter approval," *id.* at 133-34; and (3) the "increase in the fees was [not] an unreasonable, arbitrary, or capricious exercise of police power." *Id.* at 134-35.

The City draws the Court's attention to select language from *Larson* to show it had "*a reasonable basis* to establish a separate classification for those users accessing the new [sewer system]" (Br. of Respondent 14-15) (emphasis added). But Ms. Sites does not challenge the $3,570 fee as lacking a "rational basis," as in an Equal Protection challenge (Br. of Appellant 13-15). She challenges the ordinance's disparate classification system as an unconstitutional special law where a general law could have been made applicable. *Larson* does not address any element of her claim.

Under the Special Laws Clause, "the mere existence of *a rational or reasonable basis for the classification is insufficient*" to uphold a facially special classification. *Sprint Spectrum*, 203 S.W.3d at 184 (emphasis added). Instead, the defending party must show "a substantial justification" for using a special law instead of a general law: that

"the permission granted is so unique to the persons, places, or things classified that a generally applicable law could not achieve the same result." *Id.*

Under the heading "Substantial Justification For the Fee," the City offers only "that a reasonable basis exists for the classification of sewer system users challenged in this case" (Br. of Respondent 27). This "reasonable basis" argument permeates the briefs of both the City (Br. of Respondent 14-15, 19-22, 27) and *Amicus* (Br. of *Amicus* 10, 16-17, 19-20). To support their notion that a "reasonable basis" is enough to justify a special law or deem a classification "general," the only Special Laws Clause cases they cite are *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 831 (Mo. banc 1991); *City of Lebanon v. Schneider*, 163 S.W.2d 588, 590-91 (Mo. banc 1942); *City of Springfield v. Smith*, 19 S.W.2d 1, 3-4 (Mo. banc 1929);[2] and *Mound City Land & Stock Co. v. Miller*, 70 S.W. 721, 726 (Mo. 1902).

All these cases predate this Court's 2006 restatement in *Sprint Spectrum* that a reasonable basis is "insufficient," and all but one predate even the "rule of open-endedness" to determine facial specialness this Court first announced in *Walters v. City of St. Louis*, 259 S.W.2d 377, 382 (Mo. banc 1953). While a "reasonable basis" may once

[2] *Amicus* twice states the 1929 *Smith* case was "cited by Appellant" (Br. of *Amicus* 19-20). Ms. Sites pointed to *Smith* only in her overview of the Special Laws Clause's history, which *Smith* discussed in detail (Br. of Appellant 12). She relied no further on *Smith*. Even a cursory reading of *Smith* shows it is utterly out of step with this Court's modern Special Laws Clause analysis as explained in *Sprint Spectrum*.

have been sufficient to vitiate specialness or provide an excuse for a special law, today the two-step "close-endedness" and "substantial justification" analysis outlined in *Sprint Spectrum* and subsequent cases is the law of Missouri. The City's reliance on *Larson*'s mention of "reasonableness" is irrelevant. The City devotes only one page to its alleged "substantial justification," on which it does not mention the relevant standard (Br. of Appellant 27). *Amicus* does not even pretend to engage in the current, two-step Special Laws Clause analysis (Br. of *Amicus* 16-21).

The City has not met its burden to show any substantial justification for using a special law, rather than a general law, to set its fees for obtaining a sewer connection permit, tap, and materials. It argues that the payers of the 750% higher fee "derive a special benefit or service from the new sewer system" (Br. of Respondent 19, 27, 39). But the evidence was that general residents of Sullivan paying the $500 connection fee receive the *same tap and service* as the residents of the special subclass paying the $3,750 fee (Transcript 40). That cannot be a substantial justification.

Moreover, most importantly, the Special Laws Clause, unlike Equal Protection or any of the claims in *Larson*, takes into account "whether, *considering the purposes of the Act*, a general law could have been made applicable." *Borden Co. v. Thomason*, 353 S.W.2d 735, 765 (Mo. banc 1962) (emphasis in the original). (Br. of Appellant 14-15). The purpose of Ordinance No. 2581 does not relate to anything more than obtaining a sewer connection permit and the associated tap and connection materials, all of which are the same for all residents of Sullivan, regardless of where they live. Newly-connecting

residents of the post-1996 subclass do not receive anything different *under the ordinance* than the general class of new connectors everywhere else in Sullivan (Tr. 38-40).

Larson did not consider this level of analysis, which is what differentiates the Special Laws Clause from the Equal Protection Clause. The City may be able to articulate a "reasonable basis" for desiring to charge connectors in the post-1996 subclass 750% more. But it and *Amicus* do not – and cannot – show why the permission the ordinance grants the subclass is so unique to it that a generally applicable law could not achieve the same result of setting the otherwise uniform conditions of permission to connect to the sewer. The City's "reasonable basis," relying on *Larson* and outdated special law decisions, is irrelevant.

II. The City's invocation of *res judicata* and collateral estoppel has no merit.

The City also argues that *res judicata* and collateral estoppel bar Ms. Sites from arguing the ordinance violates the Special Laws Clause in the first place, due to *Larson* (Br. of Respondent 28-38). First, it says Ms. Sites's claim is *res judicata* because she is a resident of Sullivan and thus the doctrine of "virtual representation" puts her in privity with the plaintiffs in *Larson*, who could have (but did not) raise whether the ordinance violates the Special Laws Clause (Br. of Respondent 28-36). Then, it argues Ms. Sites's claim is collaterally estopped because *Larson* held the City had "a reasonable basis to establish" the $3,750 subclass (Br. of Respondent 36-38).

But these affirmative defenses are not properly before this Court. The trial court specifically denied all the City's affirmative defenses – which did not include *res judicata* – and reached the merits of Ms. Sites's Constitutional claim. Absent a cross-

appeal, the City cannot reargue them now. Also, the City did not plead *res judicata* at any time before the trial court, and thus waived that defense. Even if it had, its archaic invocation of "virtual representation" is outdated and ignores current Due Process precedents. And because "reasonableness" is irrelevant to a Special Laws Clause claim, *Larson*'s discussion of "reasonableness" cannot collaterally estop Ms. Sites's claim.

A. The City cannot re-raise its denied defenses without cross-appealing.

Generally, "in the absence of a cross-appeal, the reviewing court is concerned only with the complaint of the party appealing[;] … the opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him." *Goldberg v. State Tax Comm'n*, 618 S.W.2d 635, 642 n.6 (Mo. banc 1981).

Ms. Sites raised her Special Laws Clause issue in her Second Amended Answer (L.F. 20). The City then moved to dismiss that answer, arguing the issues she raised in it "have been adjudicated once before, although with a different party in [*Larson*], and that the Defendant is collaterally estopped from bringing forth these issues in this manner as they have already been judicially settled." (L.F. 26). The trial court denied the City's motion and allowed the case to proceed (L.F. 4). In its final judgment, the court mentioned none of the City's affirmative defenses, and instead reached the merits of Ms. Sites's Special Laws Clause claim (L.F. 46).

When a respondent raises an affirmative defense but the trial court denies it, the respondent must preserve it in order to re-raise it in response to the appeal. *Gamble v. Browning*, 277 S.W.3d 723, 727 (Mo. App. 2008). In *Gamble*, a defendant raised *res judicata* in a motion for summary judgment that the trial court subsequently denied. *Id.*

at 726-27. The defendant did not cross-appeal, but argued in response to the plaintiff's appeal that "the judgment should be affirmed on the basis of *res judicata* …" *Id.* The presented no record that the *res judicata* argument "was raised and preserved in a motion for a directed verdict." *Id.* at 727. As such, the reviewing court did "not properly have that issue" before it and "proceed[ed] to the merits of the direct appeal." *Id.*

This is in line with appellate decisions from other states holding more explicitly that when the trial court rejects a party's affirmative defense to a claim, the party must cross-appeal in order to re-raise its denied defense. *Kelly v. Brown*, 260 S.W.3d 212, 216-17 (Tex. App. 2008); *United Air Lines v. W. Air Lines*, 282 P.2d 118, 122 (Cal. App. 1955). In Missouri, prevailing parties routinely cross-appeal so as to argue their affirmative defenses the trial court denied. *See, e.g.*, *Waddington v. Cox*, 247 S.W.3d 567, 568 (Mo. App. 2008); *Henty Const. Co. v. Hall*, 783 S.W.2d 412, 413 (Mo. App. 1989).

The City seeks to sidestep this necessary procedure. In effect, it argues the trial court was wrong in rejecting its affirmative defenses and proceeding instead to reach Ms. Sites's Constitutional claim, and this Court should accept those defenses instead. Because the City did not cross-appeal, however, it cannot now invoke affirmative defenses the trial court denied were applicable.

B. Because the City did not plead *res judicata* below, it waived that defense.

Most of the City's second point argues *res judicata* by "virtual representation" forever bars Ms. Sites – and anyone else in Sullivan – from ever again raising any argument against the ordinance's validity, due to *Larson*. Even if the City can reargue its

denied affirmative defenses now, it never specifically pleaded the distinct affirmative defense of *res judicata* at any time in the trial court. As a result, it waived this defense.

The City claims it "effectively plead [*sic*] the affirmative defense of res judicata," using this language: "'Plaintiff City of Sullivan states to the Court its affirmative defense to the Counterclaim set forth by the Defendant in this cause as the issues set forth therein have been adjudicated once before in [*Larson*] …'" (Br. of Respondent 33) (citing L.F. 24). Conveniently, though, the City omits what came after its inserted ellipsis: "and that the Defendant *is collaterally estopped* from bringing forth these issues in this manner as they have already been judicially settled." (L.F. 24) (emphasis added). The City pleaded collateral estoppel, not *res judicata*. In fact, the City never mentioned *res judicata* below.

While the City might wish that collateral estoppel and *res judicata* are the same theory, they are not. "The distinction between collateral estoppel and res judicata is that the former applies only to issues previously litigated; however, res judicata applies to every point related to the subject matter, including those which might have been brought forward at the time." *Gardner v. City of Cape Girardeau*, 880 S.W.2d 652, 656 (Mo. App. 1994). The City argued "issue preclusion" before the trial court. Now, on appeal, it seeks instead to expand this to mean "claim preclusion" (Br. of Respondent 33).

Citing no authority, the City insists that, while it "did not mention 'res judicata' by specific name, there is no requirement that it had to do so" (Br. of Respondent 33-34). This contention is without merit. *Res judicata* must be specifically pleaded and cannot be raised for the first time on appeal. *Lamont v. Lamont*, 922 S.W.2d 81, 85 n.1 (Mo. App. 1996). "In pleading to a preceding pleading, a party shall set forth all applicable

affirmative defenses and avoidances, including but not limited to … res judicata …" Rule 55.08. Failure to plead an affirmative defense results in waiver of that defense. *Detling v. Edelbrock*, 671 S.W.2d 265, 271 (Mo. banc 1984).

In *Heins Implement Co. v. Mo. Highway & Transp. Comm'n*, this Court held pleading estoppel is not the same as pleading *res judicata*, which must be pleaded specifically – by name – or else is waived. 859 S.W.2d 681, 684-85 (Mo. banc 1993). In that case, the respondent argued that "listing laches, estoppel, and waiver as defenses in its answer had the same effect as pleading res judicata." *Id.* The Court disagreed: "[the respondent] is wrong. Res judicata is a separate and distinct affirmative defense *that must be specifically pleaded*." *Id.* at 684-85 (emphasis added).

In this case, the City never raised *res judicata* below. Thus, it forever waived this defense.

C. The City misunderstands "virtual representation"; the form of it the City invokes is outdated, unfair, and violates Due Process.

Even if the City somehow can raise *res judicata* now, on appeal, the way in which it seeks to do so is contrary to Due Process. The City argues *res judicata* by "virtual representation" should mean that if some resident of a city unsuccessfully challenges the validity of one of the city's ordinances on some theory, all other residents are forever barred from challenging that ordinance ever again, on any other theory.

This is not the meaning or working of "virtual representation." The City cites no case in which *res judicata* by "virtual representation" barred a litigant's claim that a law was unconstitutional. To apply it as the City desires would strip defendants of their basic

right to proffer defenses to a political subdivision's attempt to enforce something contrary to the highest law of the land.

Ms. Sites is the defendant in this case. The City sought to enforce its ordinance against her. In her defense, she responded that the ordinance violates the Special Laws Clause. The City, however, asks this Court to bar Ms. Sites's Constitutional claim because plaintiffs in a previous suit challenged the ordinance on entirely different theories.

"Virtual representation" has never been applied this way in Missouri. Every case the City cites to illustrate this doctrine was one in which it was applied to bar a *plaintiff's* non-Constitutional challenge to a public body's administrative action that earlier had been challenged on the same or similar theories, not a defendant's defense against an allegedly unconstitutional law's enforcement that had never been litigated before. *See Knowlton v. Ripley County Mem. Hosp.*, 743 S.W.2d 132, 134-35 (Mo. App. 1988); *Powell v. City of Joplin*, 73 S.W.2d 408, 410 (Mo. 1934); *Drainage Dist. No. 1 v. Matthews*, 234 S.W.2d 567 (Mo. 1950); *Hixson v. City of Kan. City*, 239 S.W.2d 341, 343-44 (Mo. banc 1951); *Seibert v. City of Columbia*, 461 S.W.2d 808, 811 (Mo. banc 1971). Even the case the City argues is the most "similar," *Sierk v. Reynolds*, 484 S.W.2d 675, 679 and 681 (Mo. App. 1972) (Br. of Respondent 32), was merely a partially repetitive, non-Constitutional challenge to a tax bill by one of the same parties to the original suit. And still, the court in *Sierk* reached the party's claims that were not raised in the earlier suit. *Id.* at 682-83.

The way the City proposes to use "virtual representation" is frightening. If its argument "were taken to its logical conclusion, the fact that the plaintiff in [*Plessy v. Ferguson*, 163 U.S. 537 (1896)], lost would have been enough to preclude the plaintiffs half a century later in [*Brown v. Bd. of Ed.*, 347 U.S. 483 (1954)]." *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 974 (7th Cir. 1998). Under the City's argument, a grossly unconstitutional law, challenged once unsuccessfully by a plaintiff, never could be challenged again, even in defense, by any resident of the same jurisdiction.

Criminal defendants often challenge the Constitutionality of the law they are charged with having violated, sometimes successfully. *See, e.g., State v. Beine*, 162 S.W.3d 483, 486-88 (Mo. banc 2005). Under the City's reading of "virtual representation," however, woe to those defendants if a civil plaintiff previously challenged the law unsuccessfully. If both the earlier plaintiff and the criminal defendant are Missourians, the plaintiff would have "virtually represented" the defendant, and the defendant's challenge would be barred by *res judicata*.

All the cases the City cites in support of this contention are more than 20 years old. In the more recent cases of *Richards v. Jefferson County*, 517 U.S. 793 (1996), and *S. Cent. Bell Telephone Co. v. Ala.*, 526 U.S. 160 (1999), however, the Supreme Court of the United States specifically held that the City's reading of nonparty claim preclusion violates federal Due Process. And in the very recent case of *Taylor v. Sturgell*, 128 S.Ct. 2161, 2167 (2008), the Supreme Court expressly "disapprove[d] the doctrine of preclusion by 'virtual representation'" and unanimously abolished it from federal law.

Richards involved two different Alabama state court cases challenging the validity of a county's tax under various provisions of the Alabama Constitution. In the first, brought by a city and later consolidated for trial with three county residents' separate suit, the Supreme Court of Alabama upheld the tax. *Id.* at 795. Thereafter, a class of all nonfederal employees subject to the county's tax brought a second case, challenging the tax under Due Process and Equal Protection, which were not raised in the first suit. *Id.* The Supreme Court of Alabama held the second suit was precluded by its decision in the first, because there was a "substantial identity of parties." *Id.* at 795-96.

The U.S. Supreme Court disagreed. The Alabama court's holding violated the Due Process rights of the second group of plaintiffs:

> [I]n Anglo-American jurisprudence ... one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. This rule is part of our deep-rooted historic tradition that everyone should have his own day in court. As a consequence, a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.

Id. at 798 (citations omitted).

The *Richards* plaintiffs could not be barred by the earlier suit brought by others under different theories. The Court squarely rejected the notion that *res judicata* could apply because the later plaintiffs were adequately represented in the earlier suit. *Id.* at

798-802. The earlier suit was not on behalf of a class that included the later plaintiffs, and that the city participated in the earlier case was irrelevant. *Id.* at 802-05.

Similarly, Ms. Sites cannot be bound by *Larson* – especially as *Larson* was not a class action and did not involve any claim under the Special Laws Clause. The mere fact that it involved Sullivan and Ordinance No. 2581 cannot be enough for it to preclude Ms. Sites and her different claim.

In *Bell Telephone*, the Supreme Court held even where a nonparty to a previous suit knows of that suit and engages an attorney from it, applying *res judicata* to her in her subsequent, separate suit violates Due Process. 526 U.S. at 167-68. As in *Larson*, in *Bell Telephone* the plaintiffs in the previous suit were not acting as class representatives, and there had been no special procedures to safeguard the interests of absentees, as a class action would have. *Id.* at 168.

Finally, in *Taylor*, the Court held that because "a litigant is not bound by a judgment to which she was not a party," 128 S.Ct. at 2165, as a matter of Due Process virtual representation no longer can preclude a nonparty to a previous suit from litigating even *the same claim* in a subsequent suit. *Id.* at 2178. Rather, any "preclusive effect" of prior litigation should "be determined according to the established grounds for nonparty preclusion." *Id.*

Those six grounds are: (1) agreement to be bound by the previous adjudication; (2) a preexisting legal relationship between the original and new parties, *e.g.*, preceding/succeeding property owners, bailee/bailor, assignee/assignor; (3) the previous case was a class action in which the nonparty was part of the class, or was brought by a

fiduciary of the nonparty; (4) the nonparty controlled the prior litigation; (5) the nonparty is a proxy for the previous party; or (6) a special statutory regimen is consistent with Due Process and expressly forecloses successive litigation by non-litigants. *Id.* at 2172-73. None of these grounds are present here. The City's attempt to use "virtual representation" to transcend them is obsolete and inappropriate. *Id.* at 2178.

If the City's misstatement of Missouri's doctrine of "virtual representation" has any lingering validity, the Court should follow the U.S. Supreme Court and abolish preclusion by virtual representation in Missouri. That others challenged the City's ordinance on other theories in *Larson* should have no preclusive effect on Ms. Sites. She was not a party to *Larson*, and her claim was not at issue there. Her right to Due Process trumps the City's antiquated invocation of virtual representation.

D. Collateral estoppel does not apply.

Finally, the City argues Ms. Sites is collaterally estopped from arguing the unreasonableness of the $3,750 fee, because *Larson* held the City has "a reasonable basis" for the fee (Br. of Respondent 21, 36-38). If the City can re-raise this denied defense, it, too, is without merit.

Ms. Sites does not challenge the "reasonableness" of the City's fee amount. Rather, she challenges whether the fee's subclass is a special law where a general law could be made applicable. As Ms. Sites explained above (pp. 13-14), for a fixed classification to pass muster under the Special Laws Clause, "the mere existence of a rational or reasonable basis for the classification is insufficient." *Sprint Spectrum*, 203 S.W.3d at 184. Instead, there must be "a substantial justification" for using a special law,

rather than a general law: "the permission granted" must be "so unique to the persons, places, or things classified that a generally applicable law could not achieve the same result." *Id.*

Larson made no finding as to whether the ordinance's special subclass met that exacting standard, which goes far beyond "reasonableness." Whether the City had a "reasonable basis" for its fee is irrelevant. *Larson* does not collaterally estop Ms. Sites from litigating her Special Laws Clause claim.