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## **JURISDICTIONAL STATEMENT**

This case involves the determination of which entity has jurisdiction over certain annexed property to provide fire protection and emergency ambulance service. Appellant contends that it has jurisdiction pursuant to Section 321.320, RSMo<sup>1</sup>; Respondent contends that it has jurisdiction pursuant to Section 72.418.2. This appeal follows a civil judgment that the Jackson County Circuit Court entered in favor of Respondent on March 4, 2008. Appellant filed its Notice of Appeal with the circuit court on March 31, 2008.

Appellant challenges the constitutionality of Section 72.418.2 in the event that statute prevails over Section 321.320. The trial court's Judgment can be reversed because Section 72.418.2 does not apply; a conclusion that would not require a determination of Section 72.418.2's constitutionality. In that event, jurisdiction would be proper in this Court. Mo. Const. art. V, § 3; § 477.070, RSMo.

If this Court should find, however, that the case cannot be decided without reaching the constitutional issues, then it should be transferred to the Missouri Supreme Court. Mo. Const. art. V, § 11.

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<sup>1</sup> All Section references are to the Revised Statutes of Missouri (2000), unless otherwise stated.

## STATEMENT OF FACTS

### Parties

Appellant City of Lee's Summit, Missouri ("City") is a body corporate and is a constitutional charter city, organized and existing under the Missouri Constitution, the laws of the State of Missouri, and its Charter, and is located in Jackson County and in Cass County, Missouri ("Cass County"). L.F. 76. The City maintains and operates its own city fire department and its own emergency ambulance service. L.F. 79. The City is not wholly located within the boundaries of any fire protection district. L.F. 79. The City's 2000 decennial census is 70,700. L.F. 79.

Respondent South Metropolitan Fire Protection District ("South Metro") is a fire protection district formed in accordance with Chapter 321, RSMo and is a political subdivision of the State of Missouri. L.F. 76. South Metro provides fire protection and emergency ambulance services to all property within South Metro's geographic boundaries. L.F. 78.

### The Annexation

On January 6, 2005, the City annexed approximately 320 acres in Cass County (hereinafter the "Annexed Property") by Ordinance No. 5872. L.F. 80. The Annexed Property is legally described as:

The north half of Section 1, Township 46, Range 32, in Cass County, Missouri. Contains 318.72 Acres, more or less, subject to existing roads and easements of records.

L.F. 80. Prior to its voluntary annexation by the City, the Annexed Property was located in unincorporated Cass County, and within the geographic boundaries of South Metro. L.F. 80-81.

Cass County has not established a boundary commission pursuant to Section 72.400 et seq., L.F. 82. Because Cass County does not have a charter form of government where fifty or more cities, towns, and villages have been established, it cannot form a boundary commission pursuant to Section 72.401. L.F. 82-83. St. Louis County is presently the only county in Missouri with a boundary commission as it has a charter form of government where fifty or more cities, towns, and villages have been established, pursuant to Section 72.401. L.F. 83.

### **Taxation**

On June 15, 2004, South Metro issued \$6,750,000.00 of general obligation debt. L.F. 80. South Metro presently assesses a ½% sales tax on retail sales for general revenue purposes. L.F. 79.

As of August 16, 2007, South Metro assesses a total property tax levy of \$1.033 per \$100 of assessed valuation against all real property within its geographic boundaries, of which \$0.4717 per \$100 of assessed valuation is assessed for general revenue and operation of the fire district, \$0.0394 per \$100 of assessed valuation is assessed for dispatching services, \$0.3694 per \$100 of assessed valuation is assessed for the operation of emergency ambulance service, and \$0.1525 per \$100 of assessed valuation is assessed for bond retirement or debt service. L.F. 78-79.

The City presently assesses a total property tax levy of \$1.4926 per \$100 of assessed valuation against all real property within its geographic boundaries, of which \$0.8690 per \$100 of assessed valuation is assessed for general revenue purposes, \$0.1539 per \$100 of assessed valuation is assessed for public parks, and \$0.4697 per \$100 of assessed valuation is assessed for general obligation debt service. L.F. 80.

### **The Controversy**

The City and South Metro dispute whether the Annexed Property remains within the geographic boundaries of South Metro subsequent to its voluntary annexation by the City. As a result of the voluntary annexation, South Metro and the City are now engaged in a dispute for which there is no adequate remedy at law, in that South Metro believes it has the duty to provide fire and emergency ambulance service to the Annexed Property pursuant to Section 72.418.2, and the City believes that as a result of the Annexation Ordinance, effective January 6, 2005, the Annexed Property was excluded from the boundaries of South Metro pursuant to Section 321.320. L.F. 83.

**POINTS RELIED ON**

- I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CONCLUDING THAT SECTION 321.320 DOES NOT CONTROL BECAUSE THE STATUTE IS NOT LIMITED TO ANNEXATIONS THAT OCCURRED ONLY IN OR BEFORE 1969 IN THAT THE STATUTE’S USE OF THE VERB “IS INCLUDED” DOES NOT HAVE A TEMPORAL LIMITATION, THE STATUTE IS PRESUMED TO OPERATE PROSPECTIVELY, AND THE MISSOURI SUPREME COURT HAS APPLIED THE STATUTE TO POST-1969 ANNEXATIONS.**

Section 321.320, RSMo

*Battlefield Fire Protection. Dist. v. City of Springfield*, 941 S.W.2d 491 (Mo. banc 1997)

*Bopp v. Spainhower*, 519 S.W.2d 281, 284 (Mo. banc 1975)

*City of Kirkwood v. Allen*, 399 S.W.2d 30, 36 (Mo. banc 1966) (superseded by statute)

**II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CONCLUDING THAT SECTIONS 72.418.2 & 72.418.3 CONTROL BECAUSE THESE SECTIONS DO NOT APPLY IN NON-BOUNDARY COMMISSION COUNTIES IN THAT THE STATUTES, WHEN READ IN CONTEXT, ARE A PART OF THE BOUNDARY COMMISSION LAW THAT CURRENTLY APPLIES ONLY TO ST. LOUIS COUNTY, AS DEMONSTRATED BY SENATE BILL 256 (1993) AND SECTION 321.322.4.**

1993 Mo. Laws 924

Section 321.322, RSMo

*State v. Johnson*, 148 S.W.3d 338 (Mo. App. W.D. 2004)

**III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CONCLUDING THAT SECTION 72.418.2 PREVAILS OVER SECTION 321.320 BECAUSE THESE STATUTES CAN BE HARMONIZED SUCH THAT SECTION 321.320 APPLIES IN NON-BOUNDARY COMMISSION COUNTIES AND SECTION 321.320 IS MORE SPECIFIC IN THAT SECTION 72.418.2 APPLIES ONLY TO BOUNDARY COMMISSION COUNTIES AND SECTION 321.320 IS THE MORE SPECIFIC OF THE TWO AS IT CONTAINS A POPULATION LIMITATION AND DOES NOT ADDRESS AS MANY AREAS AS COMPARED TO THE MORE COMPREHENSIVE SECTION 72.418.2, AND THE RECENT AMENDMENT TO SECTION 321.322 SHOWS THAT SECTION 72.418.2 DOES NOT APPLY STATEWIDE.**

Section 321.320, RSMo

*State ex rel. Riordan v. Dierker*, 956 S.W.2d 258 (Mo. banc 1997)

*State ex rel. Fort Zumwalt School Dist. v. Dickherber*, 576 S.W.2d 532 (Mo. banc 1979)

**IV. THE TRIAL COURT ERRED IN NOT ENTERING JUDGMENT FOR APPELLANT ON THE BASIS THAT SECTION 72.418.2 VIOLATES SECTIONS 3 & 6, ARTICLE X OF THE MISSOURI CONSTITUTION BECAUSE IT IMPOSES A NON-UNIFORM TAX ON ALL REAL PROPERTY WITHIN SOUTH METRO'S BOUNDARIES AND IT EXEMPTS THE ANNEXED PROPERTY FROM TAXATION WITHOUT CONSTITUTIONAL AUTHORIZATION IN THAT PROPERTY WITHIN SOUTH METRO'S BOUNDARIES WILL BE TAXED DIFFERENTLY AND THE ANNEXED PROPERTY DOES NOT QUALIFY FOR A CONSTITUTIONALLY PERMISSIBLE TAX EXEMPTION.**

Article X, Section 3, Missouri Constitution

Article X, Section 6, Missouri Constitution

*State v. Metro. St. Louis Sewer Dist.*, 275 S.W.2d 225 (Mo. banc 1955)

*City of Hannibal v. County of Marion*, 800 S.W.2d 471 (Mo. App. E.D. 1990)

**V. THE TRIAL COURT ERRED IN NOT ENTERING JUDGMENT FOR APPELLANT ON THE BASIS THAT SECTION 72.418.2 VIOLATES SECTION 1, ARTICLE X OF THE MISSOURI CONSTITUTION BECAUSE CITY TAXES WILL NOT BE USED FOR CITY OF LEE'S SUMMIT PURPOSES IN THAT SECTION 72.418.2 GRANTS THE ANNEXED PROPERTY AN EXEMPTION FROM SOUTH METRO'S TAXES AND REQUIRES THAT THE CITY USE ITS MUNICIPAL FUNDS TO PAY SOUTH METRO THE AMOUNT SOUTH METRO WOULD HAVE RECEIVED FROM TAXING THE ANNEXED PROPERTY AT SOUTH METRO'S TAX RATES BUT FOR THE TAXATION EXEMPTION (EXCEPT FOR ANY BONDED INDEBTEDNESS PRIOR TO THE ANNEXATION), ALL WITHOUT ANY REGARD TO THE CITY'S TAX RATE.**

Article X, Section 1, Missouri Constitution

*State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101 (Mo. banc 1941)

## ARGUMENT

**I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CONCLUDING THAT SECTION 321.320 DOES NOT CONTROL BECAUSE THE STATUTE IS NOT LIMITED TO ANNEXATIONS THAT OCCURRED ONLY IN OR BEFORE 1969 IN THAT THE STATUTE’S USE OF THE VERB “IS INCLUDED” DOES NOT HAVE A TEMPORAL LIMITATION, THE STATUTE IS PRESUMED TO OPERATE PROSPECTIVELY, AND THE MISSOURI SUPREME COURT HAS APPLIED THE STATUTE TO POST-1969 ANNEXATIONS.**

**A. Standard of Review**

Statutory interpretation is an issue of law that is reviewed *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003).

**B. Introduction**

This case provides the Court with an opportunity to ascribe reasonable meanings to two different statutes, Section 321.320 and Section 72.418.2, and conclude that the City has the responsibility to provide fire protection and emergency ambulance services to certain recently annexed land pursuant to Section 321.320. The issue presented involves statutory interpretation; the Court’s decision will have ramifications on municipal fire protection and emergency ambulance services and municipal financing of such services throughout the State of Missouri.

The trial court’s conclusion that Section 321.320 does not apply to annexations after 1969 is wrong as a matter of law. Unfortunately, the trial court’s analysis contained mistaken legislative history. Moreover, the Missouri Supreme Court has recently applied the statute differently than the trial court’s interpretation.

South Metro relies on a subsection's single sentence for its assertion that Section 72.418.2 “[applies] to *any* annexation, by *any* city.” L.F. 93 (emphasis added). What South Metro ignores is the larger statutory scheme of the boundary commission law (which includes Section 72.418), which has historically only concerned the St. Louis County Boundary Commission. South Metro also ignores key provisions in the subsection’s enacting legislation (1993 Mo. Laws 924, referred to herein as “Senate Bill 256”), which, in no uncertain terms, states why the legislation was enacted – with reference to the St. Louis County Boundary Commission – and, consistent with that reference, repealed an existing statutory scheme that only applied in St. Louis County.

This Court should give effect to both Section 321.320 and Section 72.418.2. This is easy to do: Section 321.320 applies in non-boundary commission counties statewide; Section 72.418.2 applies in boundary commission counties such as St. Louis County. Ascribing these reasonable and well-supported meanings to these statutes alleviates the heavy burden South Metro places on this Court necessary for it to find in South Metro’s favor. This is because the crux of South Metro’s argument as to why Section 72.418.2 prevails over Section 321.320 requires this Court to render Section 321.320 essentially meaningless. Given the ease by which this Court can harmonize and give effect to both statutes, there is no need for this Court to repudiate a law that has been in effect in its current form since 1969, and that the Missouri Supreme Court recently applied to defeat a fire protection district’s claim to challenge an annexation.

If this Court concludes that Section 72.418.2 controls the City challenges the Constitutionality of Section 72.418.2. In that event, this case should be transferred to the Missouri Supreme Court. Mo. Const. art. V, § 11.

**C. Section 321.320 Controls**

Fire protection district boundaries are not sacrosanct. Chapter 321, RSMo (entitled “Fire Protection Districts”) contains three different processes by which property can be excluded from a fire protection district’s boundaries:

- i. Section 321.310 provides that a property owner can petition the fire protection district for detachment;
- ii. Section 321.320 provides that when certain cities (i.e., population of forty thousand inhabitants or more) annex property in the fire protection district boundaries, the annexed property is then excluded from the fire protection district boundaries by operation of law; and
- iii. Section 321.322 provides that when certain cities (i.e., at least two thousand five hundred but not more than sixty-five thousand population) annex property in the fire protection district boundaries, the annexed property is then excluded from the fire protection district boundaries by operation of law, provided that the annexing city shall make payments to the affected fire protection district in a lump sum or over a five year period.

Section 321.320 controls. This statute provides:

If any property, located within the boundaries of a fire protection district, is included within a city having a population of forty thousand inhabitants or more, which city is not wholly within the fire protection district, and which city maintains a city fire department, the property is excluded from the fire protection district.

§ 321.320, RSMo. The parties stipulated that the City 1) has a population of seventy thousand seven-hundred, 2) is not wholly located within a fire protection district, and 3) maintains its own fire department. L.F. 79.

In finding that Section 321.320 was not controlling, the trial court relied on a statutory amendment made over four (4) decades ago that, in part, changed the phrase “is now or hereafter included” to “is included.” The trial court reasoned that had the General Assembly intended to subject property annexed after 1969 to Section 321.320, it would have maintained the pre-amendment phrase “hereafter included” in the statute.

Section 321.320’s use of the verb “is included” does not have a temporal limitation. The trial court concluded that the term “is included” is “a present tense determination to be made at the time of the statute’s amendment.” L.F. 98. The trial court is correct that the term “is included” is in the present tense; “is” is the third person, singular, present tense form of the verb “to be” and “included” is an adjective describing the state of the property within the city. THE NEW OXFORD AMERICAN DICTIONARY 854 (2d ed. 2005). However, the trial court is incorrect in its reasoning that the use of the present tense means that only property included in the applicable city *at the time of Section 321.320’s amendment* is subject to the Section.

Under generally accepted rules of legislative drafting and statutory construction, statutes should be drafted in the present tense so that they apply on their date of enforcement. “Statutes should always be drafted in the present tense for the statute is applied not as of the date of enactment but as the date of enforcement.” Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 21.10 (6th ed. 2000). This is what the General Assembly did. THE LEGISLATIVE DRAFTER’S DESK REFERENCE’s instruction is consistent with this interpretation. “Whenever possible, use the present tense rather than the past or future tense... a statute is a

moveable feast – that is, it speaks as of whatever time it was drafted, enacted, or put into effect.” Lawrence E. Filson, *THE LEGISLATIVE DRAFTER’S DESK REFERENCE* 231 (1992).

Not surprisingly, Congress applies a similar interpretation. “In determining the meaning of any [federal statute], unless the context indicates otherwise . . . words used in the present tense include the future as well as the present . . . .” 1 U.S.C. § 1 (2000).

Missouri law is no different. Missouri courts presume that a statute operates prospectively. *State Bd. of Registration for Healing Arts v. Boston*, 72 S.W.3d 260 (Mo. App. W.D. 2002). “Unless expressly so stated, a statute does not refer only to a factual situation as of the time of enactment...” *City of Kirkwood v. Allen*, 399 S.W.2d 30, 36 (Mo. banc 1966) (superseded by statute). In *City of Kirkwood*, the Missouri Supreme Court considered whether Section 71.860, RSMo (Supp. 1965) (which allows certain cities to annex property) applied to only those municipalities “located in any first class county which has adopted” a charter and whether this statute applied to cities in such counties which may in the future adopt a charter. *Id.* at 36. In other words, was the statute’s applicability limited to the date the statute was enacted? The Missouri Supreme Court reasoned that:

It would be a strained and unrealistic construction to say that the 1963 Act was intended to apply only to the factual situation in existence at the time of its enactment. The reasonable construction of the words used do not impel that construction, and such a construction would be contrary to the manifest intent of the Legislature, particularly when it may be deemed that the Legislature did not intend to enact an invalid statute.

*Id.* at 36-37. *See also Bopp v. Spainhower*, 519 S.W.2d 281, 284 (Mo. banc 1975) (holding that statute phrased in the present tense did not preclude its application to events that preceded its enactment).

General rules of grammar confirm that the present tense is not limited to one point in time. Rather, it indicates an event occurring now, either in the present progressive tense (it is happening now and is continuing in the future) or as a rule; it can also indicate habitual action or general truths. Gary Lutz & Diane Stevenson, *GRAMMAR DESK REFERENCE* 16 (2005). An exception exists if the present tense verb is qualified by an appropriate adverb. For example, “she works here” means that this is where she has worked, where she currently works, and where she will work for the foreseeable future. *See id.* However, “she works here at the moment,” (which is qualified by the adverbial phrase “at the moment”) limits her action to a certain point in time. *See id.* at 37. In Section 321.320, there is no adverb that limits the application of the term “is included” to the moment of the amendment (*i.e.*, “is *now* included”).

If the General Assembly had truly intended that Section 321.320 apply only to certain properties as of the date of the amendment, as the trial court reasoned, it could have easily left in the word “now” to read “[i]f any property... is *now* included.” This would have complied with the rule as stated in *City of Kirkwood* because the General Assembly would have expressly stated that the statute will only apply to factual situations at the time of the statute's enactment. The General Assembly did not do this. Instead, the General Assembly deleted the temporal limitations.

What is more, the General Assembly knows how to draft statutes with limited durational effectiveness; if that was what the General Assembly intended, it could have done so here. See Section 205.354.1 (authorizing Boone County, Missouri, for *only* the year 1986, to call a

nonbinding preference election to determine the wishes of the voters of the county as to whether the county hospital is to be sold).

If this Court takes the trial court's reasoning to its logical conclusion, Section 321.320 is rendered essentially meaningless. According to the trial court, when the General Assembly deleted the conjunctive phrase "now or hereafter" from Section 321.320, it intended that only the deletion of "hereafter" have effect but not the deletion of "now." This reasoning is patently incongruous. If this Court applies the same reasoning consistently, then Section 321.320 does not apply to property within its purview at the time of the amendment nor does it apply to property that has since come into its purview. This interpretation is contrary to the rules of statutory construction. *See Edwards v. Gerstein*, 237 S.W.3d 580, 581 (Mo. banc 2007) (stating that "[when] interpreting statutes, courts do not presume that the legislature has enacted a meaningless provision").

If this Court adopts the trial court's reasoning that statutes, drafted in the present tense, apply only if the conditions stated therein existed on the date the statute was enacted, it will affect numerous statutes, such as Sections 64.401, 70.600, 204.472, 233.470, and 247.165. Indeed, a simple terms and connectors search for the term "is included" in the Westlaw Missouri Statutes database displays fifty-three (53) statutes that include that phrase in the statute's text.

One example is Section 301.032 that requires owners of "fleet vehicles" to register the same with the Department of Revenue. Section 301.010 defines fleet vehicle as "a motor vehicle which *is included* as part of a fleet" (emphasis added). Applying the trial court's reasoning, only those motor vehicles that were included as part of a fleet *at the moment of the statute's enactment* are a part of a fleet that is subject to Chapter 301's registration requirements. This is an absurd result (as is the reasoning that brought it about) and the Court should avoid such

constructions. *Reichert v. Board of Educ. of City of St. Louis*, 217 S.W.3d 301, 305 (Mo. banc 2007) (“Construction of statutes should avoid unreasonable or absurd results . . .”).

In addition to the incorrect legal reasoning, the legislative history contained in the Judgment is factually wrong. The phrase “is now or hereafter included” was not changed by the 1969 amendment as stated in the Judgment at 10, but rather the phrase was changed by a 1961 amendment. *Compare* 1957 Mo. Laws 723 *with* 1961 Mo. Laws 553. *See also* 1969 Mo. Laws 430. Accurate legislative history is important because the 1969 amendment actually broadened the scope of the statute. Pursuant to the 1961 amendment, Section 321.320 read as follows:

If any property, located within the boundaries of a fire protection district **in a county of the first class, except those having a charter form of government**, is included within a city having a population of forty thousand inhabitants or more....

1961 Mo. Laws 553 (emphasis added). The session laws are contained in the Appendix.

The 1969 amendment deleted the limitation that the property had to be located “in a county of the first class, except those having a charter form of government.” As a result of the 1969 amendment, the statute has a broader and more general application than it did in 1961, which is certainly inconsistent with an intent to limit its applicability. Furthermore, in light of the General Assembly’s 1969 action enlarging the statute’s applicability, it is absurd to conclude that the statute’s application had been previously limited to the 1961 time period when the phrase “now or hereafter” was deleted.

Finally, the trial court’s conclusion is directly contrary to how both the Missouri Supreme Court and the Missouri Attorney General have applied Section 321.320. *Battlefield Fire Protection District v. City of Springfield*, 941 S.W.2d 491, 492 (Mo. banc 1997) (applying

Section 321.320 to affirm the trial court's dismissal for failure to state claim regarding a challenge to a 1994 annexation); Mo. Att'y Gen. Op. No. 59-87 (June 4, 1987) (opining that the effect of the City of Joplin's *continuing* annexation efforts depends upon its population in order to determine whether Section 321.320 or Section 321.322 apply).

A careful reading of the Missouri Supreme Court's decision in *Battlefield Fire Protection District v. City of Springfield*, *supra*, makes clear that the Court does not interpret Section 321.320 to be limited to only those annexations that occurred in 1969, as the trial court concluded. In that case, the City of Springfield annexed land in 1994 that, prior to the annexation, was located within the boundaries of the fire protection district. *Id.* at 491-92. The fire protection district sought a declaratory judgment that the annexation was invalid because not all of the fee owners signed the annexation petition as required by the annexation statute. The city filed a motion to dismiss based upon the fire protection district's lack of standing.

The Missouri Supreme Court noted that, regarding an annexation ordinance, a party has the necessary legally protectable property interest to maintain suit "only if it is conferred by statute or if the plaintiff can demonstrate that it is directly and adversely affected by the ordinance." *Id.* at 492. In affirming the trial court's dismissal of Battlefield's suit, the Missouri Supreme Court held as follows:

In view of these rules, and the absence of any statutory authority to bring suit, Battlefield alleges that Springfield's annexation of National Place caused a loss in tax revenue without an accompanying decline in Battlefield's costs for providing fire protection service. **This allegation would be sufficient to state a claim were it not for § 321.320, RSMo 1994**, which provides that whenever a city having a population of forty thousand or more inhabitants annexes an area previously lying

within a fire protection district, the fire protection district **no longer** has the obligation to provide service to that area.

*Id.* at 492 (emphasis added). Clearly, the Missouri Supreme Court did not interpret Section 321.320 to be only applicable to annexations that occurred in 1969 given that it relied on the statute to uphold the trial court's dismissal of the fire protection district. The Court went on to note that the fire district's loss of tax revenue "will be offset by a decline in the need to provide fire protection services for that area." *Id.*

#### **D. Conclusion**

The trial court erroneously interpreted Section 321.320 and in a manner directly contrary to the Missouri Supreme Court's application of Section 321.320. Section 321.320 is not limited to annexations that occurred before or only on the effective date of an amendment in 1969. This Court should reverse the Judgment of the trial court.

**II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CONCLUDING THAT SECTIONS 72.418.2 & 72.418.3 CONTROL BECAUSE THESE SECTIONS DO NOT APPLY IN NON-BOUNDARY COMMISSION COUNTIES IN THAT THE STATUTES, WHEN READ IN CONTEXT, ARE A PART OF THE BOUNDARY COMMISSION LAW THAT CURRENTLY APPLIES ONLY TO ST. LOUIS COUNTY, AS DEMONSTRATED BY SENATE BILL 256 (1993) AND SECTION 321.322.4.**

**A. Standard of Review**

Statutory interpretation is an issue of law that is reviewed *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003).

**B. Sections 72.418.2 and 72.418.3 Do Not Control**

In finding for Respondent, the trial court concluded that Sections 72.418.2 and 72.418.3 are “plain, clear and unambiguous” and that they “apply to any annexation, by any city.” L.F. 93. The trial court made two significant errors in its Judgment. First, it failed to consider the context in which the sections were found – the boundary commission laws; laws that have only ever applied to St. Louis County. Second, it failed to consider the sections’ enacting legislation, Senate Bill 256 (1993), which made clear the sections were applicable only to boundary commission counties (*i.e.*, St. Louis County).

The trial court read Sections 72.418.2 and 72.418.3 in extreme isolation from the context of the boundary commission laws as a whole. This court must consider Sections 72.418.2 and 72.418.3 in context. While the statute’s text is the starting point in determining the statute’s meaning, “[t]extual analysis, of course, involves more than consideration of statutory terms in isolation.” *In Re Benn*, 491 F.3d 811, 814 (8<sup>th</sup> Cir. 2007) (citing *State v. Johnson*, 148 S.W.3d

338, 343 (Mo. App. W.D. 2004)). This is because “[s]ometimes, when we isolate one phrase from its statutory context, we get a meaning different from that which would appear if we considered the entire statute in context.” *State v. Johnson, supra*. Thus, this Court must be guided by the recognized principle of statutory construction that one part of a statute should not be read in isolation from the context of the whole act. *See Hudson v. Director of Revenue*, 216 S.W.3d 216, 221-222 (Mo. App. W.D. 2007).

The boundary commission law, Section 72.400 *et seq.*, was originally passed in 1989 “[i]n response to the near chaos that has historically marked St. Louis County annexations . . . .” *State ex rel. City of Ellisville v. St. Louis Co. Bd. of Election Comm’rs*, 877 S.W.2d 620, 621 (Mo. banc 1994). The boundary commission law was never intended to apply outside of St. Louis County. *See O’Reilly v. City of Hazelwood*, 850 S.W.2d 96, 97-99 (referring to the law as the “St. Louis County Boundary Commission Act” and noting that “[all] concede that § 72.400 RSMo Supp. 1991 can apply only to St. Louis County, and no other county in Missouri.”). *See also City of Ellisville*, 877 S.W.2d at 624 (“We cannot say with any degree of assurance that the legislature intended the boundary commission law to apply to all counties or even to all first class counties in Missouri. Indeed, by the language it used, the legislature clearly intended that the legislation apply *only* to St. Louis County.”).<sup>2</sup>

The boundary commission law establishes a process in which the boundary commission reviews proposals affecting the boundaries of incorporated and unincorporated areas in St. Louis County. Boundaries may be affected by annexation, simplified boundary change by petition,

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<sup>2</sup> On April 4, 1995, as a result of the Missouri Supreme Court decisions invalidating the boundary commission law because it could only apply to St. Louis County, the people amended the constitution to retroactively delete the requirement that a law applicable to any county must apply to all counties of the same class. 1995 Mo. Laws 1317. The effect of this amendment was to supersede the Court’s holding in *City of Ellisville*. Thus, the language used in the current version of Section 72.401.1(1) & (2), RSMo (2000), makes the entire boundary commission law presently applicable only to St. Louis County – just as it was when originally enacted in 1989 – but the Constitutional infirmities have been removed.

simplified boundary change by transfer of jurisdiction, protection of unincorporated areas, incorporation of new cities, and consolidation of cities. Section 72.400; Section 72.405 (Supp. 2001).

In reading the entire boundary commission section of Chapter 72, it is strained, to say the least, that the General Assembly intended to bury in subsection 2 of Section 72.418 a provision that applies to both boundary commission counties and non-boundary commission counties, when every other section and subsection of the boundary commission section of Chapter 72 (*e.g.*, Sections 72.400 to 72.423) applies only to boundary commission counties.

Sections 72.418.2 and 72.418.3 must also be read in context with their enacting legislation – Senate Bill 256 (1993). “The particular meaning to be ascribed to specific words and phrases must depend to some extent upon the context in which they are used and, when appearing in a statute, upon the purpose to be accomplished by the provisions of the particular statute.” *Hayes v. Hayes*, 252 S.W.2d 323, 327 (Mo. 1952).

Prior to 1993, the boundary commission law failed to address which entity (an annexing city or local fire protection district) was entitled to provide fire protection service upon an annexation in St. Louis County. Rather, Section 72.418 only addressed which entity was entitled to provide fire protection service when a new city was *incorporated* pursuant to the St. Louis County Boundary Commission, with no reference to annexations. Instead, Chapter 321, entitled “Fire Protection Districts” (specifically, Sections 321.655 to 321.685) addressed which entity was entitled to provide such services upon annexation in St. Louis County. Chapter 321 also addressed this situation outside of St. Louis County for cities with population of 40,000 or more (Section 321.320) and cities with 2,500 to 40,000 (since changed to 65,000) (Section 321.322).

Senate Bill 256 changed all that. The Bill repealed only those sections of Chapter 321 that applied to St. Louis County and added sections to the boundary commission law to address which entity was entitled to provide fire protection and emergency services upon annexation in St. Louis County. Three important aspects in Senate Bill 256 demonstrate that Section 72.418.2 was not intended to apply to all annexations by all cities, but instead only to those annexations in boundary commission counties (as that issue was not previously addressed within the boundary commission law). These three aspects are:

1) The General Assembly's repeal of certain sections of Chapter 321 that applied only to St. Louis County concerning overlapping fire protection district and city boundaries, but failure to repeal other sections of Chapter 321 that applied to overlapping boundaries in all other counties; and

2) The General Assembly justified the bill's emergency clause, which allowed for an earlier effective date, based on the fact that there were pending proposals before "the boundary commission"; and

3) The General Assembly's reference to "simplified boundary changes" as being part of an annexation, when a simplified boundary change cannot be effectuated without a boundary commission.

First, Senate Bill 256 repealed Sections 321.655, 321.660, 321.665, 321.670, 321.675, 321.680, and 321.685. 1993 Mo. Laws 924. These seven statutes formerly addressed annexations within St. Louis County and provided for an election to determine whether fire protection service would be provided by the fire protection district serving the annexed land, or the annexing city. Notably, other sections within Chapter 321 that also addressed annexations and fire protection service in other counties were *not* repealed, significantly Sections 321.320 and 321.322. Senate

Bill 256 thus reflects the General Assembly's intent to leave undisturbed Sections 321.320 and 321.322, and only repeal those statutes that applied in St. Louis County.

Repealing Sections 321.655 to 321.685 when Section 72.418.2 was enacted was necessary because Section 72.401 already provided that Sections 72.400 to 72.423 were to be the sole and exclusive manner in which boundary changes would proceed in a boundary commission county (i.e., St. Louis County). Senate Bill 256 simply repealed those provisions in Chapter 321 that were specific to St. Louis County in a manner consistent with Section 72.401's mandate that boundary changes only occur through the boundary commission law.

There is an unmistakable connection between the statutes that the General Assembly repealed upon enacting Section 72.418.2, and those that it did not repeal. Here, the General Assembly did not repeal Sections 321.320 and 321.322 because these statutes did not conflict with Section 72.418.2 as Sections 321.655 to 321.685 would have because Sections 321.320 and 321.322 do not apply in boundary commission counties. The trial court's conclusion that Senate Bill 256 was designed to extend the reach of Section 72.418.2 statewide is contradicted by the General Assembly's legislative action repealing the previous statutory framework that applied only in St. Louis County but not repealing those statutes that applied statewide.

The second important aspect regarding Senate Bill 256 is that it contained an emergency clause in its Section B. This section provided:

Because immediate action is necessary to provide several municipalities who have **annexation proposals pending before the boundary commission**, and because there is a dispute as to fire protection and emergency medical services jurisdiction between municipal fire departments and fire protection districts, this act is deemed necessary for the immediate preservation of the public health, welfare,

peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

1993 Mo. Laws 924, 927, § B (emphasis added). “Insight into the legislature’s object can be gained by identifying problems sought to be remedied and the circumstances and conditions existing at the time of enactment.” *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003). Section B informs us that the General Assembly enacted Senate Bill 256 in response to what was only occurring in boundary commission counties for which the bill was intended to apply.

Third, the reference to “simplified boundary changes” in the first sentence of Section 72.418.2 demonstrates that the subsection is limited to boundary commission counties. As defined, a simplified boundary change can mean only one of two things: petition for change signed by at least 75% of the affected property owners or a “transfer of jurisdiction between municipalities.” § 72.405.6, RSMo (Supp. 2001). Neither method is available in non-boundary commission counties, so the phrase “including simplified boundary changes” simply enlarges the scope of the previously used “annexation”.

A simplified boundary change can *only* occur in boundary commission counties. Section 72.405.6 contains a detailed process, peculiar *only* to boundary commissions and the boundary commission law, to effectuate simplified boundary changes. Therefore, if “any annexation”, as used in Section 72.418.2, includes boundary change processes that cannot, as a matter of law, occur in non-boundary commission counties, then “any annexation” does not refer to annexations in non-boundary commission counties.

From Section 72.418.2's inception, it was clear that the General Assembly was seeking to address the situation that was occurring at that time in St. Louis County. Focusing on only two words of the amendment in Senate Bill 256 misses the point that the General Assembly intended that this amendment resolve chaos created by unchecked incorporations and annexations in St. Louis County. The actions that the General Assembly took in Senate Bill 256 to repeal only St. Louis County related statutes, include in the emergency clause an express reference to St. Louis County, and modify "annexation" to include an action peculiar only to boundary commissions cannot be ignored; these actions lead to the inescapable conclusion that Section 72.418.2 does not apply statewide. Section 72.418.2 only applies to counties in which a boundary commission has been established. Cass County, Missouri, has not established a boundary commission pursuant to Section 72.400 et seq., and Section 72.418 is therefore inapplicable.

- **The General Assembly's Most Recent Action on the Meaning of Section 72.418.2**

The General Assembly's most recent action amending Section 321.322 so that certain cities would be subject to Section 72.418.2 confirms that it does not believe that Section 72.418.2 applies to all cities. This Court must consider "statutes involving similar or related subject matter when such statutes shed light upon the meaning of the statute being construed." *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. banc 2005) (noting that tax statutes should be construed in context with each other).

In 2005, the General Assembly amended 321.222 to add subsection 4. Like Section 321.320, Section 321.322 contains a similar statutory mechanism for property to be excluded from a fire protection district upon a municipal annexation. Specifically, Section 321.322 provides that when certain cities (*i.e.*, at least two thousand five hundred but not more than sixty-five thousand population) annex property into the fire protection district boundaries, the annexed

property is then excluded from the fire protection district boundaries by operation of law, provided that the annexing city shall make payments to the affected fire protection district in a lump sum or over a five year period.

The 2005 amendment to Section 321.322 provides:

The provisions of this section shall not apply where the annexing city or town operates a city fire department and was on January 1, 2005, a city of the fourth classification with more than eight thousand nine hundred but fewer than nine thousand inhabitants and entirely surrounded by a single fire district. **In such cases, the provision of fire and emergency medical services following annexation shall be governed by subsections 2 and 3 of section 72.418, RSMo.**

§ 321.322.4, RSMo (emphasis added). Subsection 4 provides an exception to Section 321.322's general rule of excluding property from a fire protection district when annexed by cities with a population of at least two thousand five hundred but not more than sixty-five thousand, and instead provides that Section 72.418.2 and Section 72.418.3 shall apply.

Given that subsection 4 was added to Section 321.322 in 2005, it reflects the most recent legislative action concerning the meaning of Section 72.418.2. What better way to know the General Assembly's intent as to the meaning of Section 72.418.2 than to consider why, in 2005, the General Assembly would have added subsection 4 written in a manner so narrow that it only applies to the City of Harrisonville, Missouri?<sup>3</sup> The answer is simple: the General Assembly wanted the City of Harrisonville to be subject to Section 72.418.2 when it otherwise was not. To effectuate that intent, the General Assembly added subsection 4 to Section 321.322, thereby

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<sup>3</sup> The parties stipulate that 321.322.4 only applies to Harrisonville, Missouri. *See* Transcript, p.76-77 (16:25; 1-2).

withdrawing the City of Harrisonville from Section 321.322 and expressly placing it within the reach of Section 72.418.2.

The 2005 legislative amendment adding subsection 4 to Section 321.322 would not have been necessary if Section 72.418.2, in existence prior to Section 321.322.4, truly applied to all annexations statewide. If the trial court's interpretation regarding Section 72.418.2 is correct, then that can only mean one thing: the General Assembly did not need to add subsection 4 to Section 321.322, and in so doing, the General Assembly committed a useless act. Such a result is not how statutes are construed in Missouri. *See Harding v. Lohman*, 27 S.W.3d 820, 824 (Mo. App. W.D. 2000) (noting that "the legislature is never presumed to have committed a useless act" and "[t]o amend a statute and accomplish nothing from the amendment would be a meaningless act."). The trial court's interpretation of Section 72.418.2 renders Section 321.322.4 meaningless because the effect of Section 321.322.4 would have already been accomplished 12 years prior by the enactment of Section 72.418.2.

The carefully crafted and deliberate addition of subsection 4 to Section 321.322 is the most recent and clearest action from the General Assembly stating what it intended Section 72.418.2 to mean. The fact that the General Assembly was making amendments to Section 321.322 five (5) years after it had last amended Section 72.418 (last amended in 2000) is significant because it demonstrates the General Assembly's intent that Section 321.322 was still an effective statute, and, most important for purposes of this case, that the General Assembly did not previously intend that Section 72.418.2 apply statewide.

- **Missouri's Written Legislative History Confirms That Section 72.418 Was Intended to Only Apply in Boundary Commission Counties**

Until recently, the General Assembly has not provided for any extrinsic written legislative history. Since 1995, however, the General Assembly does provide written summaries

of the various bills that are introduced. These written bill summaries are helpful in determining what the General Assembly thought and intended a bill to mean. *Cf. Bullington v. State*, 459 S.W.2d 334 (Mo. 1970) (using the official journals of the House and Senate as indicia of legislative intent).

Section 72.418 was amended in 1995 by House Bill 446, in 1999 by Senate Bill 160, and in 2000 by House Bill 1967. Every single one of the written summaries pertaining to these bills states in no uncertain terms that the relevant bill applied to St. Louis County.

- The 1995 written summary for House Bill 446 states in part: “In revision of the law pertaining to the St. Louis Boundary Commission, the bill: . . . .”
- The 1999 written summary for Senate Bill 160 states in part: “ST. LOUIS BOUNDARY COMMISSION - The act makes the following changes pertaining to the St. Louis Boundary Commission: . . . .”
- The 2000 written summary for House Bill 1967 states in part: “This bill makes several technical changes regarding the St. Louis Boundary Commission.”

Year after year after year of legislative amendments, the Bill Summaries for bills amending Section 72.418 constantly and correctly refer to these bills as applying to the St. Louis County Boundary Commission. The Bill Summaries are contained in the Appendix.

• **Section 320.310 Is Irrelevant**

The trial court’s conclusion that Section 320.310 reflects a legislative intent consistent with its interpretation of Sections 72.418.2 and 72.418.3 is severely misplaced. There are two

reasons why this statute does not reflect any intent that Section 72.418 controls over Section 321.320.

First, Section 320.310.5 provides: “[n]othing in this section shall supercede the provisions set forth in Section 67.300, RSMo, Chapter 190, RSMo, or Chapter 321, RSMo.” Thus, this section provides that it does not expressly or impliedly repeal or alter Section 321.320. The same, however, cannot be said for Chapter 72, RSMo because it is not one of the three (3) statutory chapters mentioned. Therefore, the implication is that Section 72.418.2 has been superseded, but not Section 321.320.

Second, Section 320.300 expressly states that it does not apply to fire protection districts that are supported by local tax revenues:

**The provisions of sections 320.300 to 320.310 shall apply only to volunteer fire protection associations either partially or wholly funded by membership or subscriber fees and shall not apply to fire protection districts supported by local tax revenues, or which have contracted with a political subdivision to respond to fires within the area of an association's boundaries.**

§ 320.300, RSMo (emphasis added). South Metro is supported by local tax revenues and therefore Section 320.310 does not apply. It does not get much simpler.

Additionally, the effective date for Section 320.310 was August 28, 2007. The City annexed the Annexed Property in January 2005. The meaning of the statute notwithstanding, it does not apply retroactively. Mo. Const. art. I, §13 (prohibiting laws that are retrospective in operation).

### **C. Conclusion**

The trial court erred in concluding that Sections 72.418.2 and 72.418.3 control. These statutes apply only in boundary commission counties. This Court should reverse the Judgment of the trial court.

**III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR RESPONDENT CONCLUDING THAT SECTION 72.418.2 PREVAILS OVER SECTION 321.320 BECAUSE THESE STATUTES CAN BE HARMONIZED SUCH THAT SECTION 321.320 APPLIES IN NON-BOUNDARY COMMISSION COUNTIES AND SECTION 321.320 IS MORE SPECIFIC IN THAT SECTION 72.418.2 APPLIES ONLY TO BOUNDARY COMMISSION COUNTIES AND SECTION 321.320 IS THE MORE SPECIFIC OF THE TWO AS IT CONTAINS A POPULATION LIMITATION AND DOES NOT ADDRESS AS MANY AREAS AS COMPARED TO THE MORE COMPREHENSIVE SECTION 72.418.2, AND THE RECENT AMENDMENT TO SECTION 321.322 SHOWS THAT SECTION 72.418.2 DOES NOT APPLY STATEWIDE.**

**A. Standard of Review**

Statutory interpretation is an issue of law that is reviewed *de novo*. *Barker v. Barker*, 98 S.W.3d 532, 534 (Mo. banc 2003).

**B. Sections 321.320 Prevails over Section 72.418**

If this Court concludes under Points I and II, *supra*, that Section 321.320 and Section 72.418.2 both apply, then the statutes are in conflict because either the City or South Metro, but only one of them, can have jurisdiction to provide fire protection and emergency ambulance service. In that event, Section 321.320 and Section 72.418 would relate to the same subject matter – the provision of fire service in an area after annexation - and therefore must be read *in pari materia*. “Statutes are considered to be *in pari materia* when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.” Norman J.

Singer, STATUTES AND STATUTORY CONSTRUCTION § 51.03 (6th ed. 2000). As such, these statutes are to be read consistently and harmoniously in their several parts and provisions. *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). This is true even though the statutes are found in different chapters and enacted at different times. *State ex rel. Dir. of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000). “Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general.” *State ex rel. Fort Zumwalt School Dist. v. Dickherber*, 576 S.W.2d 532, 536-537 (Mo. banc 1979) (citation omitted).

The trial court took a mutually exclusive approach to harmonizing these two statutes. It concluded that Section 72.418.2 means something and that Section 321.320 means nothing (or at least stopped meaning anything in 1969). This type of approach contains no harmony whatsoever, and is contrary to the well-settled rule that statutes must be given effect if possible. *See State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997) (“Statutes which seemingly are in conflict should be harmonized so as to give meaning to both statutes”). Here it is entirely possible and plausible to give effect to both without rendering one of them essentially meaningless, as the trial court did. This is easy to do. This Court can interpret Section 72.418.2 as applicable to annexations involving cities within a county that have established a boundary commission. This Court can interpret Section 321.320 as applicable to its stated respective cities in counties that have not established a boundary commission.

The result is the same even if this Court holds that harmonizing is not possible due to the statutes’ repugnant nature, and instead that one statute must prevail over the other. In this

instance, Section 321.320 is more definite and specific than the broad and general Section 72.418.2, and Section 321.320 therefore prevails.

In this regard, the trial court misapplied the holding in *Wellston Fire Prot. Dist. of St. Louis Cty. v. State Bank and Trust Co. of Wellston*, 282 S.W.2d 171 (Mo. App. E.D. 1955). *Wellston* stands for the simple proposition that with two statutes – all other things being equal (i.e., level of specificity) – the later enacted will prevail over the earlier enacted. *Wellston* was misapplied here because Sections 321.320 and 72.418.2 are not otherwise equal in that Section 321.320 is the more specific statute. Indeed, the trial court relied on a “general rule” stated in *Smith v. Missouri Local Gov’t Employees Retirement Sys.*, 235 S.W.3d 578 (Mo. App. W.D. 2004) that does not apply because the earlier enacted statute (Section 321.320) is not of the “more general nature.” “The more specific of two statutes dealing with a common subject matter generally will prevail, whether it passed before or after the more general statute.” 82 C.J.S. Statutes § 355 (1999).

“Perhaps even more important than the time of enactment rule, is the consideration of general as against special statutes.” Janice M. Pueser, RULES OF STATUTORY CONSTRUCTION FOR LEGISLATIVE DRAFTING, 17 F.R.D. 143, 149 (1955). South Metro needs the best of both worlds under the general versus specific analysis. On one hand, it must argue that Section 72.418.2 is so broad that it applies to all annexations by all cities with a fire department. On the other hand, it must argue that Section 72.418.2 is more specific than the narrowly tailored Section 321.320. Section 321.320 does not apply to “all cities.” The trial court’s conclusion that Section 72.418.2 was more specific rested on the reasoning that “it expressly addresses the effect of annexation on the continuing jurisdiction of fire protection districts.” L.F. 99. That reasoning, however, is equally true for Section 321.320. *See generally Battlefield Fire Protection District v. City of*

*Springfield, supra* (“This allegation would be sufficient to state a claim were it not for § 321.320, RSMo 1994, which provides that whenever a city having a population of forty thousand or more inhabitants annexes an area previously lying within a fire protection district, the fire protection district **no longer** has the obligation to provide service to that area.”) (emphasis added).

There are two ways to measure the specificity of a statute: what is its subject matter and to whom does it apply. The larger the subject matter and the more cities it could affect means that the statute is more general than specific. Conversely, the fewer number of subjects addressed by the statute and the fewer cities it could affect means that the statute is more specific than general. In *Fort Zumwalt School Dist. v. Dickherber*, 576 S.W.2d 532 (Mo. banc 1979), the Missouri Supreme Court had to compare conflicting statutory schemes to determine whether interest on school funds held by the county be credited to the school district or retained by the county. The county relied on Section 52.360, which pertained to interest on all money received; the school district relied on Section 100.150(2), which pertained to interest on school fund money received. 576 S.W.2d at 536-537. The school fund was a subset of “all money” received by the county. The Court held Section “52.360 is a general statute relating to money received by county collectors in second class counties... Section 110.150 specifically deals with specific funds” – the school district’s. *Id.* at 537. Thus, *Fort Zumwalt School Dist. v. Dickherber* instructs that when two statutes address a common area (*i.e.*, cities with population over 40,000), but one of them addresses **more than** just that particular area (*i.e.*, all cities), the statute that address more than just that particular area is not as specific as the statute that **just** addresses that particular area.

The trial court concluded that Section 72.418.2 applies to all cities with a fire department. Section 321.320 does not apply to all cities with a fire department. Section 321.320 only applies

to a narrow class of cities which meet the following criteria: 1) a population of more than forty thousand, 2) is not wholly located within a fire protection district, and 3) maintains its own fire department. Section 321.320's population requirement is more specific than Section 72.418.2 in that Section 72.418.2 does not contain any minimum or maximum population requirements whatsoever for it to apply.

The subject matter of Section 321.320 is narrower than the subject matter of Section 72.418. Section 321.320 only applies to annexations. Section 72.418 applies to the following subject matters: 1) new city incorporations, 2) annexations, 3) simplified boundary change by petition of at least 75% of the property owners, or 4) a simplified boundary change by transfer of jurisdiction. Section 321.320 addresses just one subject and can apply to fewer cities due to its population requirement, as compared to 72.418, which addresses four (4) subjects and contains no population requirements. Section 321.320 is therefore more specific because it addresses only a part of what 72.418 addresses.

Because Section 321.320 is more specific, it is not necessary to consider the effect of the later amendments to Section 72.418 because Section 72.418 is more general. Even if this Court did consider later enactments, the most recent legislative action affecting Sections 72.418.2 and Section 72.418.3 occurred in 2005 with the addition of subsection 4 to Section 321.322, as discussed above in Point II. Thus, while the more general Section 72.418.2 is more recent than the more specific Section 321.320, to the extent that recent legislative activity is relevant, Section 321.322.4 must be considered.

### **C. Conclusion**

The trial court erred in concluding that Section 72.418.2 prevails over 321.320 in the event both statutes apply but cannot be harmonized. Section 321.320 should be read to apply to

non-boundary commission counties and Section 72.418.2 should be read to apply to boundary commission counties. Even if these statutes cannot be harmonized, Section 321.320 prevails because it is more specific. This Court should reverse the Judgment of the trial court.

**IV. THE TRIAL COURT ERRED IN NOT ENTERING JUDGMENT FOR APPELLANT ON THE BASIS THAT SECTION 72.418.2 VIOLATES SECTIONS 3 & 6, ARTICLE X OF THE MISSOURI CONSTITUTION BECAUSE IT IMPOSES A NON-UNIFORM TAX ON ALL REAL PROPERTY WITHIN SOUTH METRO'S BOUNDARIES AND IT EXEMPTS THE ANNEXED PROPERTY FROM TAXATION WITHOUT CONSTITUTIONAL AUTHORIZATION IN THAT PROPERTY WITHIN SOUTH METRO'S BOUNDARIES WILL BE TAXED DIFFERENTLY AND THE ANNEXED PROPERTY DOES NOT QUALIFY FOR A CONSTITUTIONALLY PERMISSIBLE TAX EXEMPTION.**

**A. Standard of Review**

Constitutional challenges to statutes are reviewed *de novo*. *Hodges v. City of St. Louis*, 217 S.W.3d 278 (Mo. banc 2007).

**B. Section 72.418.2 Violates, Sections 3, Article X, of the Missouri Constitution**

Count III of the City's Counterclaim seeks alternative relief in the event that it is determined that Section 72.418.2 prevails over Section 321.320 by requesting that Section 72.418.2 be declared unconstitutional under Article X, Sections 3 and 6 of the Missouri Constitution.

- **Section 72.418.2 Creates a Non-Uniform Tax Scheme in Violation of Article X, Section 3 of the Missouri Constitution**

Section 72.418.2 creates a non-uniform tax scheme for real property in South Metro's geographic boundaries. The Section provides in its third sentence: "[s]uch annexed area **shall not be subject to taxation** for any purpose thereafter by the fire protection district except for

bonded indebtedness by the fire protection district which existed prior to the annexation” (emphasis added). In other words, someone who owns property within South Metro, but outside of the Annexed Property, must pay South Metro’s property taxes; conversely, someone who owns property within the Annexed Property will not have to pay South Metro’s property taxes. Such a result is not uniform.

Section 72.418.2’s exemption of the Annexed Property from South Metro’s taxes violates Article X, Section 3 of the Missouri Constitution, which provides: “[t]axes... shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.” Section 72.418.2’s exemption ensures that there will not be uniform taxation of the property located within South Metro’s boundaries.

This situation is just like the situation in *State v. Metro. St. Louis Sewer Dist.*, 275 S.W.2d 225 (Mo. banc 1955), in which the Missouri Supreme Court considered the sewer district’s taxation method that taxed district property differently depending upon whether the property was located in the City of St. Louis or St. Louis County. Three cents per one hundred dollars assessed valuation was placed on property in the county, but only a two cent levy was placed on property in the city. The Missouri Supreme Court held that the sewer district’s differential property tax rates based upon geographical area violated Article X, Section 3 of the Missouri Constitution because they were not uniform. *Id.* at 233. *See also City of Hannibal v. County of Marion*, 800 S.W.2d 471, 473 (Mo. App. E.D. 1990) (holding that the City of Hannibal’s charter provision exempting Hannibal citizens from paying Marion county’s poor and road tax violated Article X, Section 3 because it “violates the requirement that taxes be ‘uniform upon the same class.’”).

This is exactly what Section 72.418.2 accomplishes: a differential property tax assessment by South Metro based upon geographical areas within the district (i.e., those properties in South Metro’s boundaries that are a part of the Annexed Property and those that are not a part of the Annexed Property). As the Missouri Supreme Court did in *State v. Metro St. Louis Dist.* and *City of Hannibal v. County of Marion*, this Court must declare the result to be unconstitutional.

- **It Is Unconstitutional to Consider the Annexed Property a “Subclass” for Taxation Purposes**

The trial court incorrectly upheld Section 72.418.2’s taxing scheme because, it reasoned, “Section 72.418.2 creates a *subclass* of subjects who... will be uniformly subject to property tax....” Judgment at 14 (emphasis added). Contrary to the trial court’s conclusion, the General Assembly may not further classify or sub-classify **real** property for the purpose of taxation. As noted above, “[t]axes ... shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.” Mo. Const. art. X, § 3. When the subject of taxation is property, the Missouri Constitution also provides the following with regard to classifications:

All taxable property shall be classified for tax purposes as follows: class 1, real property; class 2, tangible personal property; class 3, intangible personal property. The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned.

Mo. Const. art. X, § 4(a). The Missouri Constitution further requires real property to be sub-classified as either (1) residential property; (2) agricultural and horticultural property; or (3) utility, industrial, commercial, railroad, and all other property not included as residential or agricultural and horticultural property. Mo. Const. art. X, § 4(b).

The Constitution specifically states that “**subclasses** (1), (2), and (3) [of Class 1, real property] **shall not be further divided**, provided, land in subclass (2) may by general law be assessed for tax purposes on its productive capability.” Mo. Const. art. X, § 4(b) (emphasis added). Thus, in clear and unambiguous terms, the General Assembly cannot create additional classes or subclasses of real property for the purpose of taxation. The General Assembly is without authority to permit this further sub-classification of real property within South Metro’s territorial limits.

Under the trial court’s reading of Section 72.418.2, South Metro would be required to subject residential real property located within its territorial limits, but not within the Annexed Property, to its property tax. On the other hand, South Metro would be prohibited from subjecting residential real property within its territorial limits that is also part of the Annexed Property to its real property tax. Thus, the residential real property in the Annexed area would be improperly divided into a subclass, in direct conflict with Article X, Sections 4(a) and 4(b). Further, any tax so imposed would not be uniform upon the same class or subclass of subjects (i.e., all real property in South Metro’s boundaries) in contravention of Article X, Section 3.

In support of its holding that South Metro could further classify real property within its boundaries, the trial court relied on the general rule that, to the extent that the General Assembly is authorized, it may divide various subjects of taxation into distinct classes and may impose differing rates on those classes, provided that the tax is uniform on all of the members of the

same class and that the classification is reasonable and not arbitrary. The City does not dispute that this is the general rule. However, the trial court's analysis stops short at the general rule, completely ignoring the specific constitutional prohibition regarding further classification of **real** property for the purpose of taxation.

The City acknowledges that not all property is subject to the same constitutional prohibition on sub-classification for taxing purposes as real property. For example, “[e]xcises are not subject to all the constitutional inhibitions applicable to taxes on property.”<sup>4</sup> *General American Life Ins. Co. v. Bates*, 249 S.W.2d 458, 462 (Mo. banc 1952). Reasonable classifications may be made when dealing with excise taxes, but not with property taxes except as otherwise established by the Missouri Constitution. Indeed, the Missouri Supreme Court, in *General American Life Ins. Co. v. Bates*, refused to extend various cases involving excise license taxes, income taxes, and various other excise taxes as authority to permit statutory provisions that were otherwise prohibited with respect to property taxes. *Id.* at 462-63. Because the General Assembly may not classify real property, the City does not bear any burden to negate a conceivable basis that might support it. That principle of law simply does not apply to real property taxes.

The cases cited in support of the trial court's erroneous conclusion that the General Assembly may create subclasses of taxable real property do not apply. Not one single cited case involves the taxation of real property in Missouri; this is not surprising given the clear constitutional mandate prohibiting the further division or classification of real property for taxation purposes. Simply put, the “subject” of South Metro's property tax is *real* property,

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<sup>4</sup> There are three types of taxes: “capitation or poll taxes, taxes on property, and excises.” *General American Life Ins. Co. v. Bates*, 249 S.W.2d 458, 462 (Mo. banc 1952). Excise taxes include “...every form of taxation which is not a burden laid directly upon persons or property; in other words, excises include every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation.” *Id.*

which by Constitutional edict, is a class of taxable property not subject to further division or classification. Mo. Const. art. X, § 4(a). The trial court’s conclusion can not be reconciled with this edict or either of the holdings in *State v. Metro. St. Louis Sewer Dist.*, *supra*, or *City of Hannibal v. County of Marion*, *supra*.

• **Section 72.418.2’s Exemption Is Not an Attempt to Avoid Double Taxation**

The trial court also concluded that the phrase in Section 72.418.2 that the annexed property “shall not be subject to taxation” is not a tax exemption at all, but rather a transfer of taxation authority to avoid double taxation. It cannot seriously be considered that the phrase “shall not be subject to taxation” is not a tax exemption. It is. BLACK’S LAW DICTIONARY defines “exemption” in pertinent part as “[i]mmunity from . . . the payment of tax.” BLACK’S LAW DICTIONARY 271 (6th ed. 1990). The property owners within the annexed area will not be paying South Metro’s property tax other than for bonded indebtedness, which preceded the annexation.

The trial court’s reasoning rests on the false premise that double taxation is per se illegal. It is not. “To constitute double taxation in the prohibited sense the second tax must be imposed upon the same property for the same purpose, *by the same state or government* during the same taxing period . . . .” *State ex rel. Spink v. Kemp*, 283 S.W.2d 502, 518 (Mo. banc 1955). Here, Section 72.418.2’s tax exemption cannot be justified in that it avoids prohibited double taxation because, but for Section 72.418.2, there would be two taxes imposed by two *different* taxing jurisdictions.

**C. Section 72.418.2 Violates Section 6, Article X, of the Missouri Constitution**

Not only does Section 72.418.2 allow South Metro to impose taxes in a non-uniform manner, it also exempts the Annexed Property from taxation in violation of Article X, Section 6 of the Missouri Constitution. That Section sets forth what property is exempt from taxation, and

provides that “[a]ll laws exempting from taxation property other than the property enumerated in this article, shall be void.” Mo. Const. art. X, § 6(1).

In *City of Hannibal v. County of Marion, supra*, the Supreme Court considered whether the Hannibal City Charter, which exempted Hannibal citizens from certain Marion County taxes violated Article X, Section 6. The court held that “[n]othing in Art. X, § 6 permits exemption from county taxes for ‘citizens of Hannibal,’ and thus” the city charter provision is void. *Id.* at 473. Here, too, nothing in Article X, Section 6 of the Missouri Constitution permits an exemption for “property subject to Section 72.418.2” from South Metro’s taxes, and thus it is void.

- **Section 72.418.2 Must Be Stricken in Its Entirety**

If this Court declares that the statutorily forced payment of taxes by the annexing city to the fire protection district is unconstitutional, it must also declare Section 72.418.2 invalid in its entirety.

While it is true that the provisions of every statute are severable, those provisions that are “so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one” cannot be severed. § 1.140, RSMo. Legislative intent indicates that all of Section 72.418.2 was essentially and inseparably connected and dependent upon the other provisions in that subsection and would not have been enacted separately. Indeed, with the exception of the last sentence in Section 72.418.2, which was added by Senate Bill 735 in 1996, the current language in subsection 2 remains identical to that which was adopted in 1993 in Senate Bill 256.

The Missouri Supreme Court has already been faced with the issue of whether to sever one part from the boundary commission law, and it declined to do so. In *City of Ellisville v. St.*

*Louis County Bd. of Election Commr's, supra*, the Court struck down Section 72.400.2, RSMo (Supp. 1993). Faced with the task of whether to sever that provision from the remainder of the boundary commission law, the Court held:

We do not believe it is possible to sever the offending provision of Section 72.400.2 from the remainder of the law. Where the legislature intended a statutory provision to apply only to a particular county, removal of that language substantially alters the intent of the General Assembly. We cannot say with any degree of assurance that the legislature intended the boundary commission law to apply to all counties or even to all first class counties in Missouri. Indeed, by the language it used, the legislature clearly intended that the legislation apply *only* to St. Louis County. For this Court to hold otherwise for the convenience of St. Louis County would be to engage in an act of legislation which neither the constitution nor Section 1.140 permits.

877 S.W.2d at 624.

Here, it is patently obvious that the General Assembly's intent in Section 72.418.2 was to discourage annexations by cities with their own fire departments into areas served by a fire protection district by forcing the annexing city to perpetually subsidize the fire protection district's operating expenses. Given the legislative and litigation history of the boundary commission law, this Court cannot state with any degree of assurance that the General Assembly would have enacted Section 72.418.2 without the perpetual operating expense subsidy. Accordingly, for this Court to sever the offending taxation sentences in Section 72.418.2 would be an act of legislation, and this Court should follow the Missouri Supreme Court's lead in *City of Ellisville* and refrain from doing so.

**D. Conclusion**

Section 72.418.2 violates Article X, Sections 3 and 6 of the Missouri Constitution. This Court should transfer this case to the Missouri Supreme Court.

**V. THE TRIAL COURT ERRED IN NOT ENTERING JUDGMENT FOR APPELLANT ON THE BASIS THAT SECTION 72.418.2 VIOLATES SECTION 1, ARTICLE X OF THE MISSOURI CONSTITUTION BECAUSE CITY TAXES WILL NOT BE USED FOR CITY OF LEE'S SUMMIT PURPOSES IN THAT SECTION 72.418.2 GRANTS THE ANNEXED PROPERTY AN EXEMPTION FROM SOUTH METRO'S TAXES AND REQUIRES THAT THE CITY USE ITS MUNICIPAL FUNDS TO PAY SOUTH METRO THE AMOUNT SOUTH METRO WOULD HAVE RECEIVED FROM TAXING THE ANNEXED PROPERTY AT SOUTH METRO'S TAX RATES BUT FOR THE TAXATION EXEMPTION (EXCEPT FOR ANY BONDED INDEBTEDNESS PRIOR TO THE ANNEXATION), ALL WITHOUT ANY REGARD TO THE CITY'S TAX RATE.**

**A. Standard of Review**

Constitutional challenges to statutes are reviewed *de novo*. *Hodges v. City of St. Louis*, 217 S.W.3d 278 (Mo. banc 2007).

**B. Section 72.418.2 Violates Missouri Constitution, Article X, Sections 1**

Count V of the City's Counterclaim seeks relief in the event that it is determined that Section 72.418.2 applies and prevails over Section 321.320 by requesting a declaratory judgment that Section 72.418.2 be declared unconstitutional under Article X, Section 1 of the Missouri Constitution.

Article X, Section 1 of the Missouri Constitution prohibits municipalities from using public monies for a private purpose. It provides: "[t]he taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate

purposes.” Missouri Const. art. X, § 1. The issue here is not whether the provision of fire protection and emergency ambulance service serves the general public. Instead, the issue is whether City taxes are being used for City of Lee’s Summit purposes. Under Section 72.418.2, City taxes will not be used for City of Lee’s Summit purposes, and instead they will be used to pay South Metro’s operating expenses.

Section 72.418.2 forces the City to use its municipal funds for a non-municipal (*i.e.*, City of Lee’s Summit) purpose. Section 72.418.2 grants the Annexed Property an exemption from South Metro’s taxes and requires that the City use its municipal funds to pay South Metro the amount South Metro would have received from taxing the Annexed Property at South Metro’s tax rates but for the taxation exemption (except for any bonded indebtedness prior to the annexation), all without any regard to the City’s tax rate. Financing of a fire protection district’s operating expenses by revenues derived from City taxes is inconsistent with article X, section 1.

The City’s forced payment of its municipal funds pursuant to Section 72.418.2, in lieu of South Metro taxing the Annexed Property, promotes a private end in that the only beneficiaries of the statute are the persons who own property in the Annexed Property because they are relieved of paying South Metro’s property taxes. *See generally State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 102 (Mo. banc 1941).

South Metro is a single purpose taxing district. South Metro’s 2007 property tax rate, excluding debt service, is \$0.8805 per \$100 of assessed valuation. The City’s 2007 property tax rate, excluding the park and debt service levies, is \$0.8690 per \$100 of assessed valuation. Under Section 72.418.2, the City is forced to pay more to subsidize South Metro’s property tax revenues from the Annexed Property than the City itself would receive from its own property tax revenues from the Annexed Property. This is true even without excluding such portions of the

City's property tax revenues that may support other City departments and services, all so property owners in the Annexed Property can enjoy fire protection and emergency ambulance service from South Metro without having to pay for it. This does not constitute an exercise of the City's taxing power for a City purpose.

The statutes relied upon by the trial court actually support the City's contention that the forced redistribution of City funds to support another political subdivision violates article X, section 1. Sections 71.370, 71.390 and 321.320(16) all empower a city and fire protection district to "contract" for services. There is nothing contractual (*i.e.*, mutuality of assent) about Section 72.418.2. Section 67.250 authorizes a city to grant funds to a fire protection district. Again, Section 72.418.2's compulsory nature is antithetical to a grant.

### **C. Conclusion**

Section 72.418.2 violates Article X, Section 1 of the Missouri Constitution. This Court should transfer this case to the Missouri Supreme Court.

## CONCLUSION

For the foregoing reasons, this Court must reverse the Judgment of the trial court. The trial court should have entered Judgment on behalf of the City declaring that it has the responsibility to provide fire protection and emergency ambulance services to the Annexed Property pursuant to Section 321.320. This Court should declare that Section 321.320 applies in non-boundary commission counties, and Section 72.418.2 applies in boundary commission counties. This is true without concluding that a conflict exists because it is a reasonable way to harmonize and give effect to both statutes, and should be the result even if the Court did find a conflict exists because Section 321.320 is more specific. This Court may correct the trial court's errors by entering the Judgment the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

Even if this Court was inclined to conclude that Section 72.418.2 prevailed over Section 321.320, such a conclusion would be thwarted because Section 72.418.2 is unconstitutional in its non-uniform taxation scheme, its impermissible tax exemption and its resultant forced tax expenditures for a non-municipal purpose. Accordingly, Section 321.320 would still apply, but this Court should transfer this case to the Missouri Supreme Court.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I hereby certify that the foregoing brief of Appellant City Lee’s Summit, Missouri complies with Rule 84.06 and Local Rule XII and that:

- (1) The signature block contains the information required by Rule 55.03;
- (2) The brief complies with the limitations contained in Rule 84.06(b);
- (3) The brief contains 12,906 words, as determined by the “word count” feature of Microsoft Word;
- (4) I am filing with this brief a computer disk which contains a copy of the above and foregoing brief in the Microsoft Word format;
- (5) The attached computer disk has been scanned for viruses and that it is virus free.

I further certify that two copies of the foregoing brief and one computer disk have been mailed, postage pre-paid to counsel of record listed below on the 4th day of August, 2008:

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