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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.

South Metro mischaracterizes the City's position by stating that, "Appellant argues that *despite the legislature's present tense drafting*, [Section 321.320 should apply prospectively]." Respondent's Brief, 50 (emphasis added). In fact, the City argues that *because* Section 321.320 uses the present tense, this Court should apply the Section prospectively. South Metro makes this mischaracterization in spite of the fact that it concedes that "unless expressly so stated, a statute does not refer only to a factual situation as of the time of enactment…." Respondent's Brief, 51 (citing *City of Kirkwood v. Allen*, 399 S.W.2d 30, 36 (Mo. banc 1966)).

What is more, South Metro does not challenge (or provide *any* contrary authority) to the fact that legislative drafting rules, general grammar rules, treatises on statutory construction, federal law, and Missouri common law all instruct that statutes (like Section

321.320) should be drafted in the present tense to ensure they have prospective application. *See* Appellant's Brief, 19-21. South Metro fails to address the practical implications of not giving statutes, drafted in the present tense, prospective application; a rule that could severely limit every statute drafted in the present tense.

South Metro ignores this wide-body of authority and asks the Court to believe that because Section 321.320 does not say "any property… *hereafter* included…," the term "is included" is "susceptible to inconsistent but equally plausible interpretations, requiring this court to [examine the legislature's intent]." Respondent's Brief, 51. The *only* support South Metro offers for its argument that the term "is included" is ambiguous is a passing statement in *Reals v. Courson*, where the Court noted that the use of the term "hereafter" can indicate a legislative intent that an act apply in the future. 164 S.W.2d 306, 308 (Mo. 1942).

However, the *Reals* decision does not support South Metro's argument. In *Reals*, a division of this Court determined whether a law that allowed for issuance of school bonds was a special or local law. *Id*. The contested statute provided that the "board of directors of school districts, formed of cities and towns having [between 200,000 and 450,000 inhabitants]… shall have authority to borrow money and issue bonds…." *Id*. at 307. Like the City, the appellants in *Reals* argued that the statute was not frozen in time but applied at the time of enforcement. *Id*. The Court agreed.

In the very next sentence of the *Reals* decision, which South Metro omits, the Court acknowledges that "the general tenor of the language [of the contested statute]… is broad enough that it is reasonably susceptible of the interpretation and construction that it

was intended to and does apply to future districts coming within the class…." *Id*. The fact that the statute was not qualified by the term "hereafter" had *no effect* on the Court's decision in the case. In fact, the Court's determination that the statute applied prospectively was based on the use of the term "formed of," which, unlike the present case, is actually the *past* (not present) tense. Although the Court found that the act was a special law, this holding was based on explicit language in the statute sun-setting the act in 1946. Since the *Reals* decision, the Court has affirmed that *Reals* does not stand for the proposition that South Metro suggests. *City of Kirkwood v. Allen*, 399 S.W. 2d at 37.

Even if this Court considers the legislative history of Section 321.320, South Metro's interpretation of such history remains patently incongruous; a point South Metro never resolves. South Metro asks this Court to believe that in 1961, when the legislature deleted the term "now or hereafter" from Section 321.320, it intended that its deletion of the term "hereafter" have meaning (i.e., that the Section would not apply "hereafter" the amendment) but its deletion of "now" should have no meaning (South Metro continues to argue that the Section applied "now," i.e., at the time of the amendment). If this Court applies South Metro's argument consistently, it would render the Section meaningless because the Section would have applied neither at the time of its enactment nor after its enactment. South Metro's choice to ignore this point does not make it go away.

South Metro argues that the *only* thing the legislature could have intended when it amended Section 321.320 was to limit the statute's application to the moment of amendment. South Metro ignores the substantive changes of the legislature's amendments (i.e., excluding first class *charter* counties in 1961 and then, in 1969,

deleting the limitation to certain counties, making the statute's application broader). *See* 1961 Mo. Laws 553 and 1969 Mo. Laws 430. South Metro fails to address why the legislature would have expanded the Section's application in 1969 and, at the same time, limited it to that year.

Finally, South Metro inappropriately dismisses this Court's decision in *Battlefield Fire Protection District v. City of Springfield*, 941 S.W.2d 491 (Mo. banc 1997). South Metro argues that the City has afforded "far greater weight to this Court's *passing reference* to Section 321.320… then [*sic*] is warranted." Respondent's Brief, 53. However, what South Metro terms a "passing reference" actually constitutes the basis for this Court's decision. This Court held that the Battlefield fire protection district would have had standing to challenge the annexation *but for* Sections 321.320 and 321.330, which provided that Battlefield no longer had to service the annexed area. 941 S.W.2d at 492. The fact that these statutes were in effect created the "concomitant" decline in Battlefield's costs and services, which prevented the district from having standing to challenge the annexation. *Id*.

South Metro argues that this does not amount to a "reasoned analysis of the issues before this Court today" concerning the temporal effect of the phrase "is included." Respondent's Brief, 53-54. However, if the Section had stopped applying in 1969 (as South Metro argues), then Battlefield would have had standing to challenge the annexation. If anything, *Battlefield* demonstrates that there is no ambiguity in the term "is included," as Battlefield presumptively conceded the statute applied. It further proves

how well-established the rule is that statutes should be drafted in the present tense (a point that is evidenced by South Metro's lack of authority to the contrary).

D. Conclusion

The trial court erroneously interpreted Section 321.320 and in a manner directly contrary to this 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. Sections 72.418.2 and 72.418.3 Must Be Read in Context of the Boundary Commission Law and Senate Bill 256

South Metro mischaracterizes the parties' central dispute concerning how to ascertain Section 72.418.2's meaning. The dispute is not (as South Metro alleges) over whether the Court should look at Section 72.418.2's meaning. The dispute concerns whether the Court should try to ascertain the Section's meaning by reading: (1) a single sentence, out of context; or (2) the sentence in context of the statute and act in which it appears.

This Court has employed the latter method before and read statutory language in context to properly understand the legislature's purpose and intent, not distort it. *Dairyland Ins. Co. v. Hogan*, 605 S.W.2d 798 (Mo. banc 1980) (stating the "cardinal rule that 'the intention of an act will prevail over the literal sense of its terms'"). The central issue in *Dairyland* was Missouri's 1978 "uninsured motorist" statute, which by its plain terms required insurance policies to provide coverage for damages caused by "uninsured

motor vehicles," not uninsured *motorists*. *Id*. at 799 (referencing Section 379.203) (emphasis added). In *Dairyland*, there was a car collision and the putative at-fault driver (Danforth) was driving without permission. The car Danforth was driving was insured but he was not. The injured individuals' insurer refused to pay the uninsured motorist coverage because, it argued, the *vehicle* that Danforth was driving was insured and, therefore, the coverage did not apply. This Court refused to rely on the literal meaning of the statute's terms because it would result in an absurd result and would be contrary to the intention of the act. *Id*. at 800.

Moreover, this Court has long recognized that the meaning of words depends upon the context. *Hayes v. Hayes*, 252 S.W.2d 323, 327 (Mo. 1952). Accordingly, this Court "must construe the statute in light of the purposes the legislature intended to accomplish and the evils it intended to cure." *State ex rel. Whiteco Indus., Inc. v. Bowers*, 965 S.W.2d 203, 207 (Mo. App. E.D. 1998). *See also State ex rel. Rhodes v. Crouch,* 621 S.W.2d 47, 49 (Mo. banc 1981) (noting that the construction of statutes is not to be hyper-technical, but instead is to be "reasonable and logical and [to] give meaning to the statutes.").

SB 256 sheds light on the purposes the legislature intended to accomplish. South Metro goes to great lengths to argue that this Court should ignore the legislative history of Section 72.418 and assume that the legislature intended to bury in the boundary commission law a section that applies to non-boundary commission counties. South Metro fails to address any of the City's cases that instruct the Court to consider the legislature's intent. South Metro also uses faulty analysis when addressing the rule that when two statutes that cover the same subject matter and are unambiguous standing apart

but conflict when examined together, the Court must consider the legislature's intent. Respondent's Brief, 37-38. South Metro reasons that because Sections 72.418.2 and 72.418.3 do not conflict, there is no need to consider the legislature's intent. *Id*. at 38. South Metro ignores the obvious conflict that spawned this case — between Section 72.418.2 and 321.320.

South Metro fails to address the City's argument concerning why the legislature repealed Sections 321.655 to 321.685 with SB 256 but failed to repeal other sections in Chapter 321 (such as 321.320). *See* Appellant's Brief, 28-30. The City has already addressed the relevance of this action in its brief. The City notes that one plausible explanation for why the statutes were not repealed is that the legislature intended that those statutes remain in effect. After all, existing statutes are presumed to be valid and "[r]epeals by implications are not favored." *In re Nocita*, 914 S.W.2d 358, 359 (Mo. banc 1996).

South Metro argues that if the legislature wanted to limit Section 72.418.2's application to boundary commission counties, it could have done so by simply using the term "boundary change" instead of the term "any annexation" in its amendment to Section 72.418.2. Respondent's Brief, 32. This argument is unsupported by fact or reason.

First, if the legislature were to use the term "boundary change" instead of "annexation" in Section 72.418.2, it would contradict (and possibly nullify) Section 72.418.1. This is because the two subsections deal with different forms of "boundary changes" and provide different funding mechanisms for each; Section 72.418.1 addresses

boundary changes caused by cities incorporating and Section 72.418.2 addresses boundary changes caused by annexations.[1] Specifically, Section 72.418.1 prohibits newly incorporated boundary commission cities from creating their own fire department and allows the fire protection district that is currently servicing the area to levy and collect its own taxes. Section 72.418.2, while ensuring that the fire protection district continues to provide services to the annexed area, prohibits such district from levying and collecting its own taxes except for prior bonded indebtedness. If the legislature had used the term "boundary change" in 72.418.2 (a term that includes both incorporations and annexations) instead of "annexation" (as South Metro argues), it would actually contradict 72.418.1's mandate that fire protection districts serving recently incorporated cities levy and collect their own taxes.

Second, South Metro makes a contradictory argument concerning the meaning of the term "any annexation." In one sentence, South Metro argues that "any annexation," as used in Section 72.418.2, is a general term, stating that "the legislature's reference to 'any annexations' [in Section 72.418.2] includes not only 'annexations' pursued via means outlined by other, more commonly employed statutory procedures [in Chapters 71 and 79], but also the 'simplified boundary change' procedure…available only in boundary commission counties." Respondent's Brief, 33-34. However, just a few paragraphs prior to this, South Metro argues that the term "boundary change," which the boundary

[1] Both of these terms ("incorporation" and "annexation") are a part of the boundary commission law's definition of "boundary change." *See* Section 72.400(2).

commission law defines as "***any annexation***, consolidation, incorporation..." (Section 72.400 (2) (emphasis added)), is "expressly limited in their application to Sections 72.400 to 72.423." Respondent's Brief, 32. South Metro has taken a phrase that it argues is unambiguous and ascribes it two different meanings. This simply proves that Section 72.418.2 must be read in context.

Finally, South Metro tries to extend this faulty argument to explain that because the 1995 addition of Section 72.418.3 also does not use the term "boundary change" and other limiting words, then the Section must apply to all annexations. Respondent's Brief, 37. South Metro concludes that the terms of Section 72.418.3, allowing a fire protection district to "approve or reject any *proposal* for the provision of fire protection and emergency medical services by a city," supports its argument that Section 72.418 applies to all annexations by any city. *Id*.

South Metro's argument raises the question of where does the proposal South Metro claims to be able to approve or reject come from when a city annexes land in a county that does not have a boundary commission. Here, the City annexed the Annexed Property pursuant to a Section 71.012 voluntary annexation, which does not require a "proposal" to be submitted regarding the provision of fire protection and emergency medical services. Stipulated Exhibit 14. If there is no requirement for a proposal, then what proposal is South Metro going to approve or reject? The "proposal" that Section 72.418.3 is referring to is a requirement set forth in Section 72.403 that requires a city proposing to annex territory in a county with a boundary commission to submit a proposal to the boundary commission. That proposal must address issues such as services

the city will provide, including fire protection services. Section 72.403.3(4), RSMo. In fact there is *no* requirement to make a proposal unless you are annexing land in a county with a boundary commission. This illustrates that Section 72.418.3 is limited to boundary commission counties and how nonsensical it is to claim this provision applies in a county where there is no boundary commission.

B. The 2005 Amendment to Section 321.322 Is Proof Section 72.418.2 Is Limited to Boundary Commission Counties

South Metro asks this Court to believe that Sections 72.418.2 and 72.418.3 apply broadly and beyond boundary commission county annexations. The City has pointed out that Section 321.320 is not the only section that conflicts with South Metro's interpretation; Section 321.322 also is in direct conflict with South Metro's analysis (a point South Metro concedes at page 43 of its brief). Section 321.322 is similar to Section 321.320 in that it allows certain cities (with fire departments) that annex property previously serviced by a fire protection district, to service the annexed property. All parties agree that in 2005 the legislature amended Section 321.322 to allow one city – Harrisonville, Missouri – to be subject to Sections 72.418.2 and 72.418.3. Respondent's Brief, 43.

South Metro asks this Court to believe that in 2005, the legislature, realizing there was conflict between Section 72.418 and Section 321.322, decided to resolve that conflict - not by repealing 321.322 in its entirety, nor by taking Sections 72.418.2 and 72.418.3 out of the boundary commission law and placing them in the more generally applicable Chapter 321. Rather, South Metro speculates, the legislature resolved that conflict by

mandating that Harrisonville, Missouri (a city of about 9,000 residents) be subject to Section 72.418 and not Section 321.322. Respondent's Brief, 42-44. Apparently, the "clear and plain" language of Section 72.418 was not enough to put Harrisonville, Missouri squarely within the statute's reach and so the legislature felt it necessary to do so. This is illogical. If the legislature intended that Sections 72.418.2 and 72.418.3 applied broadly and also believed there was any conflict, they would have done more than make the Sections applicable *only* to Harrisonville, Missouri and leave all other issues unaddressed.

What is more, South Metro is asking this Court to believe that Section 321.322 was repealed by implication when the legislature amended Section 72.418 in 1993 and added subsection 2. If South Metro's argument is true then it was especially egregious that the legislature amended Section 321.322 in 2005, adding Section 321.322.4; the legislature would have been amending a statute that South Metro argues was repealed twelve years earlier! In that case, Section 321.322.4 would not have been necessary and its enactment would constitute a meaningless act on the part of the legislature, contrary to established rules of statutory construction.

In fact, this is contrary to how Missouri Court's interpret statutes. In amending a statute, "the General Assembly is presumed to have acted with knowledge of the state of the law." *In Re Nocita*, 914 S.W.2d 358, 359 (Mo. banc 1996). There is no need to engage in fabrication with regard to Section 321.322.4. The legislature did not amend a statute twelve years after it repealed the same statute by implication. Instead, the legislature amended a statute that was still in force and effect, and in so doing necessarily

stated its intent that Section 72.418.2 does not apply outside of boundary commission counties.

Unfortunately, South Metro engages in speculation unsupported by the record in this case that the legislature "was asked" to squarely address the conflict between Section 72.418 and Section 321.322. Respondent's Brief, 43. Moreover, South Metro's idea that Section 321.322.4 represents a "trend" is nonsensical. *Id*. at 44. First, one action is not a trend. Second, within the context of legislation applicable to Missouri cities, a statutory subsection that applies only to one city out of more than approximately six hundred cities using a population increment of one hundred is not a "trend" but a recognition on the part of the legislature that, but for the action, Section 72.418.2 does not apply because it is not applicable statewide. Section 321.322.4 is a clear statement by the legislature that Section 72.418.2 is of limited applicability and it is telling that South Metro resorted to speculation unsupported by the record in its attempt to refute it.

C. Section 320.310 Is Irrelevant

South Metro argues that Section 320.310 evidences a legislative intent that supports its reading of Sections 72.418.2 and 72.418.3. Subsection 5 of that Section provides that: "[n]othing in this section shall supersede the provisions set forth in section 67.300, RSMo, chapter 190, RSMo, or chapter 321, RSMo." South Metro tries to argue that the "[n]othing in the section shall supersede" language in subsection 5 applies only to the subject matter of subsection 5, not subsections 1 through 5. Respondent's Brief, 46-47. This argument fails to distinguish between the legislature's careful and deliberate use of the words "subsection" and "section" throughout Section 320.310. Whenever the word

"subsection" is used in Section 320.310, it is always followed by the specific paragraph number or is modified by the word "this," as it did in subsection 2 defining a term used in the preceding sentence.

Indeed, consider the first clause of subsection 5: "Notwithstanding the provisions of subsections 2 and 3 of this section . . . ." This clause would make no sense if the Court applies South Metro's definition of the word "section," which would mean: notwithstanding the provisions of subsections 2 and 3 of this *subsection 5*. Such an interpretation produces an absurd result, which is to be avoided in construing statutes. The legislature showed that it knew the difference between a section and a subsection, and used those words appropriately throughout Section 320.310. If the legislature had wanted the meaning desired by South Metro, it could have said so. Accordingly, the logical, and consistent, way to interpret the word "section" in subsection 5 is that it means Section 320.310.

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.

Nowhere in South Metro's brief does it ever attempt to harmonize Section 321.320 and Section 72.418.2. Instead, South Metro immediately characterizes the conflict between the two Sections as "irreconcilable." Respondent's Brief, 55. South Metro's failure to try and harmonize the two Sections violates the basic rule that when statutes that relate to the same subject matter conflict, one must try to harmonize them to give effect to both. The effect of this failure to harmonize is even more pronounced in this case because South Metro argues that Section 72.418.2 impliedly repeals *two* statutes (Sections 321.320 and 321.322) and invalidates this Court's decision in *Battlefield Fire Protection District v. City of Springfield*. The fact that two statutes would effectively be

erased from law and this Court would be rendering meaningless a decision it made in 1997 highlights why harmonization is the preferred means to avoid implied repeals. The City set forth in its brief (pages 38-39) how easy it is to harmonize the statutes rather than requiring this Court to repeal Sections 321.320 and 321.322, thus respecting the rule that statutes are presumed valid and repeals by implications are disfavored.

South Metro argues that Section 72.418.2 prevails over Section 321.320 because it was enacted later. The great irony and inconsistency in South Metro's argument is Section 321.322.4. Section 321.322.4 represents the most recent legislative pronouncement concerning the meaning of Section 72.418.2, and this most recent action is the most important.[2] Of course, South Metro fails to discuss the effect of Section 321.322.4 in its Point Three.[3] However, Section 321.322.4 makes it clear that the legislature never intended Section 72.418.2 to apply to non-boundary commission

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[2] As discussed *supra*, the legislature added subsection 4 to Section 321.322 in 2005. Section 321.322 generally allows certain annexing cities (with fire departments) to service an annexed area that was previously serviced by another fire protection district. Subsection 4 provides that Section 321.322, "shall not apply [to Harrisonville, Missouri]… [instead,] the provision of fire and emergency medical services following annexation shall be governed by subsections 2 and 3 of section 72.418, RSMo."

[3] South Metro does address Section 321.322.4 earlier in its brief (pages 42-44) and argues that the "irreconcilable conflict" between Section 321.322.4 and Section 72.418.2 should be resolved in favor of the latter. Respondent's Brief at 44.

counties; instead, the legislature added Section 321.322.4 in 2005 because it believed 72.418.2 did *not* apply to non-boundary commission counties and, therefore, had to make a special exception for Harrisonville, Missouri. Thus, if this Court gives effect to the most recent legislative action concerning Section 72.418.2 (as South Metro requests), then it must give effect to Section 321.322.4.

At pages 58 and 59, South Metro tries to make four comparisons between the two statutes in an attempt to show that Section 72.418.2 is more specific. Each one fails:

● South Metro places form over substance by noting that Section 72.418.2 is more specific because it mentions annexations but Section 321.320 does not use that word. Respondent's Brief, 58-59. "Include" means "to cause to be a part of something." American Heritage Dictionary 665 (New College ed. 1979). That definition describes annexation. Accordingly, if land which is not part of the City is caused by an annexation ordinance pursuant to a voluntary annexation petition to then be a part of the City, then the land "is included" in the City. Indeed, South Metro stipulated that the Annexed Property was annexed by the City. L.F. 80-81. South Metro acknowledges the annexation on one hand, but then argues that the land so annexed has not been "included" in the annexing city. As this Court considered the facts and issues in *Battlefield*, "include" as used in Section 321.320 means the same as annexation.

● South Metro argues that Section 321.320 does not address the effect of annexations upon a fire district's continuing jurisdiction. Respondent's Brief, 59. South Metro ignores this Court's decision in *Battlefield* that, under Section 321.320, "the fire protection district no longer has the obligation to provide service to that area." 941

S.W.2d at 492. Thus, Section 321.320 addresses the effect of annexations upon a fire district's continuing jurisdiction, and this Court has said that the fire district has no continuing jurisdiction.

● South Metro also ignores Section 321.330, even though it was part of the basis for this Court's holding in *Battlefield*, in arguing that Section 321.320 does not provide for fire protection district compensation despite a continuing obligation to service bonded indebtedness. As this Court noted in its *Battlefield* holding, Section 321.330 accompanies Section 321.320 and expressly makes provision that fire district taxation to serve prior bonded indebtedness continues. This Court stated in *Battlefield*:

> Furthermore, even after the annexation, § 321.330, RSMo 1994, gives Battlefield the right to property tax revenues on real and personal property located in the annexed area at the time of annexation, although the right is limited to the amount of revenues necessary to relieve any indebtedness outstanding at the time of annexation.

941 S.W.2d at 492.

● Reliance on Section 72.418.3 is misplaced in light of Section 72.403.3(4). *See* discussion under Point II (A), *supra*.

Point by point by point by point, South Metro's basis that Section 72.418.2 is the more specific statute unravels as the complete statutory and judicial story is told.

South Metro desperately does not want this Court to acknowledge that, by its terms, Section 321.320 is of more limited application than Section 72.418.2. South Metro tries to accomplish this by asking the Court to ignore the Sections' *subject matters*, and

consider the *manner* with which such subject matters are addressed. Specifically, South Metro argues that the "more comprehensive ***manner*** in which Sections 72.418.2 and 72.418.3 address this subject matter [of the annexation and the fire protection district's jurisdiction] is far more definite and specific than Section 321.320." Respondent's Brief, 60-61 (emphasis added).

This is not the test to determine which statute is more specific. "Specific" is defined as "belonging or relating uniquely to a particular ***subject***." THE NEW OXFORD AMERICAN DICTIONARY 1629 (2d ed. 2005) (emphasis added). "General" is defined as "affecting or concerning all or most people, places, or things; widespread" – a definition that, like "specific," is dependent on the number of the effected ***subjects***. *Id.* at 700. Moreover, the use of the word "uniquely" in defining "specific" supports Appellant's position because "uniquely" means "belonging or connected to (one particular person, group, or place)." THE NEW OXFORD AMERICAN DICTIONARY 1837 (2d ed. 2005). Thus, something "general" applies to all or most, while something "specific" applies to a relative few. Pursuant to South Metro's analysis, if two statutes deal with the same subject matter and one statute applies only to a single city and the others apply to all cities, the latter statute would prevail as the more specific *if* it contained a more detailed procedure for dealing with the subject matter. Not only is this reasoning absurd, South Metro provides no authority for it.

What is more, through its own words, South Metro characterizes Section 72.418.2 as a general statute. At page 33 of its brief, South Metro states that Section 72.418.2 applies to "<u>all cities</u> and <u>any annexation</u>" (emphasis provided by South Metro).

Ostensibly, South Metro means "all cities with a fire department," but Section 321.320 applies only to those cities: 1) with a population of more than forty thousand; (2) which are not wholly located within a fire protection district; and 3) which maintain their own fire departments. Pursuant to South Metro's own analysis, 72.418.2 applies to all cities (a broader, more general subject matter) and Section 321.320 applies to only those cities meeting the just-stated requirements (a more limited subject matter).

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.

Article X, Section 3 of the Missouri Constitution requires that South Metro's taxes be "uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax."

South Metro argues that Section 72.418.2 does not violate Article X, Section 3 because the "subclass of subjects within South Metro's jurisdictional boundaries created by Section 72.418.2 is comprised of those *residents* who reside in the Annexed Property… Every subject within that subclass [of *residents*] is treated uniformly." Respondent's Brief, 64. South Metro mischaracterizes the subject of South Metro's ad valorem property tax as "residents"; the subject of the tax is, of course, real property.

There are only three constitutionally allowed subclasses of real property: residential, agricultural and commercial/industrial. Mo. Const. art. X, § 4(b). The Missouri Constitution provides that these three subclasses of real property cannot be

further subdivided. Mo. Const. art. X, § 4(b). Thus, all residential real property located within South Metro's territory must pay the same tax levy rate.

If sub-classifications of real property other than those provided for in the constitution were constitutionally permissible, then perhaps South Metro's defense would have some merit. But Section 4(b) plainly does not allow further sub-classification of real property by the legislature for tax purposes. Mo. Const. art. X, § 4(b) (real property "shall not be further divided"). The City's reference to Section 4(b) is therefore only to respond to South Metro's misplaced defense.

South Metro stipulated that it assesses a property tax levy "against **all** real property within its geographical boundaries." L.F. 78-79 (emphasis added). South Metro further acknowledges that under Section 72.418.2, not all residential real property within its geographical boundaries will pay South Metro's property tax levy because the Annexed Property is not subject to South Metro's tax but would be within its geographic boundaries. Respondent's Brief, 66-67. Such a result is not "uniform . . . within the territorial limits of the authority levying the tax."

Uniformity means all real property within South Metro's geographical boundaries is subject to South Metro's same tax levy. This Court invalidated a taxing authority's attempt to have real property subject to a rate in one part of its geographical boundaries, but a different rate in a different part of its geographical boundaries, holding that the tax was not uniform upon all the real property within the territorial limits. *State v. Metro. St. Louis Sewer Dist.*, 275 S.W.2d 225, 233 (Mo. banc 1955).

South Metro skips the threshold issue of whether the General Assembly even has the authority to create a subclass of real property other than those provided in Article X, Section 4(b), and dives directly into an argument that the reasonableness of this classification somehow overcomes its unconstitutionality. South Metro's reliance on *Barhorst v. City of St. Louis*, 423 S.W.2d 843 (Mo. 1967) is flawed. *Barhorst* is inapplicable here because it deals with an earnings tax, not a real property tax. The law recognizes that taxes of the type found in *Barhorst* fall within the category of "excise" taxes, which "are not subject to all the constitutional inhibitions applicable to taxes on property." *General American Life Ins. Co. v. Bates*, 249 S.W.2d 458, 462 (Mo. banc 1952). The City does not deny that for certain types of taxes, the legislature is authorized to make reasonable classifications. However, the Missouri Constitution makes clear that for real property, the only permitted classifications are those found in Mo. Const. Art. X, § 4(b). *See also* Section 137.016.

The other cases cited in support of South Metro's misconceived contention that the General Assembly may create subclasses of taxable real property other than those contained in Article X, Section 4(b) are also unavailing. Not surprisingly, none of these cases involves taxation of real property in Missouri. Instead, they involve a use tax, a business license tax, and a special assessment. *See State ex rel. Transport Mfg. & Equipment Co. v. Bates*, 224 S.W.2d 996 (Mo. 1949) (use tax); *508 Chestnut, Inc. v. City of St. Louis*, 389 S.W.2d 823 (Mo. 1965) (business license tax); *State ex rel. Jones v. Nolte*, 165 S.W.2d 632 (Mo. banc 1942) (special assessment).

South Metro's attempt to make *State v. Metro. St. Louis Sewer Dist.*, 275 S.W.2d 225 (Mo. banc 1955), a "reasonableness" case also misses the mark. The language South Metro quotes from that case is clearly dicta — notice the use of the phrase "would be" twice in the conclusion of the quoted language. *See* Respondent's Brief, 66. Even a cursory review of the case reveals that this Court's holding is unambiguous: "[t]herefore, we must hold that the portion of the property tax in the County in excess of that in the City is an invalid levy." 275 S.W.2d at 233-34. This Court then continues, explaining other situations that were not being considered in that case, such as special assessments (as distinct from a tax) and if the sewer district had created sewer subdistricts. 275 S.W.2d at 234. The holding in *Metro. St. Louis District* was soundly premised on the fact that the sewer district could not levy its real property tax on real property of the same class at differing rates within its jurisdictional boundaries, even where the tax would be levied in two different political jurisdictions. *See id.* at 233 (quoting 1 Cooley on Taxation 645, Sec. 311: "If the tax is a state tax it must be uniform throughout the state. If the tax is a county tax, it must be uniform throughout the county etc.… The uniformity corresponds to the territorial limits of the taxing district."). That is exactly the case here.

Moreover, the Eastern District has also addressed a similar situation in *City of Hannibal v. County of Marion*, 800 S.W.2d 471 (Mo. App. E.D. 1990), a case cited by Appellant but to which Respondent did not respond. There, the city of Hannibal's charter contained a provision that exempted its citizens from paying the county's poor and road tax. The court held that "[a]n exemption for 'citizens for Hannibal' from certain Marion County taxes violates the requirement that taxes be 'uniform upon the same class.'" *Id*. at

473. In so doing, the court sated its position "is supported by *State v. Metro. St. Louis Sewer Dist.*, 365 Mo. 1, 275 S.W.2d 225 (banc 1955)." *Id*.

The City has no burden to prove the classification unreasonable or arbitrary where the classification is unconstitutional from the outset. Indeed, there may be a number of rational reasons why a city would want to levy higher real property tax rates on different areas within its geographic boundaries: aging infrastructure resulting in higher public works costs; higher crime rate area resulting in greater demand for police services; older and dilapidated buildings resulting in more frequent fire service calls; aging population resulting in more numerous ambulance runs, etc. However, none of these reasons, no matter how reasonable, matter because the constitution requires that all real property located within the taxing authority's geographic boundaries be subject to the same tax rate. *See Lewis County C-I Sch. Dist. v. Normile*, 431 S.W.2d 118 (Mo. banc 1968) ("We fully agree that if District C-I had levied a tax upon the same class of property at a different rate in one part of the district than it did in another, Article X, s 3, would have been violated.").

South Metro repeatedly and erroneously attempts to justify the "reasonableness" of the non-uniform application of its real property tax to the Annexed Property by arguing that Section 72.418.2's exemption avoids double taxation. However, South Metro fails to respond to the holding of *State ex rel. Spink v. Kemp*, which states that to be a prohibited double tax, the second tax imposed "must be imposed upon the same property for the same purpose, *by the same state or government* during the same taxing period…." 283 S.W.2d 502, 518 (Mo. banc 1955) (emphasis added). In this case, the subject taxes

would be imposed by two different governmental entities, thus double taxation would not exist.

Instead, South Metro cites *St. Louis County Library Dist. v. Hopkins* as authority for the General Assembly to legislate to avoid double taxation. Respondent's Brief, 67, 69-70. The result of *Hopkins*, however, was to continue overlapping library taxes imposed by a county and a city. *Hopkins*, 375 S.W.2d 71, 74 (Mo. 1964). Although this Court states in *Hopkins* that the legislature is authorized to legislate to affect an existing district's taxing power, the primary context of the discussion and the cases cited there reveal that the legislature's means for doing so would be to alter the boundaries of the competing taxing districts—not by making the taxing district's tax inapplicable. *See id.* at 74-76.

Especially harmful for South Metro, however, is this Court's reference in *Hopkins* to Section 321.320 in this context of legislative boundary changes. "Where the General Assembly has intended to make provision for the result in cases resulting from annexations it has done so… And see § 321.320, V.A.M.S., providing for the exclusion from certain fire protection districts of property in the district 'included within a city having a population of forty thousand inhabitants or more….'" 375 S.W.2d at 75-76. Three years after the amendment to Section 321.320, which replaced the phrase "is now or hereafter included" with "is included", this Court, in practical application, evinced its belief that Section 321.320 is not stuck in time, but rather is evidence of the legislature's ability to resolve the problem of overlapping functions by changing the existing

boundaries of fire districts. This is precisely the City's position, which if adopted would avoid the constitutional questions raised in this case.

Mo. Const. Article X, § 6 establishes the Constitutionally permissible exemptions from property taxation and provides, in pertinent part, 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). As was this case in the discussion of the Article X, § 3 claim above, South Metro's reliance on *St. Louis County Library Dist. v. Hopkins* is misguided. *Hopkins* is completely inapplicable to an Article X, § 6 claim. This Court in that case held that two competing library taxes could continue to apply in an area of overlapping jurisdiction caused by a recent annexation without violating Mo. Const. Art. X, § 3's uniformity requirement. *Hopkins*, 375 S.W.2d at 74. In fact, Mo. Const. Art. X, § 6 is not cited anywhere in *Hopkins*. At most, this Court offers examples of statutes where the General Assembly made legislative boundary changes to resolve overlapping jurisdictional issues caused by annexation. *See Hopkins*, 375 S.W.2d at 75-76. Changing a taxing jurisdiction's boundaries so that its tax is no longer applicable is very different than creating an exemption from the imposition of a particular tax for a portion of a taxing jurisdiction's area.

South Metro fails to respond to the holding in *City of Hannibal v. County of Marion*, 800 S.W.2d 471 (Mo.App. E.D.1990), which clearly states that if a particular property tax exemption is not enumerated in Mo. Const. Art. X, § 6, then the exemption is void. *Hannibal* at 473. Just as in *Hannibal*, where "[n]othing in Art. X, § 6 permits an exemption from county taxes for 'citizens of Hannibal'", so too an exemption from South

Metro's tax for "property in the Annexed Area" is void. Instead, South Metro posits, without citation to supporting authority, that the language in Section 72.418.2 does not exempt the Annexed property from taxation. But 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).

Conclusion

Section 72.418.2 violates Article X, Sections 3 and 6 of the Missouri Constitution.

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.

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 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 7,433 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 one copy of the foregoing brief and one computer disk have been mailed, postage pre-paid to counsel of record listed below on the 29th day of September, 2008:

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