IN THE SUPREME COURT OF MISSOURI

THOMAS NESKE et al.,	)	
	)	
Plaintiffs/Respondents,	)	
	)	
vs.	)	No. SC87976
	)	
CITY OF ST. LOUIS et al.,	)	
	)	
Defendants/Appellants.	)	

Substitute Reply Brief of Appellants
City of St. Louis, Missouri, Francis G. Slay, James Shrewsbury, and Darlene Green

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Appeal from the Circuit Court of St. Louis City
The Honorable David Dowd, Circuit Judge

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TABLE OF CONTENTS

Table of Authorities 3

Statement of Facts 6

Argument 7

Point I 7

Point II 23

Point III 26

Conclusion 30

Certificate of Service 32

Certificate of Compliance 33

TABLE OF AUTHORITIES

Alumax Foils, Inc. v. City of St. Louis,

939 S.W.2d 901 (Mo. banc 1997) 13, 14

Bartlett v. Ross, 891 S.W.2d 114 (Mo. banc 1995)..... 11, 12

Boone County Court v. State, 631 S.W.2d 321,

(Mo. banc 1982) 9, 11, 12, 14, 15, 16, 17, 18, 21

Buchanan v. Kirkpatrick, 615 S.W.2d 6 (Mo. banc 1981)..... 9, 10

City of Hazelwood v. Peterson, 48 S.W.3d 36 (Mo. banc 2001) 11

City of Jefferson v. Missouri Dep't of Natural Resources,

916 S.W.2d 794 (Mo. banc 1996) 14, 15

David Ranken, Jr. Tech. Inst. v. Boykins,

816 S.W.2d 189 (Mo. banc 1991) 13

Fort Zumwalt School Dist. v. State,

896 S.W.2d 918 (Mo. banc 1995) 8, 11, 12, 14, 15

In Interest of T.B., 963 S.W.2d 252 (Mo. App. 1997)..... 8

In re Tri-County Levee Dist., 42 S.W.3d 779 (Mo. App. E.D. 2001) 15

Keller v. Marion County Ambulance Dist.,

820 S.W.2d 301 (Mo. banc 1991) 20

Kelly v. Hanson, 959 S.W.2d 107 (Mo. banc 1997)..... 15

Marion v. Marcus, 199 S.W.3d 887 (Mo. App. 2006)..... 13, 14

Missouri Ass'n of Counties v. Wilson, 3 S.W.3d 772 (Mo. banc 1999)..... 12

Missouri State Employees' Retirement Sys. v. Jackson County,

738 S.W.2d 118 (Mo. banc 1987) 18, 19, 20

Missourians for Separation of Church & State v. Robertson,

592 S.W.2d 825 (Mo. App. 1979) 16

Roberts v. Progressive Northwestern Ins. Co.,

151 S.W.3d 891 (Mo. App. 2004) 8

Sommer v. City of St. Louis, 631 S.W.2d 676 (Mo. App. 1982) 16

State ex rel. Board of Health Center Trustees v. County Comm'n of Clay County,

896 S.W.2d 627, 631 (Mo. banc 1995) 9, 11, 12

State ex rel. Employees of Retirement System v. Board of Estimate and Apportionment, Cause No. 004-01181, aff'd at 43 S.W.3d 887

(Mo. App. 2001) 24, 29

State ex rel. Field v. Smith, 49 S.W.2d 74 (Mo. 1932) 25

State ex rel. Hunter v. Lippold, 142 S.W.3d 241 (Mo. App. 2004) 28, 29

State ex rel. Sayad v. Zych, 642 S.W.2d 907

(Mo. banc 1982) 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22

State ex rel. Twenty-Second Judicial Circuit v. Jones,

823 S.W.2d 471 (Mo. banc 1992) 25

Tomlinson v. Kansas City, 391 S.W.2d 850,(Mo. banc 1965) 30

Mo. Const. Art. VI, § 25 ..... 18, 19

Mo. Const. Art. VI, § 26 ..... 23, 24

Mo. Const. Art. X, § 16 7

Mo. Const. Art. X, § 18 ..... 9, 10, 11

Mo. Const. Art. X, § 21 ..... 9, 10, 11, 12, 14, 15, 16, 17, 20

Mo. Const. Art. X, § 22 ..... 9, 10, 12, 15, 20

Mo. Const. Art. X, § 23 ..... 15, 16

City of St. Louis Revised Code § 4.16.500 29

§ 86.337, RSMo 21, 26, 27, 28

§ 86.343, RSMo 21

§ 86.344, RSMo 26, 28

§ 86.810, RSMo 15

§ 262.597, RSMo 28

Rule 70.02 13

Rule 84.04 7

STATEMENT OF FACTS

The respondents say that they are not satisfied with the accuracy or completeness of the statement of facts in the City's substitute brief, but they do not favor the Court with an explanation of how it might be inaccurate or incomplete. The respondents set forth an elaborate description of the certification process, a vote by the trustees of the PRS, and an explanation of the actuary's assumptions and report, none of which are necessary or relevant to the issues on appeal. The City's statement of facts is entirely adequate.

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PRS AND AGAINST THE CITY BECAUSE REQUIRING THE CITY TO PAY THE AMOUNT CERTIFIED BY THE PRS VIOLATES THE HANCOCK AMENDMENT (ARTICLE X, SECTIONS 16-24, OF THE MISSOURI CONSTITUTION) IN THAT THE HANCOCK AMENDMENT PROHIBITS THE STATE FROM REQUIRING INCREASED EXPENDITURES BY OTHER POLITICAL SUBDIVISIONS BEYOND THE FUNDING LEVEL IN 1981, AND THE UNDISPUTED FACTS SHOW THAT THE PRS CERTIFIED AMOUNT EXCEEDS THE FUNDING LEVEL IN 1981.

The PRS attempts to avoid a consideration of the merits of this point by claiming that the City has waived its Hancock Amendment argument by not raising it in the point relied on. The City crafted the above point relied on to comply with Rule 84.04(d)(1), which requires that the point shall (A) identify the trial court ruling or action challenged (the entry of summary judgment in favor of the PRS); (B) state the legal reasons for reversible error (the certified amount violates the Hancock Amendment); and (C) explain in summary fashion why those legal reasons support the claim of reversible error (the state cannot require increased expenditures without appropriation, and the certified amount exceeded the funding required in 1981).

As explained in Point I, the City is aggrieved by the entry of judgment in favor of the PRS in violation of the Hancock Amendment. Inherent in this claim of error are the sub-issues mentioned in the City's substitute brief -- whether the PRS is a state agency,

whether the level of activity has increased, whether the level of activity is measured in raw dollars or adjusted for inflation, and whether the City has standing.

The cases from the Court of Appeals cited by the PRS are not on point. In *Roberts v. Progressive Northwestern Ins. Co.,* 151 S.W.3d 891 (Mo. App. 2004), the Southern District held that the appellant did not preserve her argument challenging the admission of hearsay testimony by asserting that the judgment was against the weight of the evidence in her point relied on. 151 S.W.3d at 894. The Southern District noted that the point relied on did not specify the challenged ruling that the trial court erred in admitting specific evidence. Furthermore, the point relied on did not specify that the testimony was inadmissible hearsay and why, in the context of the case, the inadmissible hearsay supported reversal. Similarly, in *Interest of T.B.,* 963 S.W.2d 252, 256 (Mo. App. 1997), the appellant's point relied on questioned the sufficiency of the evidence to support the judgment, yet the appellant's argument challenged the trial court's admission of hearsay evidence. Unlike *Roberts* and *Interest of T.B.,* the City's point relied on clearly challenges the trial court's action in granting summary judgment to the PRS, and the argument that follows is addressed to that issue.

Further, this is a case of public importance in which the City's arguments are crystal clear. Millions of public dollars are at issue. The Court has been provided with extensive briefs addressing the merits. The PRS was certainly able to discern the City's argument and provide a vigorous response. Indeed, the PRS devotes eleven pages of its substitute brief to the standing issue alone. The public interest would not be served by gratifying the PRS's desire to avoid a decision on the merits.

A. The City Defendants have standing to raise the Hancock Amendment.

The PRS contends that because the City is not a taxpayer, it is not allowed to raise the Hancock Amendment as a defense. The PRS's reliance on *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 919 (Mo. banc 1995), and *State ex rel. Board of Health Center Trustees v. County Comm'n of Clay County*, 896 S.W.2d 627, 631 (Mo. banc 1995), ignores the interests sought to be protected by the City. As noted in the City's first brief, *Fort Zumwalt* and *Clay County* are distinguishable and do not support the PRS's standing argument. If the Court were to find *Fort Zumwalt* and *Clay County* to apply, however, they were wrongly decided, and the Court should use this case as an opportunity to clarify the law in this area.

The central purpose of the Hancock Amendment "is to limit taxes by establishing tax and revenue limits and expenditure limits for the state and other political subdivisions which may not be exceeded without voter approval." *Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 13 (Mo. banc 1981). To achieve this goal, the Hancock Amendment added three key provisions to the Missouri Constitution. *See Boone County Court v. State*, 631 S.W.2d 321, 325-26 (Mo. banc 1982). Article X, section 18, limits state revenues and expenditures. Section 22 limits local government revenues in the form of taxes, licenses, or fees. Section 21 prevents the state from requiring local government to assume a greater proportion of currently shared financial responsibilities and eliminates the state's power to mandate new or increased levels of service or activity by local government without state funding. *See Boone County*, 631 S.W.2d at 325-26. The official ballot title presented to the voters when they passed the Hancock Amendment showed these three

purposes: "[1] Limits state taxes except for yearly adjustments based on total incomes of persons in Missouri or emergencies; [2] prohibits local tax or fee increases without popular vote. [3] Prohibits state expansion of local responsibility without state funding." *Buchanan,* 615 S.W.2d at 13.

Section 18 ("the general assembly . . . shall not increase taxes or fees without voter approval") and section 22 ("Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees . . . without the approval of the required majority of the qualified voters") are both protections explicitly created for the benefit of taxpayers. Thus, it makes sense that only taxpayers have standing to complain of violations of section 18 or section 22. *See, e.g., City of Hazelwood v. Peterson,* 48 S.W.3d 36 (Mo. banc 2001) (holding taxpayers have standing to complain of illegal tax while city does not).

Section 21, by its plain terms, is not directed to taxpayers, but rather is explicitly designed for the protection of local government entities: "The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of ***counties and other political subdivisions***. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of ***counties or other political subdivisions***, unless a state appropriation is made and disbursed to pay the ***county or other political subdivision*** for any increased costs." Mo. Const. Art. X, § 21 (emphasis added).

Taxpayers are not mentioned in section 21. The interests of individual taxpayers are directly implicated by sections 18 and 22 because those sections relate to the imposition of taxes. A violation of section 21, on the other hand, affects taxpayers only indirectly. (This is shown by the PRS's argument in this case, which says that the City can just take money from some other part of the budget to meet the PRS's demands for additional funding rather than raising taxes.) In these circumstances, it is appropriate for the local government entity to have the ability to contest a violation of section 21 of the Hancock Amendment, as the Court permitted in, for example, *State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982), and *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982). As a body corporate and politic with the ability to sue and be sued, the City is the appropriate entity to raise a Hancock defense.

It is apparent how any confusion arose over a local government entity's standing to contest a violation of section 21 of the Hancock Amendment. *Clay County* holds that a county lacks standing to raise a Hancock objection to a tax imposed on taxpayers: "The Commission has no standing in such a matter." 896 S.W.2d at 631.

Fort Zumwalt was decided the same day as *Clay County* and, according to the PRS, extended the *Clay County* holding (only taxpayers can object to a tax levy) to a context in which it is illogical. In *Fort Zumwalt*, the state unconstitutionally reduced the proportion of funding it provided to school districts for special education services. The Court cited *Bartlett v. Ross*, 891 S.W.2d 114, 116 (Mo. banc 1995), for the straightforward proposition that school districts are not considered real parties in interest in tax protests before the State Tax Commission (and it is true that school districts are

only indirectly affected by changes in levies imposed on taxpayers). The Court than declared that the school districts in *Fort Zumwalt* were without standing to bring an action to enforce Article X, Section 21. *Fort Zumwalt*, 896 S.W.2d at 921.

The logical leap in *Fort Zumwalt* makes no sense. While a local government entity has no standing to raise a claim that affects taxpayers directly and the local government entity only indirectly (as in *Clay County* and *Bartlett*), the local government entity must be allowed to assert a violation that falls on it directly and on taxpayers only indirectly (as in *Zych* and *Boone County*). To hold that a local government entity cannot assert a Hancock violation that falls directly on the local government entity, while taxpayers who are affected indirectly if at all are the only ones who can raise the issue, makes no sense. Such a holding would ignore the fundamental differences between the sections of the Hancock Amendment that protect taxpayers directly (sections 18 and 22) and the section that expressly protects "counties and other political subdivisions" (section 21). Subsequent cases that parrot the erroneous conclusion in *Fort Zumwalt* without analysis do nothing to bolster the PRS's claims. *See, e.g., Missouri Ass'n of Counties v. Wilson*, 3 S.W.3d 772, 776 (Mo. banc 1999).

This case illustrates the absurdity of the PRS's argument. The PRS, a governmental entity, sued the City, a governmental entity, and its officials. As the plaintiff, the PRS got to choose whom to sue. It did not sue any taxpayer, and indeed, it could not file an action that would state a claim against a City taxpayer because the PRS has no right to any relief from any City taxpayer. It sought relief from the City, the entity whose money it seeks to obtain. Holding that the City and its officials, the only

defendants in the case, lack standing to raise a defense implicated by the claims the plaintiffs have chosen to advance would be an absurd result.

The courts of this state routinely clarify the law as set forth in previous opinions. For many years, this Court held that the Court of Appeals lacked jurisdiction to entertain appeals from judgments involving the validity of local taxes imposed under the authority of state statutes. *See, e.g., David Ranken, Jr. Tech. Inst. v. Boykins,* 816 S.W.2d 189, 190 (Mo. banc 1991). In 1997, however, the Court reversed these cases, holding that they misinterpreted the Missouri Constitution: "We are, of course, aware of those cases and, by our opinion in this case, believe that they are not consistent with the plain language of the constitution. To remove any doubt about our holding, the listed cases are overruled to the extent that they silently acquiesce to this Court's jurisdiction or directly interpret the constitution to permit this Court to assume exclusive appellate jurisdiction where construction of a municipal revenue ordinance is at issue." *Alumax Foils, Inc. v. City of St. Louis,* 939 S.W.2d 907, 911 (Mo. banc 1997).

Similarly, the Western District recently recognized a longstanding error in a line of cases. In *Marion v. Marcus,* 199 S.W.3d 887 (Mo. App. 2006), both parties stated that the standard of review for the trial court's refusal to give a proffered jury instruction was abuse of discretion. The parties supported this contention by citation to numerous cases, but the Court of Appeals recognized that the those cases erroneously declared the law: "The cases cited by the parties indeed stand for this proposition. However, those cases conflict with Rule 70.02(a) . . . . The refusal to give a verdict director supported by the law and the evidence is not a matter for the trial court's discretion. . . . Our research

indicates that many of the cases stating that the trial court has discretion to give or refuse an instruction constitute an unsupported and unreasoned expansion of the narrow circumstances in which the exercise of trial court discretion is justified." *Id.* at 892-93.

As in *Alumax* and *Marion*, the Court should recognize the confusion caused by *Fort Zumwalt* and cases following it. Local government entities have standing to raise section 21 of the Hancock Amendment in opposition to unconstitutional state actions. *See Zych; Boone County*. The Court should reverse the trial court's judgment to the contrary.

In addition to the foregoing, *Fort Zumwalt* is distinguishable. In that case, the claim was that the state had failed to maintain its proportion of funding to local school districts for special education so that the additional, unfunded burden would fall on the districts' taxpayers. In this case, by contrast, the issue is not maintaining the state's proportion of an activity, but rather an unfunded increase in an existing activity. The plaintiffs claim that the City should fund this increase by taking money from other City services, not by increased taxes.

The PRS attempts to distinguish some of the cases cited by the City by pointing to the presence of a taxpayer; however the presence of a taxpayer does not change the holding in each of those cases. In *City of Jefferson v. Missouri Dep't of Natural Resources,* 916 S.W.2d 794 (Mo. banc 1996), the Court held that the Hancock Amendment limited a new statute that increased costs with respect to required solid waste management plans from the municipalities. The PRS says that a taxpayer from Jefferson City was a plaintiff, and therefore the standing requirement was met. However, the cities

of St. Joseph and Eldon and Buchanan County were also plaintiffs, and no taxpayers from those cities were named, yet the Court held in *City of Jefferson v. Missouri Dep't of Natural Resources,* 863 S.W.2d 844 (Mo. banc 1993), that remand was appropriate for all of the appellants (including St. Joseph, Eldon, and Buchanan County) to put on evidence of increased costs associated with the new statute.

Fort Zumwalt does not purport to overrule *Zych* or *Boone County*. Other cases following *Fort Zumwalt* allow municipalities or other political subdivisions to assert the Hancock Amendment, including *Kelly v. Hanson,* 959 S.W.2d 107 (Mo. banc 1997), and *In re Tri-County Levee Dist.,* 42 S.W.3d 779 (Mo. App. E.D. 2001). In *Tri-County,* the levee district filed a petition for readjustment of benefits for property owned by the state highway commission. The MHTC argued in response that the levee district's assessment violated Section 22 of the Hancock Amendment. Although the Court of Appeals rejected MHTC's argument (finding that the assessment was not a tax under the Hancock Amendment), it is notable that the court considered the merits of the MHTC's Hancock Amendment argument, which was raised as a defense to the levee district's petition. *Tri-County Levee Dist.,*42 S.W.3d at 786.

The PRS claims that section 86.810 cannot supersede the language of the Missouri Constitution Article X, section 23, which provides taxpayers with standing to bring suit to enforce the Hancock Amendment. The plain language of section 23 does not address whether municipalities may raise Section 21 of the Hancock Amendment as a defense in a declaratory judgment action. The Missouri General Assembly is not precluded from providing for such standing by statute, as it did in section 86.810. Regardless of the

statute, as explained above, local government entities have standing to raise a violation of a section of the Hancock Amendment that was explicitly designed to protect them. *See Zych*; *Boone County*. Further, there was a good reason why the taxpayers of Missouri, who passed the Hancock Amendment through the initiative process, would include section 23 to provide explicitly for the standing of taxpayers. In the time period that the Hancock Amendment was passed, the issue of taxpayer standing was highly unsettled. See, e.g., *Missourians for Separation of Church & State v. Robertson*, 592 S.W.2d 825, 837 (Mo. App. 1979); *Sommer v. City of St. Louis*, 631 S.W.2d 676, 679 (Mo. App. 1982). Section 23 does not express any intent to deny standing to local governments protected by the express terms of section 21.

B. Requiring the City to pay the certified amount would violate the Hancock Amendment.

Requiring the City to pay the PRS certified amount for 2004 would violate the Hancock Amendment, Missouri Constitution Article X, Section 21, which prohibits the state from requiring increased activities or services of political subdivisions beyond that required at the time the Hancock Amendment went into effect in 1981.

(i) The PRS is a state agency under the Hancock Amendment.

The PRS argues that it is not a state agency subject to the restrictions of the Hancock Amendment. The PRS attempts to distinguish itself from the Police Board, which the Court determined to be a state agency subject to the Hancock Amendment. *See Zych*, 642 S.W.2d at 907 (Police Board could not require the City to increase its level of funding beyond that required by law at the time that the Hancock Amendment became

effective in 1981 unless the state made an appropriation to fund the increase). The PRS contends that its functions are purely local when compared to the state functions performed by the Police Board.

In determining the Police Board's status as a state agency for purposes of the Hancock Amendment, the Court emphasized that the State had the power to compel municipalities to fund a police force. *Zych*, 642 S.W.2d at 910. The General Assembly then delegated that authority to the Police Board. *Id.*

The PRS ignores the fact that the Police Board, created pursuant to Chapter 84, RSMo, serves the City of St. Louis, not the entire state. Like the Police Board, the PRS is explicitly "created and established" by state law. The duty to fund the PRS arises only from state statutes. Similar to *Zych*, the state has compelled the City to fund the pension system. The General Assembly delegated this authority to the PRS; therefore the PRS is as plainly a state agency for purposes of the Hancock Amendment as the Police Board was in *Zych*.

The PRS contends that Article X section 21 does not include pension benefits within its scope. The plain language of the Hancock Amendment does not support this claim. The PRS cites to *Boone County v. State*, 631 S.W.2d 321 (Mo. banc 1982), in which the Court held a statutory increase in annual salary for county collectors to be unconstitutional unless the state paid for such an increase. The PRS improperly relies on *Boone County* for the proposition that an increase in activity refers to the operation of government in performing services, and then attempts to argue that pension benefits have nothing to do with the operation of government.

What PRS again fails to recognize is that an increase in the *funding* of such benefits is the increased activity, which undoubtedly affects the operation of the government since the PRS is seeking more than $ 9.5 million from the City's budget. PRS does not acknowledge that *Boone County* involved an increase in the *salaries* of county collectors, which would have equally as much of an impact on the "operation of government in performing services" as pension payments. *Boone County*, 631 S.W.2d at 325-26. PRS further ignores *Zych*, which addressed the City's duty to fund the Police Board. 642 S.W.2d at 910-11. Requiring an increased cost to fund activities as to which the City has an existing statutory duty is an explicit violation of the Hancock Amendment. *Id.*; *see also Missouri State Employees' Retirement Sys. v. Jackson County*,738 S.W.2d 118, 121 (Mo. banc 1987).

(ii) The activity required of the City has increased since 1980.

In arguing that the activity required of the City has not increased since 1980, the PRS first asserts that the cost-of-living adjustments (COLAs) in retirement benefits should not be deemed an increased activity because voters approved such adjustments following passage of the Hancock Amendment. Quite to the contrary, voters simply enabled cities, counties, and political subdivisions to provide for COLAs out of public funds if the pension systems would remain actuarially sound. Mo. Const. Art. VI, § 25. Voters did *not* require the provision of these COLAs; rather, the voters simply left it in the hands of the cities, counties, or political subdivisions to determine whether and when the adjustments could be provided. Unlike the first exception in section 25, which grants the *General Assembly* power to authorize cities, counties, or political subdivisions to

provide for pensions, the last exception does not even refer to the General Assembly, which indicates that the voters sought to leave the determination of whether to provide COLAs up to the cities and counties.

Here, the City did not "authorize" or approve such a provision -- it was forced upon the City by the state legislature, which is not a city, county, or a political subdivision. Section 25 makes no mention of what entity should bear the cost when the state legislature forces COLAs upon a city without city approval. Accordingly, the COLAs must be taken into consideration when determining whether the City has been required to fund an increase in activity mandated by the state without corresponding state appropriations.

(iii) The City's increased activity is determined by raw dollar figures.

The PRS suggests that the City's activity level has not increased when calculating the City's contribution to the pension system as a percentage of the active members' payroll. This is not a proper calculation of the activity increase, as evident by the Court's calculation using raw dollar figures in *Zych.* 642 S.W.2d at 909.

The PRS creatively asserts that the holding in *Missouri State Employees' Retirement System v. Jackson County,* 738 S.W.2d 118, 121 (Mo. banc 1987) ("*MOSERS*"), set forth the test for the increase in the activity of a pension system as the "net fiscal effect." The PRS cites to this as support for its assertion that the Court should compare the City's contribution to the pension system as a percentage of the active members' payroll. The PRS' reliance on *MOSERS* is misplaced and taken out of context. In *MOSERS,* the court held that the Hancock Amendment did not allow the county to

withhold funding to clerks for past service credits because the state had provided the requisite appropriation. 738 S.W.2d at 121. According to this Court, the county was sufficiently compensated by the state since the county was relieved of compensating the clerks in the future pursuant to a new statute:

> The county argues that the requirement that it fund past service credits is an increased level of activity or service, not previously required. It overlooks the patent circumstance that the net effect of the changes wrought by Sec. 483.245 and 103.345 is to relieve it of the burden of compensating the clerks after July 1, 1981. It would retain the benefit of the transfer, while rejecting the burden. The net fiscal effect of the changes is overwhelmingly in favor of the county.

Id. Nowhere does the Court hold that the test for increased activity should be based on a percentage calculation. Indeed, this assertion is directly contrary to the Court's analysis in *Zych.* 642 S.W.2d at 909-10.

The people of Missouri determined that the effect of inflation is not relevant in dealing with the unfunded mandates provisions of the Hancock Amendments. For example, section 22 deals with alterations in the levy of various taxes when revenue from the items subject to the Hancock Amendment increases faster than the rate of inflation. *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 303 (Mo. banc 1991). Notably, section 21 of the Hancock Amendment deals in absolute dollars, making no

provision for the effect of inflation in connection with unfunded mandates. If the drafters of the Hancock Amendment had wanted to include inflation as a factor in barring unfunded mandates, they could have done so.

The PRS asserts that the City's certified budget amount for 1980 is erroneous; however, the City did not argue that normal contribution rate constituted the entire certified budget amount. Rather, the PRS' dispute lies with the City's argument that only the normal contribution in 1980 should be used as the base from which to judge whether and how much the City's activity has increased since the Hancock Amendment was enacted.

Section 86.337, RSMo, provides, in part, that the total amount payable by the City in any given year shall not be less than the "normal contribution rate" of the total compensation earnable by all members during the year. In 1981, the City paid $5,886,755 as the normal contribution set forth under section 86.337 RSMo, excluding administrative expenses provided pursuant to section 86.343, RSMo. L.F. at 207, 542. The PRS urges the Court to use $7,854,680 as the base figure, which is the entire amount paid by the City in 1981 to the PRS, including the City's portion of administrative expenses. As the PRS recognizes, the certified amount in 1981 included an accrued liability contribution, which has been discontinued today. The PRS is comparing apples to oranges. Absent additional state funding, the $5,886,755 total is the maximum amount that may be sought by the PRS in accordance with the Hancock Amendment. *See Boone County*, 631 S.W.2d at 325-26; *Zych*, 642 S.W.2d at 910-11. The amount certified by the PRS for fiscal year 2003-2004 totaled $9,575,892. L.F. at 210. This amount is almost $4

million more than the normal contribution required in 1981. As in *Zych*, the PRS may not require the City to fund the system in an amount in excess of that required in 1981 without a corresponding appropriation by the state.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PRS AND AGAINST THE CITY BECAUSE REQUIRING THE CITY TO PAY THE AMOUNT CERTIFIED BY THE PRS VIOLATES ARTICLE VI, SECTION 26(A), OF THE MISSOURI CONSTITUTION AND CONSTITUTES AN IMPROPER DELEGATION OF LEGISLATIVE POWER IN THAT ARTICLE VI, SECTION 26(A), PROVIDES THAT NO CITY MAY BECOME INDEBTED BEYOND ITS INCOME AND THE UNDISPUTED FACTS SHOW THAT THE CITY'S REVENUE FOR 2003-2004 HAS ALREADY BEEN APPROPRIATED AND TRANSFERRED TO VARIOUS RECIPIENTS SO THAT IF THE CITY WERE REQUIRED TO PAY THE CERTIFIED AMOUNT FOR FISCAL YEAR 2003-2004, THE CITY WOULD BE OBLIGATED IN EXCESS OF ITS REVENUES.

Requiring the City to appropriate the certified contributions to the PRS would violate Article VI, section 26(a), of the Missouri Constitution, which provides that no city may become indebted beyond its income:

> No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution.

Mo. Const. Art. VI, § 26(a).

The PRS first responds by criticizing the City's citation to Judge Dierker's opinion in *State ex rel. Employees' Retirement System of the City of St. Louis v. Board of Estimate and Apportionment*, Cause No. 004-01181, which was affirmed on appeal at 43 S.W.3d 887 (Mo. App. 2001) ("*ERS*"). Obviously, the City recognizes that neither of these opinions constitute precedent; however, given the similar posture, the City believes that *ERS* and Judge Dierker's rationale provides persuasive authority. The PRS's histrionic objections are unwarranted.

The PRS next contends that Article VI, section 26(a), is inapplicable to the present case because the PRS governing statutes do not require the City to borrow money to pay its contribution. However, requiring the City to appropriate the certified contributions to the PRS would violate section 26(a) because the revenue for 2003-2004 has already been appropriated and transferred to various recipients. If the City is required to pay the certified amount for fiscal year 2003-2004, the City would then be obligated in excess of its revenues. In *ERS*, Judge Dierker recognized that the City's budget is adopted on an annual basis, and, as a municipality, it cannot obligate itself in excess of its anticipated revenues in any given fiscal year except through proper bond issues. *See ERS*, L.F. 680.

The PRS attempts to draw an analogy to a parent with a child support obligation who spends his/her income on travel and entertainment and is unable to pay the child support as a result. As explained to the trial court, the City is not arguing that it should be allowed to forego payment of member benefits (i.e. child support) and, in fact, the City has repeatedly recognized this obligation. The City is not deliberately creating a constitutional violation or attempting to avoid its legal duties by allowing the clock to run

out. Rather, the City is trying to balance the needs of this community. The City exercised its discretion to appropriate funds for police officer salaries, emergency services, and garbage pick-up and street cleaning, to name only a few important services. Whether this is "reckless spending," as the PRS suggests, is a matter of opinion, but the City's discretion to make these determinations is enshrined in the law.

The PRS relies on *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471 (Mo. banc 1992), in support of its claim that the Board of Trustees does not have unfettered discretion, and the City could have sought an administrative appeal of the certified amount. But the City does not challenge the actuarial calculation; rather, the City's dispute lies in whether the entire certified amount must necessarily be appropriated under the law and whether, if such appropriation is required, this is an improper delegation of the legislative power of appropriation. Despite the PRS' efforts to distinguish *State ex rel. Field v. Smith*, 49 S.W.2d 74 (Mo. 1932), by asserting that the trustees do not have unfettered discretion because of the actuarial computation, this does not change the fact that, under the PRS' interpretation of the statute, "the entire revenue of the city is subject to appropriation," which could leave the city's municipal functions "greatly impaired, if not wholly destroyed." *Id.* at 78-79. Any purported restrictions under the guise of an actuarial computation are unreasonable because such "restrictions" fail to consider the City's revenue.

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE PRS AND AGAINST THE CITY BECAUSE THE CITY'S PAYMENT WAS ADEQUATE AS A MATTER OF LAW IN THAT SECTION 86.337, RSMO, PROVIDES THAT, NOTWITHSTANDING THE CERTIFIED AMOUNT, A PAYMENT BY THE CITY IS SUFFICIENT AS A MATTER OF LAW IF, WHEN COMBINED WITH THE ASSETS OF THE RETIREMENT SYSTEM, THERE IS ENOUGH MONEY TO PROVIDE THE BENEFITS PAYABLE DURING THE CURRENT YEAR AND THE UNDISPUTED FACTS SHOW THAT THE ASSETS OF THE PRS EXCEED THE AMOUNT NECESSARY TO SATISFY BENEFITS PAYABLE DURING THE CURRENT YEAR.

The PRS argues that section 86.344 invokes mandatory duties on the part of the City and that the City lacks any discretion in determining whether to appropriate and transfer the certified amount. The undisputed facts show why the City does and ***must*** have discretion in determining the amount it pays over to the PRS in a particular year (as long as the PRS has enough funds to meet current obligations). This is the recent history of the PRS's certified requests for contributions from the City:

1994:	$0
1995:	$0
1996:	$0
1997:	$0
1998:	$0

1999:	$0
2000:	$0
2001:	$0
2002:	$0
2003:	$0
2004:	$9,575,892

L.F. at 161-62.

Thus, out of the clear blue sky, the PRS demanded a payment of over nine million dollars from the City after making no requests since 1994. The City's budgets are within the discretion of the City's elected officials -- the Board of Aldermen and the Board of Estimate and Apportionment. The unprecedented leap in the PRS's funding request would have put a nine-million-dollar hole in the City's budget at a difficult time for municipalities all over the country.

The possibility of such a sudden increase must have been foreseen by the General Assembly in giving the City discretion in the amount it was required to pay. Notwithstanding the certified amount, a payment by the City is sufficient as a matter of law if, when combined with the assets of the retirement system, there is enough money to provide the benefits payable during the current year:

> The total amount payable to the retirement system for each fiscal year shall be not less than the normal contribution rate of the total compensation earnable by all members during the year; provided, however, that ***the aggregate payment by the***

> ***said cities shall be sufficient when combined with the assets of the retirement system to provide the pensions and other benefits payable during the then current year***.

§ 86.337, RSMo (emphasis added).

The City recognizes that the extreme result of its interpretation would allow the PRS's funds to be depleted to zero before payment is *required*, but this is no more extreme than the PRS's interpretation of the City's obligations, which could require appropriation of the City's entire budget. Section 86.337 provides the City with the necessary discretion in determining how its budget should be appropriated. When all of the statutory provisions are read *in pari materia*, the City is simply required to appropriate and transfer an amount sufficient to satisfy the benefits payable during the *current year*, when added to the other pension fund assets.

The PRS argues that section 86.344 provides that the City "shall" appropriate and transfer the certified amounts to the PRS. The PRS relies on a recent case handed down by the Western District, *State ex rel. Hunter v. Lippold*, 142 S.W.3d 241 (Mo. App. 2004), which interpreted the language of an agricultural extension program statute as requiring a minimum appropriation by the DeKalb county commissioners. *Hunter* is not helpful to the PRS' interpretation of Chapter 86. The statute at issue in *Hunter* explicitly mandated a *minimum* appropriation of $10,000. *See* § 262.597 RSMo.

Contrary to the present dispute and statute at issue, the county commissioners in *Hunter* were not able to rely on additional language in the agricultural extension program

statute giving the county commissioners discretion in the amount that the county was required to *pay* in a given year. Unlike *Hunter*, the City is abiding by the plain language of Chapter 86 and agrees that it is required to pay whatever is necessary to satisfy member benefits, when combined with the remaining fund assets, pursuant to section 86.337. However, the City has discretion to appropriate any amount above and beyond what section 86.337, RSMo, provides is sufficient in a given year. Accordingly, *Hunter* is distinguishable from the present case and the Court's interpretation of that particular statute as mandatory is not binding.

The case most directly on point, despite the PRS' effort to discount its relevance, is *ERS*, in which Judge Dierker interpreted the use of the word "shall" in the *ERS* ordinance as directory. The ERS ordinance is much more similar than the statute in *Hunter* to the statutory language at issue here in providing that the ERS Board of Trustees "shall certify" the amounts which will become due and payable to the general revenue fund and that the certified amounts "shall" be included in the City's budget, appropriated and transferred to the ERS for the ensuing year. *See ERS*, L.F. at 673. Judge Dierker rejected the argument by the St. Louis City Employees Retirement System that the City of St. Louis Revised Code section 4.16.500 mandated an appropriation and transfer of the retirement system's certified amount by the City because of the use of the word "shall" in the ordinance. *See ERS*, L.F. at 673. Similarly, the plain language of Chapter 86, when construed together, shows that the City is not required to pay the certified amount if it exceeds the amount necessary to satisfy benefits payable during the current year.

The PRS also attempts to distinguish *Tomlinson v. Kansas City*, 391 S.W.2d 850, 853 (Mo. banc 1965), by arguing that interpretation of an ordinance was involved rather than a statute. This fails to acknowledge the underlying ***policy interests*** that the Court found important. "***Actuarial soundness is a creditable objective for a pension system, but over-all municipal financial stability is a consideration which cannot be ignored.***" *Id.* (emphasis added). The Court held that, under predecessor statutes, Kansas City was not required to appropriate the sums certified by Kansas City's firemen's pension fund, relying in part on the importance of financial stability and on the fact that the pension system had adequate funding to provide member benefits. The PRS's claims the City's budgetary constraints are irrelevant should be rejected.

The City has discretion to pay the pension fund in any amount equal to or greater than the legally "sufficient" sum. The City agrees that it cannot pay less than the amount that is legally sufficient, but the PRS cannot force the City to pay more. Because the plain language of the PRS governing provisions is directory and does not require the City to pay the certified amount, the trial court's judgment should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing reply brief of appellants and a disc containing a copy of the foregoing brief of appellants was served via U.S. mail, postage prepaid, this 14th day of December, 2006 to the following attorneys for respondents:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Reply Brief of Appellants includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 6,344, exclusive of the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

The undersigned further certifies that the discs filed with the Brief of Appellants and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.

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