

IN THE MISSOURI SUPREME COURT

THOMAS NESKE, et al.,

Plaintiffs/Respondents,

v.

CITY OF ST. LOUIS, et al.,

Defendants/Appellants.

Supreme Court No. 87976

RESPONDENTS' SUBSTITUTE BRIEF

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

**On Transfer From
The Missouri Court of Appeals
Eastern District**

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STATEMENT OF FACTS

Respondents are not satisfied with the accuracy or completeness of Appellants' Statement of Facts and, therefore, submit the following.

Respondents are, or were, the individual members of the Board of Trustees of the Police Retirement System of the City of St. Louis (the "PRS").¹ The PRS was established in 1957 pursuant to statutes enacted by the Missouri legislature, currently §§ 86.200 to 86.366, RSMo 2000.² All persons who become policemen must become members of the PRS "as a condition of their employment." § 86.207. The PRS is funded in the first instance from a 7% deduction from each paycheck of all policemen (§ 86.320) and then, if needed, from the City's contribution, which is determined by the Board of Trustees based on a recommendation of the actuary for the PRS (§§ 86.344, 86.350; L.F. 56-60, 150-152). Four separate statutes refer to the Board of Trustees' use of an actuary to be retained and utilized to determine the basis for the City's contribution amount. (§§ 86.240, 86.243, 86.247 and 86.330)

Following this statutory framework, on or about January 23, 2003, the PRS received a letter from Mercer Human Resource Consulting ("Mercer"), the PRS' actuarial consultants, which stated:

¹ Since the inception of this case, the PRS has had a scheduled election and some of the trustees have changed. The current trustees are automatically substituted as parties pursuant to Rule 52.13(d).

² All statutory references are to RSMo 2000 unless otherwise indicated.

Mercer Human Resource Consulting has completed the annual actuarial valuation of The Police Retirement System as of October 1, 2002. On the basis of that statement, we find that the contribution to the System by the City of St. Louis for the System's 2003 fiscal year beginning October 1, 2002 and the City's 2004 fiscal year beginning July 1, 2003 is \$9,575,892.

This amount was determined based on October 1, 2002 census data provided by the System and the assumptions and methods proposed in our July 2002 report: Actuarial Investigation of the Mortality, Service and Compensation Experience. This calculation was based on the provisions of relevant statutes (Sections 86.200 to 86.366 of the Revised Statutes of Missouri as amended through May 2002, inclusive).

(L.F. 60, 154)

On or about January 31, 2003, pursuant to a motion duly called and voted upon, the PRS approved the Mercer letter as follows:

City Contribution to the Retirement System – For the Board's review and approval, a copy of the letter dated January 23, 2003 from Ms. Penny Bailey with Mercer Human Resource Consulting was included in the agenda packet. Chairman Neske reported that Mercer has submitted that the City's contribution for the fiscal year beginning July 1, 2003 is \$9,575,892.00.

MOTION

Trustee Gaffigan moved to accept the letter dated January 23, 2003 from the System’s Actuary, Mercer Human Resource Consulting, stating that contributions by the City of St. Louis for the System’s 2002-2003 fiscal year and the City’s 2004 fiscal year is \$9,575,892.00.

Motion was seconded by Trustee Bonds and upon vote, the following was recorded:

Yes – 9

No – 0

Motion Passed 9-0

(L.F. 150-151) Subsequently, on February 27, 2003, the PRS sent a letter to the Board of Estimate and Apportionment of the City of St. Louis (the “Board of E&A”), pursuant to § 86.344, certifying the budget request for the fiscal year beginning July 1, 2003, stating that Mercer had conducted the annual valuation of assets as mandated by § 86.247, determined the City’s contribution to be \$9,575,892.00 and attached the January 23, 2003 letter from Mercer. The letter then stated that the PRS: “requests the payment of \$9,575,892.00 to the System pursuant to sections 86.200 through 86.366, RSMo, with payments in six equal installments to begin on July 1, 2003.” (L.F. 27)

On or about March 14, 2003, Mercer certified its final Actuarial Valuation Report, as of October 1, 2002, for the PRS (the “2002 Actuarial Report”), which formalized the findings in the January 23, 2003 letter. The 2002 Actuarial Report recommended a change in the assumption for the rate of investment return, a key actuarial assumption,

from 8.25% to 7.75%. (L.F. 57, 72) The actuary, Ms. Penny Bailey, testified that she recommended 7.75% even though the median was 7.47%, “[b]ecause the police have historically had higher returns from active management that the model builds into it.” (L.F. 172; Tr.24) A copy of the 2002 Actuarial Report is attached to the actuary’s affidavit filed in support of the Motion for Summary Judgment filed by the PRS. (L.F. 103-149)

The actuary testified that the other primary assumption that affected the City’s contribution was the salary rate. Ms. Bailey stated that:

Mercer looks at the last five years’ salary increases and compares those increases with the assumption. It is generally not reasonable to base a long term salary increase assumption on increases over a short time period because of the volatility of increase levels from year to year. The actuarial valuation process involves projecting benefits over a very long time period, and basing the salary increase assumption on experience in a short time period may distort liabilities and increase the volatility of contributions over time. Mercer, therefore, looks at 10 or 15 years of experience when it determines a salary increase assumption as well as expectations regarding future increases.... Missouri statutes also provide an ‘annual salary matrix’ ... for all police officers, but this matrix does not account for promotions and the long term trends mentioned above, which an actuarial report must consider.

(L.F. 58-59) The actuary's deposition and the 2002 Actuarial Report go into great detail on the many assumptions that Mercer must make concerning the future funding necessary for each and every active and retired officer in the system, including but not limited to, current statistics as well as assumptions concerning the future percentages of officers who will be married and married with children, the mortality rates, the percentages of who will become disabled on duty and who will become disabled not on duty, the percentage of who will retire and the percentage of who will withdraw. (L.F. 173; Tr. 26-28, 95-99) The funding must be present for all such contingencies.

The PRS actuary also testified concerning the five-year study that was prepared for the Board of Trustees.

We take a look at the experience for all of the assumptions that underlie the valuation over the five-year period that's being studied. We look at, based on our prior assumptions, what we would have assumed would happen in each year in the five-year experience study, and then we look at what actually happened during the five-year experience study for each of those assumptions....

(L.F. 173, Tr. 25-26) A copy of the five-year experience study is attached to the actuary's affidavit filed in support of the Motion for Summary Judgment filed by the PRS. (L.F. 62-101)

The actuary for the PRS also testified that she had her report reviewed by an independent actuary. She stated that "[t]he work is then reviewed and checked by the actuary and then, finally, by an independent actuary. In the case of a public plan, such as

the Police Retirement System, an independent public plan expert has responsibility for peer review of the reports.” (L.F. 57-58) The “independent peer review” is performed by a “public plan expert outside of Mercer’s St. Louis office.” (L.F. 56)

The City’s Budget Director, Frank Jackson received a copy of the 2002 Actuarial Report. (L.F. 162; Tr.11-12) Mr. Jackson received a Bachelors degree in Business Administration in 1977 from the University of Missouri, but he had no actuarial training. (L.F. 161, Tr.5; L.F. 163, Tr.14) Neither he nor anyone in his office spoke to the actuary for the PRS or anyone associated with the PRS about the budget request. He reviewed the financial information, the value of assets and the amount that was being requested as a contribution. (L.F. 162; Tr.12) It was his recommendation to the Board of E&A that the figure of \$4,115,600.00 be appropriated to the PRS. (L.F. 163, Tr.16) He admitted that the City did not hire an actuary to review the PRS actuary’s report. (L.F. 164, Tr.17) His budget amount was based on a percentage (6%) of the active police officers’ payroll for fiscal year 2004, but no actuarial calculations were performed. (L.F. 163-164; Tr.16-18) Subsequently, the City’s Annual Operating Plan, Board Bill No. 1, Committee Substitute for fiscal year 2004 shows that the City budgeted \$4,115,600.00 for the PRS. (L.F. 34)

The City’s Budget Director admitted that, unlike the Firemen’s pension system and City Employees’ pension system, which had annual requests for significant funding, the PRS had not made a contribution request of the City for pension payments since 1990. (L.F. 161-162) More specifically, the PRS had been self-sustaining since 1992, with a \$0 budget request every year until the year in question. (L.F. 151; 158-159; 193)

(The City had paid its annual payment of one-half of the System's expenses due under § 86.343.2, which expenses were approximately \$80,000 for the year in question.)

In September 2003, the Comptroller's Office offered the PRS a one-time payment of \$4,115,600.00 for fiscal year 2004 instead of the \$9,575,892.00 that was certified. The City then unilaterally made a one-time payment of \$4,115,600.00 to the PRS. (L.F. 36, 151) Pursuant to a letter dated September 23, 2003, the PRS transferred the payment by instructing The Northern Trust Company to deposit the funds noting: "This wire transfer represents a portion of the funds actuarially required for the fiscal year." (L.F. 30) No further contributions were received from the City for the fiscal year at issue.

On August 25, 2003, the PRS filed its Petition for Declaratory Judgment against the City seeking a declaration that § 86.344, and other applicable statutes, require the City to pay the PRS the certified amount (less the \$4,115,600.00 the City had previously paid). (L.F. 0001) On June 30, 2004, the PRS filed its Second Amended Petition for Declaratory Judgment. (L.F. 16-34) The case proceeded on cross-motions for summary judgment on that pleading.

On or about June 17, 2005, the Circuit Court entered its Memorandum, Order and Judgment. (L.F. 685-747)³ The Court found that: (1) under §§ 86.330, 86.337 and 86.344 "when those provisions are properly construed both with reference to their own plain

³ The trial court had two of his senior law clerks in on both of the oral arguments in this case and his 62 page decision was written wholly independent of counsel for any party.

meaning as well as with reference to the related statutory provisions of §§ 86.200 to 86.366 RSMo as a whole, the City is **required** to annually budget, appropriate and transfer to the PRS an amount that is ‘not less than’ the amount that has been certified by the PRS and its actuary as being the ‘normal contribution rate’ as defined by § 86.330, which amount is also referred to in § 86.344 as ‘the cost of benefits as determined pursuant to section 86.337.’ Further, as provided by § 86.344, the City normally has an obligation to timely transfer said certified amount to the PRS ‘in equal payments in the first six months of the ensuing year.’ However, the City’s annual obligation to appropriate and pay this amount is subject to the rights of administrative and/or judicial review that the City has under § 86.227 RSMo, in the event the City chooses in a timely manner to challenge the soundness or reasonableness of the actuary’s calculation of the amount so certified.” (2) “[T]hat it is evident from the overall structure and context of §§ 86.200 through 86.366 RSMo, that ‘shall’ as used in § 86.344 is not used in an advisory or ‘directory’ sense, but rather is used in the ordinary mandatory sense that the word ‘shall’ usually connotes. This is not changed by the fact that the statute does not specify a built-in penalty or sanction for the City’s failure to do that which the statute says ‘shall’ be done; see Bauer v. Transitional School District of City of St. Louis, 111 S.W.3d 405, 408 (Mo. banc 2003). The Court further finds that the suggested construction of the statute which has been offered by the City in this case and which centers around the language found in the second clause of § 86.337 RSMo (the part which begins with the words ‘provided, however,’), is an incorrect interpretation of the statute. The language cited therein by the City does not mean what the City claims it

means.” (3) “[I]t is undisputed that the City budget ordinance for the fiscal year at issue is expressly contrary to the relevant §§ 86.330, 86.337 and 86.344, RSMo, because said budget ordinance provided for an annual contribution to the PRS of 6% of covered payroll rather than what is required by those statutes.” (4) “[T]he governing statutory provisions of Chapter 86 RSMo which, as previously declared, require the City to appropriate and transfer to the PRS the certified amount for ‘the cost of benefits as determined pursuant to section 86.337,’ do not violate Article VI, § 26(a) of the Missouri Constitution. By the same token, for the reasons previously cited in the memorandum opinion herein, the Court finds that the case of Tomlinson v. Kansas City, 391 S.W.2d 850 (Mo. 1965), is inapplicable **as to Count I** of the case at bar.” (5) [T]hese same statutory provisions, which require the City to budget, appropriate and pay the PRS-certified annual contribution amount for benefits, do not operate as an unconstitutional delegation of legislative authority. For the same reasons, the Court finds that the case of State ex rel. Field v. Smith, 49 S.W.2d 74 (Mo. banc 1932), is inapposite.” (6) “Defendants lack standing to raise the Hancock issue and, therefore, this Court lacks jurisdiction to decide the issue. Accordingly, the Court makes no finding as to the merits of the Hancock issue, but does find, on the basis of Defendants’ lack of standing to raise it, that the Hancock Amendment is not a ‘viable’ affirmative defense that Defendants can use in this case to defeat the Plaintiffs’ entitlement to summary judgment on Count I. See Leiser v. City of Wildwood, 59 S.W.3d 597, 606 (Mo.App. E.D. 2001); Board of Health Trustees of Clay County v. County Commission of Clay County, 896 S.W.2d 627, 631 (Mo. banc 1995).” (7) that the City’s affirmative legal defenses in paragraphs 28 through

32 of the Joint Answer to the Second Amended Petition did not have legal merit; (8) “[I]nasmuch as the City did not exercise its right under § 86.227 RSMo to appeal the correctness of the PRS-certified benefits amount for Fiscal Year 2004 (\$9,575,892), and inasmuch as the Defendants did not appropriate and transfer to PRS said certified amount but instead contributed for FY ‘04 the lesser sum of \$4,115,600, the City thereby breached its legal obligations and violated the Police Retirement System’s legal rights. The City thus owes the PRS arrearages for Fiscal Year 2004 of the difference between the two amounts, that being the sum (apparently) of \$5,460,292.” (L.F. 742-746; emphasis in original)

Post-trial motions were filed and heard. The trial court denied both party’s motions. (L.F. 906) The City took a timely appeal to the Missouri Court of Appeals from this judgment. (L.F. 911) The PRS did not appeal the denial of prejudgment interest.

Thereafter, the Court of Appeals for the Eastern District heard oral argument and took the matter under submission. The Court of Appeals issued an opinion on August 22, 2006 in this case and the companion case filed by the Firemen’s Retirement System. *See, Neske v. City of St. Louis*, Case No. ED86919 and *Firemen’s Retirement System v. City of St. Louis*, Case No. ED86921. In each case, the Court of Appeals found for the Respondent retirement system but, because of the general interest and importance involved in the cases, transferred to this Court pursuant to Rule 83.02.

POINTS RELIED ON

POINT I

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE CITY HAD NO STANDING TO CHALLENGE THE POLICE RETIREMENT SYSTEM'S BUDGET UNDER ARTICLE X, SECTION 21, MO. CONST. ("THE HANCOCK AMENDMENT"), FOR THE REASONS THAT (1) THE CITY DID NOT RAISE THE ISSUE IN ITS POINT RELIED ON AND, SINCE IT WAS NOT PRESERVED FOR REVIEW, THE ARGUMENT IS WAIVED; AND (2) ARTICLE X, SECTION 23 OF THE HANCOCK AMENDMENT RESTRICTS STANDING TO TAXPAYERS, WHETHER IT IS RAISED OFFENSIVELY OR DEFENSIVELY.

State ex rel. Board of Health Center Trustees of Clay County v. County Commission of

Clay County, 896 S.W.2d 627 (Mo. banc 1995)

Fort Zumwalt School Dist. v. State, 896 S.W.2d 918 (Mo. banc 1995)

Roberts v. Progressive Northwestern Ins. Co., 151 S.W.3d 891 (Mo.App. 2004)

Mo. Const., Art. X, § 21

Mo. Const., Art. X, § 23

§ 86.810, RSMo 2000

Rule 55.03(b)(2)

Rule 84.04(d)(1)

POINT II

THE TRIAL COURT DID NOT ERR IN RULING ARTICLE X, SECTION 21 OF THE HANCOCK AMENDMENT WAS NOT VIOLATED, BECAUSE: (1) THE POLICE RETIREMENT SYSTEM (PRS) IS NOT A “STATE AGENCY” SUBJECT TO THAT CONSTITUTIONAL RESTRICTION; AND, EVEN ASSUMING ARGUENDO, IT IS A STATE AGENCY; (2) THERE HAS NOT BEEN ANY “INCREASE IN THE LEVEL OF ACTIVITY” OF THE PRS SINCE 1980 AS THOSE TERMS HAVE BEEN INTERPRETED UNDER THE HANCOCK AMENDMENT; AND, (3) THERE HAS NOT BEEN ANY “INCREASE IN THE LEVEL OF ACTIVITY” OF THE PRS SINCE 1980 AS A PERCENTAGE OF PAYROLL, WHICH IS THE ONLY PROPER MEASURE.

Missouri State Employees’ Retirement System v. Jackson County, 738 S.W.2d 118 (Mo. banc 1987)

Gregory v. Corrigan, 685 S.W.2d 840 (Mo. banc 1985)

State ex rel. Sayad v. Zych, 642 S.W.2d 907 (Mo. banc 1982)

Mo. Const., Art. X § 21

Mo. Const., Art. X, § 22

Mo. Const. Art. VI, § 25

§ 86.253.3, RSMo 2000

POINT III

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE PRS BECAUSE REQUIRING THE CITY TO PAY THE CERTIFIED CONTRIBUTION AMOUNT, AS DEFINED IN § 86.344, WAS NOT AN IMPROPER DELEGATION OF LEGISLATIVE POWER AND DID NOT CAUSE THE CITY TO BECOME INDEBTED BEYOND ITS INCOME IN VIOLATION OF ARTICLE VI, § 26(a), MO. CONST. AS: (1) THE PRS DID NOT HAVE UNFETTERED DISCRETION WITH ITS BUDGET REQUEST; (2) THE CITY ADDUCED NO EVIDENCE TO SUPPORT ITS CONTENTION THAT THE PRS AND NOT A MYRIAD OF OTHER BUDGET ITEMS CAUSED THE CITY'S ALLEGED INDEBTEDNESS BEYOND ITS INCOME; AND (3) THE PRS DEMONSTRATED THAT IT PROVIDED THE CITY WITH PROPER NOTICE OF THE CERTIFIED CONTRIBUTION AMOUNT LONG BEFORE THE CITY WAS FIRST REQUIRED TO APPROPRIATE AND TRANSFER THE REVENUE FROM ITS 2003-2004 BUDGET, YET THE CITY STILL IGNORED ITS STATUTORY DUTIES.

State ex rel. Twenty-Second Judicial Circuit v. Jones, 823 S.W.2d 471 (Mo. banc 1992)

Nicolai v. City of St. Louis, 762 S.W.2d 423 (Mo. banc 1988)

Mercantile Bank of Illinois, N.A. v. School Dist. of Osceola, 834 S.W.2d 737 (Mo. banc
1992)

Mo. Const. Art. VI, § 26(a)

§ 86.227, RSMo 2000

§ 86.344, RSMo 2000

Rule 84.04

Rule 84.16(b)

POINT IV

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE PRS BECAUSE THE CLEAR AND UNAMBIGUOUS MEANING OF THE STATUTES PROVIDES THAT THE “NORMAL CONTRIBUTION” IS MANDATORY AND THE CITY’S INTERPRETATION IS NOT CONTROLLING BUT, RATHER, WOULD LEAD TO AN ABSURD RESULT NOT *IN PARI MATERIA* WITH THE STAUTORY FRAMEWORK OF THE RELATED FUNDING PROVISIONS, WHICH IS CONTRARY TO ALL APPLICABLE RULES OF STATUTORY CONSTRUCTION.

Bauer v. Transitional School Dist. of the City of St. Louis, 111 S.W.3d 405 (Mo. banc 2003)

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

Geary v. Missouri State Employees’ Retirement System, 878 S.W.2d 918 (Mo.App. 1994)

§ 86.240, RSMo 2000

§ 86.243, RSMo 2000

§ 86.247, RSMo 2000

§ 86.330, RSMo 2000

§ 86.337, RSMo 2000

§ 86.343.2, RSMo 2000

§ 86.344, RSMo 2000

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE CITY HAD NO STANDING TO CHALLENGE THE POLICE RETIREMENT SYSTEM'S BUDGET UNDER ARTICLE X, SECTION 21, MO. CONST. ("THE HANCOCK AMENDMENT"), FOR THE REASONS THAT (1) THE CITY DID NOT RAISE THE ISSUE IN ITS POINT RELIED ON AND, SINCE IT WAS NOT PRESERVED FOR REVIEW, THE ARGUMENT IS WAIVED; AND (2) ARTICLE X, SECTION 23 OF THE HANCOCK AMENDMENT RESTRICTS STANDING TO TAXPAYERS, WHETHER IT IS RAISED OFFENSIVELY OR DEFENSIVELY.

(This Responds to Appellant's Point I)

A. Standard of Review

Appellate review of the grant of summary judgment motions is “essentially *de novo*. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. *Cherry v. City of*

Hayti Heights, 563 S.W.2d 72, 75 (Mo. banc 1978); *ITT Commercial Finance Corp.*, 854 S.W.2d at 376. Summary judgment is properly entered when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(6).

If an issue is not presented to or decided by the trial court, then it is not preserved for appellate review. *State ex rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 129 (Mo. banc 2000). Review on appeal is limited to those theories that were properly brought before the trial court. *Duncan v. American Commercial Barge Line*, 166 S.W.3d 78, 88 (Mo.App. 2004); *Heffernan v. Reinhold*, 73 S.W.3d 659, 663 (Mo.App. 2002).

B. The City Waived its Argument Regarding Proper Standing Under the Hancock Amendment by not Raising it in its Point Relied On

In its first point on appeal, the City raises its challenge under the Hancock Amendment, Art. X, §§ 16-24, Mo. Const. The Point Relied On states that the trial court error was based on the fact 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 exceed the funding level in 1981.” The trial court ruled against the City on the issue of standing under article X, § 23, Mo. Const. and, because of this, did not reach the merits of the Hancock Amendment argument. (L.F. 726)

Nowhere does the City raise the argument of standing in its Point Relied On and it is, therefore, deficient pursuant to Rule 84.04. That issue is waived and,

therefore, the City's entire Hancock Amendment argument is for naught. This Court's Rule on this subject is clear and states:

Where the appellate court reviews the decision of a trial court, each point shall: (A) identify the trial court ruling or action that the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

Rule 84.04(d)(1). The City's Point completely fails to state the legal reason for its claim of reversible error – standing to assert the Hancock Amendment challenge. If this Court's rules are going to have any force and effect whatsoever, this is a case where there is absolutely no adherence to the rule by the City and Rule 84.04(d)(1) must be enforced.

“The only issues required to be determined on appeal are those raised in the points relied on.” *Roberts v. Progressive Northwestern Ins. Co.*, 151 S.W.3d 891, 895 (Mo.App. 2004). Issues that are first raised in the argument portion of the brief are not preserved for review. *Id.*, citing *Murphy v. Director of Revenue*, 136 S.W.3d 141, 145 n.3 (Mo.App. 2004). *In Interest of T.B.*, 963 S.W.2d 252, 256 (Mo.App. 1997), the Court stated: “Because this argument was not made in the Point Relied On - - the latter does not even mention hearsay - - it is not preserved for review.” The same is true here. The City is arguing that the Hancock Amendment is a defense to the PRS' claims in its Point Relied On, but then contends, without ever mentioning it in the Point Relied On, that it had standing to raise this argument.

The issue of standing should have been raised on appeal in a Point Relied On, but since the City's standing argument was not included in its Point Relied On, it is not preserved for review and should not be considered by this Court.

C. The City Does Not Have Standing to Raise a Hancock Challenge

Assuming, *arguendo*, that the issue of standing has not been waived, the City does not have standing to enforce a claim under the Hancock Amendment. Appellants in this action are the City and various City officials, all of whom were sued in their official capacities and all of whom answered as such. (L.F. 35-40) Article X, § 23 provides, in pertinent part:

Notwithstanding other provisions of this constitution or other law, **any taxpayer** of the state, county, or other political subdivision **shall have standing** to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article

(Emphasis added.) This section of the constitution has been often interpreted to mean that only a taxpayer has standing to assert the Hancock Amendment, either as a cause of action or as a defense. *See, e.g., State ex rel. Board of Health Center Trustees of Clay County v. County Commission of Clay County*, 896 S.W.2d 627, 631 (Mo. banc 1995); *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995).

There is no allegation in Appellants' answer that any of them, in their official capacities, are taxpayers, nor is the City a taxpayer. Under article X, § 23, therefore, the City and the other Appellants do not have standing to enforce the Hancock Amendment.

See *City of Hazelwood v. Peterson*, 48 S.W.3d 36, 40 (Mo. banc 2001)(“By limiting the class of plaintiffs to ‘any taxpayer,’ the amendment recognizes ‘that any apparent injury to the [city] is merely derivative of the taxpayer’s injury.’”); *Missouri Association of Counties v. Wilson*, 3 S.W.3d 772, 776 (Mo. banc 1999)(“MAC does not have standing to enforce a claim under either section 16 or section 21.”). This Court has clearly stated that in order to have standing to assert an action under the Hancock Amendment, there must a taxpayer involved, not solely an arm of government, to assert the claim. In *Fort Zumwalt*, this Court held:

The Hancock Amendment makes no pretense of protecting one level of government from another. By its clear language, Section 23 limits the class of persons who can bring suit to enforce the Hancock Amendment to “any taxpayer.” In doing so, Section 23 recognizes that any apparent injury to the school district is merely derivative of the taxpayers’ injury.

896 S.W.2d at 921.

More importantly for the case at bar, contrary to the City’s assertion, **this Court has specifically ruled that government cannot use the Hancock Amendment as a defendant in an action asserting it as a defense.** In *State ex rel. Board of Health Center Trustees of Clay County v. County Commission of Clay County*, *supra*, the County Commission of Clay County was the defendant in a mandamus action. The Commission asserted the Hancock Amendment’s prohibition against an increase in a tax levy without voter approval as a defense. 896 S.W.2d at 631. In determining that the Commission did not have standing to raise the Hancock Amendment as a defense, this Court held:

The Commission also contends that an increase in the levy without voter approval violates the Hancock Amendment and the enabling legislation, section 137.037. We do not reach a decision on whether the Hancock provisions were violated because the Commission has no standing to bring such a challenge. The Commission's role for independent taxing authorities such as the Board is the ministerial duty of accumulating the levies assessed by such political subdivisions and certifying them to the collector for inclusion on the tax bills. Its role is not to act as a judge of the constitutionality of the tax. Moreover, the class of persons who can bring suit to enforce the Hancock Amendment is limited to taxpayers.

Id. (Emphasis added.) This Court has, therefore, made it clear that only a taxpayer has standing to raise the Hancock Amendment, **either as a cause of action or as a defense.** This has been true from the time that Hancock Amendment was enacted in November 1980 through the present day.

The facts in the *County Commission of Clay County* case are somewhat similar to those in the instant case. There, the Clay County Health Center was governed by a Board of Trustees who annually certified a budget to the Clay County Commission. The budget was based on a 1953 property tax levy with a maximum of \$.10 per \$100 of assessed valuation. The Board of Trustees voted to increase the levy in 1993 from \$.07 to \$.09 due to an increased demand in health care services. 896 S.W.2d at 629. Despite no testimony for anything other than the budget increase, the Commission voted against the increase and asserted that the increase violated the Hancock Amendment. *Id.* at 631. As

set forth above, the Court's ruling left no doubt that the Hancock Amendment cannot be used by an arm of the government against a board of trustees charged with their duty under law as a sword or a shield.

The City cites to several cases and, by way of misleading parentheticals, erroneously asserts to this Court that the cases hold that counties, state officials or other political subdivisions have standing to assert the Hancock Amendment as a defense or, at the very least, that this Court has relaxed the standing requirement. These citations are reckless at best. In each of these cases, either an individual taxpayer was a named party or the public official also filed suit in his or her individual capacity or standing was not an issue addressed by the court. Thus, the attorneys for the plaintiffs in these cases made certain that they fulfilled the constitutional requirement for standing under article X, § 23 by having an individual taxpayer named in the action. Consequently, the cases do not stand for the proposition that a municipality may assert a violation of the Hancock Amendment as a defense or that this Court has relaxed the standing requirement and the City's citation to these cases borders on a violation of Rule 55.03(b)(2).

Specifically, the City cites to *Boone County Court v. State, supra*, as one of the cases that “recognize the standing of entities like the City to assert the Hancock Amendment in opposition to improper state actions.”⁴ However, the issue of standing was never raised or even mentioned in that decision. In fact, in its recitation of the facts,

⁴ In addition, the actions of the PRS are hardly “state actions,” as it is not a state agency. (*See, infra*, Point II at pgs. 38 to 42)

this Court stated: “On May 1, 1981, William French, Richard Farmer, and Kay Roberts, filed a declaratory judgment action in their official capacity as duly elected judges of the Boone County Court, **and in their individual capacities as taxpayers and citizens of Boone County, Missouri.**” 631 S.W.2d at 323. It is mind boggling how the City could have missed this passage in this decision that clearly sets forth the fact that there were individual taxpayer-plaintiffs in the case who, even if the Court *had* discussed the issue of standing, would have had standing to sustain the challenge.

The City not only misstates the holding of *Boone County*, but its brief goes so far as to say (p. 18) that the *Fort Zumwalt* decision relied on by the PRS and the trial court did not “purport to overrule” the *Boone County Court* decision. The City neglects to point out that, since standing was not an issue in the *Boone County* decision, the *Fort Zumwalt* court naturally did not discuss it much less “overrule” it on that point. The City’s argument is a non-sequitur.

The City also cites to *City of Jefferson v. Missouri Department of Natural Resources*, 916 S.W.2d 794 (Mo. banc 1996), as authority for a city to have standing to raise the Hancock Amendment. Yet again, the City misstates the holding of the case on which it relies. The *City of Jefferson* case was clearly denoted in the decision as “*City of Jefferson II*,” because it was the second appeal of this case. Although it is not clear from that second decision that a taxpayer was a party and met the standing requirement under Hancock, a minimum amount of research disclosed that a taxpayer was a plaintiff in the case. The Court cited to its earlier decisions in *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844, 846 (Mo. banc 1993), where the recitation of

parties set out that “Appellant David E. Johnston is a resident of Jefferson City and a taxpayer.”

The City also cites to *In Re Tri-County Levee District*, 42 S.W.3d 779 (Mo.App. 2001) for authority that the Highway Commission “may contest whether a fee imposed by a levee district is improper under the Hancock Amendment.” (Appellant’s Brief p. 18) However, the Court of Appeals actually did not hold that the Tri-County Levee District had standing to bring suit under the Hancock Amendment as it did not discuss standing at all within the seven points relied upon discussed; it merely denied the challenge without comment on standing – hardly a reversal of *Fort Zumwalt* and *County Commission of Clay County*. It only shows that the defense was not raised by opposing counsel. The City’s cite to *Missouri Municipal League v. State*, 932 S.W.2d 400 (Mo. banc 1996) is similarly misleading. The issue of standing was not raised or discussed in that case and there is no indication in the opinion whether there were individual taxpayers as parties, yet the City cites it for the proposition that “municipalities may seek declaratory judgment on whether statute violates Hancock Amendment”.

The truth is that this Court has not relaxed the taxpayer standing requirement of article X, § 23. In *Missouri Association of Counties v. Wilson, supra*, which was decided after both *City of Jefferson* and *Missouri Municipal League*, this Court specifically reaffirmed the standing requirement of *Fort Zumwalt* (896 S.W.2d at 921), holding that:

M[issouri] A[ssociation of] C[ounties] does not have standing to enforce a claim under either section 16 or section 21. Appellants include MAC, a not-for-profit corporation, and several political subdivisions of the state

* * *

MAC does not allege that any of the appellants are taxpayers; under section 23, therefore, appellants do not have standing to enforce violations of either section 16 or 21.

Id. at 776-77.

The City's citation to *Kelly v. Hanson*, 959 S.W.2d 107 (Mo. banc 1997) stretches its argument that *Fort Zumwalt* has been reversed beyond its limits. In *Kelly*, this Court held that the State Auditor had standing to challenge the calculation of the formula for the Hancock Amendment calculation and nothing more. There is no language in the decision to extend its holding to be that *Fort Zumwalt* and *County Commission of Clay County*, or for that matter a plain and ordinary reading of the Constitution, have been overruled.

Finally, the City cites to *State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982) as another case that it claims was not "overruled" by *Fort Zumwalt*. Yet again, the issue of standing under the Hancock Amendment was never raised or discussed in the case, so *of course* it was not overruled. Also, the record in *Zych* is unclear as to whether the Appellants who raised the defense were sued only in their representative capacities (or if any party or judge even considered the issue at this early time in the Hancock Amendment litigation). What is clear from reading the decision is that the sharply divided 4-3 court fought bitterly over many issues before the majority ruled that the City did not have to fund the increase the Police Board's 1982-1983 budget over the same budget in 1980-1981 (a ruling that has never been honored since). The key, preliminary issue presented to the Court was whether the Police Board was a state agency that was

even subject to the Hancock Amendment's restrictions. (This issue is discussed *infra*, as it is dispositive in favor of the PRS, assuming, *arguendo*, the City has standing.) A certain non-issue in the case was standing. Notwithstanding the absence of any discussion of standing, the City asks this Court to base its decision on the *Zych* case, even though doing so (a) ignores the plain language of article X, § 23, Mo. Const., (b) disregards the pro-taxpayer/anti-government spirit of this particular constitutional amendment which never anticipated the government as its enforcer, and (c) all of the case law cited by the PRS. This is literally too good to be true for the City.

Finally, the City argues that it is in a similar position to that of the city in *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. banc 2001). The City asserts that, even though this Court unequivocally held that the City of Hazelwood was without standing to sue in that case, the case demonstrates that “even if a governmental entity lacks standing to assert a claim under the Hancock Amendment, it is not foreclosed from arguing the Hancock Amendment as a basis for relief.” (City’s Brief at p. 20) This argument is specious.

This Court specifically held that “[t]he constitutional right established in article X, section 22(a) assures **taxpayers** that they will be free of increases in local taxes unless the voters approve those increases in advance.” *Id.* at 39 (Emphasis added.) The Court went on to find:

Nevertheless, “[t]he Hancock Amendment makes no pretense of protecting one level of government from another.” *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995). By limiting the class of

plaintiffs to “any taxpayer,” the amendment recognizes “that any apparent injury to the [city] is merely derivative of the taxpayer’s injury.” *Id.* Hazelwood is without standing to sue under the Hancock Amendment.

Id. at 40. The Court struck down the tax “for the simple reason that the amount [fire protection] District was controlled by statute and it was entitled to recover for any amounts the District collected in violation of the statutory amount. *Id.* The Court permitted the taxpayer plaintiffs to recover under the Hancock Amendment and denied the City of Hazelwood any relief under the Hancock Amendment or §139.031. However, because the District was required to return the money to Hazelwood and then Hazelwood return the money to the taxpayers, this Court required the district to return the money to Hazelwood under a statute (§ 321.675) that did not require taxpayer standing. *Id.*

D. Appellant’s Argument Pursuant to § 86.810 Was Not Preserved for Appeal

After it finally realized that its standing to assert the Hancock Amendment was at issue, the City contended that it arguably had standing pursuant to § 86.810, which was enacted by the legislature in 1997. That statute provides:

The provisions of any other law notwithstanding, the board of trustees of any retirement system, the provisions of which are governed by this chapter, or any political subdivision which funds such retirement system, shall have standing to seek a declaratory judgment concerning the application of article X, section 21 of the Missouri constitution to the provisions of this chapter. In the event a final judgment is rendered by a court which judgment determines that any provision of this chapter

constitutes a new activity or service or increase in the level of an activity or service beyond that required by existing law under article X, section 21 of the Missouri Constitution, or any successor to that section, that provision of this chapter shall be void ab initio and any new benefit or feature required by such provision of this chapter shall be deemed not to have accrued and shall not be payable to members.

(Emphasis added.) First, the City erroneously assumes that this statute somehow supersedes the Missouri Constitution, which specifically reserved standing solely to taxpayers. Mo. Const. Art. X, § 23. Second, the City made no attempt to assert standing in its summary judgment motion, affidavits or other pleadings.

The fundamental purpose of construing the constitution is to give effect to the intent of the voters who adopted the amendment, *i.e.* at the time it was adopted. *Boone County Court v. State*, 631 S.W.2d 321, 324 (Mo. banc 1982). “In determining the meaning of a constitutional provision the court must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was first adopted.” *Id.* It is important that the common sense of the People is preserved and is best described as:

[E]very word employed in the constitution is to be expounded in its plain, obvious and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, or for the exercise of philosophical acuteness or judicial research. They are

instruments of practical nature, founded on the common wants, designed for common use, and fitted for common understandings.

Akin v. Missouri Gaming Commission, 956 S.W.2d 261, 263 (Mo. banc 1997), quoting *State ex inf. Dalton v. Dearing*, 364 Mo. 475, 263 S.W.2d 381, 385 (1954). If the meaning of the constitution is clear, then no act of the General Assembly can in any way add to it, detract from it, transfer it, infringe upon it or vary it. *Akin*, 956 S.W.2d at 264, citing *State ex rel. Randolph County v. Walden*, 206 S.W.2d 979, 984 (Mo. 1947). While the legislature can define a term even if it is unambiguous, the legislature has no authority to vary the meaning of unambiguous terms in the constitution. *Id.* In § 86.810, the legislature has attempted to change the meaning of art. X, § 23, which unambiguously states that “**any taxpayer** of the state, county, or other political subdivision **shall have standing** to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of this article....” (Emphasis added.) Nothing in this section provides license to the legislature to expand the definition of standing from “any taxpayer” to include “the board of trustees of any retirement system, the provisions of which are governed by this chapter, or any political subdivision which funds such retirement system....” This statute is unconstitutional; thus, the trial court did not err in ruling that § 86.810 has no effect and does not confer standing upon the City.

Additionally, the City had ample opportunity to argue that § 86.810 as an alternative basis for standing. This argument was not found in its brief supporting its motion for summary judgment, it was not brought up at the hearing on the parties’

motions for summary judgment, nor was not contained in any of the pleadings. It is, therefore, not surprising that the trial court did not address the statute in its Memorandum Opinion. In fact, the City did not argue the statute in its post-trial motion and it was not until the post-decision motions were being argued that the City even brought § 86.810 to the attention of the trial court and asserted that this fairly new statute provides it with the standing that it lacks pursuant to the well-established case law cited above and the Missouri Constitution. Consequently, as the City failed to assert § 86.810 as a basis for standing in any of its written pleadings, briefs and replies, the City failed to preserve the point for review. *State ex rel. Nixon*, 34 S.W.3d at 129. (“If an issue was not presented to or decided by the trial court, then it is not preserved for appellate review.”). Review on appeal is limited to those theories that were properly brought before the trial court. *Duncan*, 166 S.W.3d at 88. *See also Smith v. White*, 114 S.W.3d 407, 420 (Mo.App. 2003).⁵

E. Conclusion

In summary, the City’s attempt to have the legislature come to its rescue is without merit. The Missouri constitution has set forth who may enforce the Hancock Amendment. Section 86.810 cannot grant standing to the City where the constitution has limited the same. *County Commission of Clay County, Fort Zumwalt, City of Hazelwood*

⁵ The Court of Appeals’ decision went into significant detail in ruling that Appellants had failed to preserve the effect of § 86.810 for review. *Neske v. City of St. Louis*, ED86919, slip op. at 3-4.

v. Peterson and other cases have uniformly ruled that the Hancock Amendment, an obviously anti-government provision of the Missouri Constitution, was not intended to protect the government, especially against individual taxpayers seeking their hard earned pensions. The voters who enacted that standing provision meant what it says – only a taxpayer has standing to enforce it under its plain and simple meaning. Moreover, Appellants did not preserve the issues of standing or the issue of the effect of § 86.810 for appellate review.

For the reasons set forth herein, Point I should be denied.

POINT II

THE TRIAL COURT DID NOT ERR IN RULING ARTICLE X, SECTION 21 OF THE HANCOCK AMENDMENT WAS NOT VIOLATED, BECAUSE: (1) THE POLICE RETIREMENT SYSTEM (PRS) IS NOT A “STATE AGENCY” SUBJECT TO THAT CONSTITUTIONAL RESTRICTION; AND, EVEN ASSUMING ARGUENDO, IT IS A STATE AGENCY; (2) THERE HAS NOT BEEN ANY “INCREASE IN THE LEVEL OF ACTIVITY” OF THE PRS SINCE 1980 AS THOSE TERMS HAVE BEEN INTERPRETED UNDER THE HANCOCK AMENDMENT; AND, (3) THERE HAS NOT BEEN ANY “INCREASE IN THE LEVEL OF ACTIVITY” OF THE PRS SINCE 1980 AS A PERCENTAGE OF PAYROLL, WHICH IS THE ONLY PROPER MEASURE.

(This Responds to Appellant’s Point I)

A. **Standard of Review**

The PRS adopts the same standard of review as is set forth in Point Relied On I.

B. **PRS is not a “State Agency”**

Contrary to the City’s argument, the PRS is not a state agency subject to the limitations of the Hancock Amendment. As noted above, in a sharply divided 4-3 decision, this Court held in *State ex rel. Sayad v. Zych* that a separate and distinct entity, the Police Board, was a “state agency” subject to the prohibitions contained in Article X, § 21 of the Hancock Amendment. However, this is not binding on the PRS. Article X,

§ 21 prohibits a “state agency” from increasing the “level of any activity or service” beyond that required on its December 4, 1980 effective date without a state appropriation to pay for any such increase. 642 S.W.2d at 911. In so holding, the Court found:

The present statutes governing the Police Board, sections 84.010 to 84.340, RSMo 1978 and Supp., carry forward the general nature and function of the original Police Board. The specific provisions of the original and present state statutes are similar.... They require that the Police Board be composed of the Mayor of St. Louis (or one who may be officially acting in that capacity) and four gubernatorial appointees; the powers and duties of the Police Board are prescribed; the Police Board is made responsible for the establishment and control of the St. Louis police force; the City of St. Louis is prohibited from interfering with the powers, or the exercise of the powers, of the Police Board. In addition, the statutes require that the Police Board estimate its annual expenses and that the City appropriate that amount.

Id. at 909.

In *Zych*, the St. Louis Board of Police Commissioners brought a mandamus action to compel the City of St. Louis to pay its 1982-1983 budget, which was approximately \$10 million greater than the Board’s 1980-1981 budget. The Court declared that “the question is whether the St. Louis Board of Police Commissioners is a ‘state agency’ subject to the limits of Article X, Section 21....” *Id.* at 908. The Court first cited precedence from court decisions dating back to the Board’s creation in 1864, which held

that both the St. Louis and Kansas City Police Boards were state agencies. For example, in *State ex rel. St. Louis Police Commissioners v. St. Louis County Court*, 34 Mo. 546, 571 (1864), declared that “the Police Commissioners are an agency of the State Government, and required to perform within a specified locality some of the most important duties of the government.” (Emphasis added.)

In making this finding, this Court looked to the Police Board’s duty to protect the public:

[T]he protection of life, liberty and property, and the preservation of the public peace and order, in every party, division and subdivision of the State, is a governmental duty, which devolves upon the State, and not upon its municipalities.... From this duty, existing in the very nature of the state government, flows the corresponding power to impose upon municipalities of its own creation a police force of its own creation, and to compel its support out of municipal funds.

Id., 642 S.W.2d at 910, *citing State ex rel. Hawes v. Mason*, 153 Mo. at 43, 54 S.W. at 529. (Emphasis added.) Second, the Court noted that the four appointed commissioners were gubernatorial appointees. Based on these reasons, the Court detailed how the police power was historically a state function, even to the state’s subdivisions, and held that the St. Louis Police Board was a “state agency” for the purpose of article X, § 21.

However, the PRS unequivocally contends that it is not a “state agency” for many reasons. First, the PRS is a completely separate entity from the Police Board subject to wholly different laws (Chapters 86 and 84 of RSMo, respectively). The mere fact that

the Police Board is a “state agency” in no way indicates that the PRS is also a “state agency.” Chapter 84, RSMo, concerns the Police Board and, as the *Zych* case emphasizes, the statutes in that Chapter give the Police Board broad authority to perform “state functions” concerning “the protection of life, liberty and property ... which devolves upon the state, and not upon the municipalities.” *See State ex rel. Hawes v. Mason*, 153 Mo. 23, 54 S.W. 524, 537 (1899). Chapter 86, RSMo, on the other hand, concerns the PRS, and contains no provisions essential to “state functions” such as exercise of the police power or the protection of the citizenry. The pension laws pertain only to retirement, disability and death benefits to present and retired police officers who performed their duties in the City of St. Louis. The trustees’ function is entirely local, *i.e.* provide a pension and disability plan to its members. Thus, one of the main underpinnings for the decision in *Zych* as to the Police Board is inapposite to the PRS.

Second, whereas the Police Board’s active members are appointed at state level by the governor, the PRS is comprised of ten trustees, eight of whom are elected or appointed locally: three are appointed by the Mayor and five are elected by the police officers. In addition, the ninth member is the Comptroller of the City of St. Louis and the tenth member is the President of the St. Louis Police Board, who is not directly appointed by the governor and is merely an *ex-officio* member of the PRS’ Board of Trustees by virtue of his position on the Police Board. Thus, the other main ground for the decision in *Zych* is absent here, as appointment and control of the Board of Trustees is concentrated almost entirely on the local, not state, level.

Finally, the plain language of article X, § 21 does not include pension benefits within its scope. “In determining the meaning of a constitutional provision the court must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted.” *Boone County Court*, 631 S.W.2d at 324. In *Boone County Court*, the court held that the terms **“‘increase in any service’ refer to county governmental action performed for the benefit of its residents.”** *Id.* at 325. (Emphasis added.) In the case of the payment of retirement benefits, unlike the services of a county collector or an active law enforcement official, the benefit is for the retired or disabled officer only, not the residents of the county or political subdivision. The court in *Boone County Court* further held that increases in an “‘activity’ refers to the general functioning and operation of county government in performing services.” *Id.* at 325. Again, benefits to retired or disabled officers (or their families) have nothing to do with operation of government. The PRS assert that the people were concerned with increases in “taxes, licenses or fees” (article X, § 22) or with increases in the performance of present activities or services, not with pension benefits after the activity or service has been rendered.

C. The Retirement System’s “Activity” Has Not Increased Since 1980

Article X, § 21 requires that the state is prohibited from requiring “an increase in the level of any activity or service beyond that required by existing law.” (Emphasis added.) The time period for “existing law” has been deemed by this Court to be December 4, 1980, the effective date of the Hancock Amendment. *State ex rel. Sayad v. Zych*, 642 S.W.2d at 909, 911; *Fort Zumwalt*, 896 S.W.2d at 921.

Article VI, § 25 was amended in 1984, after the enactment of the Hancock Amendment, to permit cost-of-living adjustments (COLAs) in retirement benefits to retired members, as well as their dependents as long as the retirement system remained actuarially sound. The affidavit of Penny Bailey (L.F. 626-629) provides that these COLA benefits make up \$123.6 million of the \$809.7 million in total liabilities of the PRS in the October 2002 Actuarial Report. (L.F. 628-629) This undeniably means that, but for the constitutionally authorized COLA benefits, the PRS would not have required any contribution from the City but, rather, would have had a surplus of well over \$100 million. Thus, the only reason that there is a budget request at all, much less a request above the amount in 1980, is because of voter-authorized COLA benefits.

The Hancock Amendment, article X, § 21, must be read in harmony with other provisions of the Missouri Constitution, especially those voted into effect by the people after the Hancock Amendment's effective date. *Consolidated Sch. Dist. No. 1 of Jackson County v. Jackson County*, 936 S.W.2d 102, 103-104 (Mo. banc 1996); *Gregory v. Corrigan*, 685 S.W.2d 840, 843 (Mo. banc 1985). It is obvious that, with respect to “increases in activity” vis-à-vis a public retirement system, the voters in Missouri recognized that a retiree's benefits, without COLA benefit increases, could cause long-time retirees to be effectively below the poverty line.

The City argues, however, that article VI, § 25 does not require COLAs; rather, it is a permissive action on the part of local government. This provision provides “that any county, city, or potential corporation or subdivision may provide for the payment of periodic cost of living increases....”. (Emphasis added.) The City seems to think that the

people need to vote for the COLA increases when in fact they have already spoken in passing this constitutional provision authorizing their legislative bodies to enact such benefits. In this case, the people of the state of Missouri are presumed to know that the only way for the police officers of “any ... city” (in this case the officers in St. Louis) are able to receive periodic cost of living increases is through a provision in Chapter 86. Section 86.253.3 provides:

The service retirement allowance of each present and future retired member who terminated employment as a police officer and actually retired from service after attaining age fifty-five or after completing twenty years of creditable service shall be increased annually at a rate not to exceed three percent as approved by the board of trustees ... provided that each increase is subject to a determination by the board of trustees that the consumer price index (United States City Average Index) as published by the United States Department of Labor shows an increase of not less than the approved rate during the latest twelve-month period for which the index is available at the date of determination.... (Emphasis added.)

This section clearly authorizes the COLA benefits anticipated by the voters of Missouri. When article VI, § 25 is read *in pari materia* with § 86.253 and the Hancock Amendment, it is clear that they can all be read together to enable retired members to have increase that keep up with the minimum standard of living and this is not an increase in activity. It does not matter that the benefit was not “required” by the voters; they authorized the benefit and it was enacted.

The actuary for the PRS took article VI, § 25 and § 86.253 into account when making her calculations over the past years. The City has not objected to the actuarial computation in any year, including the year at issue. Therefore, the City has tacitly consented to COLA being included in the computation.

Additionally, the Hancock Amendment did not use the term “increase in dollars;” it used “increase in activity.” The concept of “activity” for a public retirement system must, in light of article VI, § 25, take into consideration the fact that COLA increases were authorized by the same voters who authorized the Hancock limitations. *Consolidated Sch. Dist. No. 1 of Jackson County*, 936 S.W.2d at 103-104; *Gregory v. Corrigan*, 685 S.W.2d at 840. In other words, if, hypothetically, in November 1980, the pension’s “activity” was \$100 million, and, after 20 years of COLA increases totaling \$10 million, all of which were enacted at times when they did not affect the actuarial “soundness” of the pension fund, the COLA benefits now increased that “activity” to \$110 million, the “activity” remained the same and the Hancock Amendment has not been violated.

Any other interpretation of article VI, § 25 and article X, § 21 ignores the effect of a cost-of-living provision, *i.e.* to adjust the benefits to keep up with inflation such that a 1980 dollar has the same purchasing power in later years as it did in 1980. Section 86.253.3 implements the COLA provision authorized by article VI, § 25 for the PRS. It adjusts the members’ benefits up (or down) based on the “consumer price index.” Without this provision, a retiree would, after ten, twenty or forty years, be receiving a benefit that has no rational relationship to the benefit he or she was intended to receive

upon retirement. Moreover, if the City's contribution for such retirees was "frozen" at the 1980 level, without respect to COLA benefits, the City would receive an unjust windfall from forty years of inflated dollars.

In this case, the COLA increases should not be counted as part of the "increased activity" in the PRS' budget since 1980. Without those voter-approved increases, the City's Hancock defense would not exist, as the PRS would not have had a budget request. The City is simply wrong when it states that the people have determined inflation to be irrelevant to public pensions. The people have determined that COLA increases are important (article VI, § 25) and the legislature listened to the voice of the people (§ 86.253). The Hancock Amendment cannot be read in isolation. This Court has stated that it will attempt to harmonize all provisions of the constitution. *Consolidated Sch. Dis. No. 1 of Jackson County*, 936 S.W.2d at 103-104. There is no conflict between art. X, § 21 and art. VI, § 25, so they must be read together and harmonized, which would allow the COLA increases.

D. The PRS Activity Level Has Not Increased as a Percentage of Payroll

As stated in the points above and below, the test for an "activity" in a pension system should not simply be the raw dollars certified by the PRS for its budget on December 4, 1980, blindly disregarding the effect of cost-of-living adjustments and other factors relevant to the evaluation of a pension system's funding. In fact, the true test is the City's contribution to the pension system as a percentage of the active members' payroll. *See Missouri State Employees' Retirement System v. Jackson County*, 738 S.W.2d 118, 121 (Mo. banc 1987) (Court held that the appropriate test for increases in

“activity” of a pension system under Hancock was the “net fiscal effect”). The City argues that the “net fiscal effect” only applied under the specific facts of the *Jackson County* case, but there is absolutely no support for this contention. This Court determined that the “net fiscal effect” can be considered in regard to funding under the Hancock Amendment. *Id.*

Valid “Hancock claims require a specific factual showing of both an increased level of activity required by the State, and increased costs in performing that activity.” *Division of Employment Security v. Taney County Dist. R-III*, 922 S.W.2d 391, 395 (Mo. banc 1996); *City of Jefferson*, 916 S.W.2d at 795. (Emphasis added.) There is no evidence of an increased level of activity under the facts presented here.

Appendix B to the Affidavit of Stephen G. Olish (L.F. 150-159) sets forth the City’s contributions to the PRS from 1970 to 2002 in both amounts of total dollars (less expenses) and as a percentage of payroll. (L.F. 158-159) For the 10 years prior to the effective date of the Hancock Amendment, the contributions of the City as a percentage of payroll varied between a low of 20.81% and a high of 24.40%. In the year at issue, 2002, the contribution of the City as a percentage of payroll is 13.97%. This is the case, even including the COLA increases over the past 20 years since they have been authorized by the voters of this state.

In short, not only has the “activity” of this pension system not *increased* since December 4, 1980, it has dramatically *decreased*, especially when one considers the voter-authorized COLA increases. The budget as an “activity” as of December 4, 1980, i.e. as a percentage of payroll was 22.68%. (L.F. 158) Again, in the budget year in

question it is 13.97%, so there has been no “increase in the level of any activity.” The City cannot deny the importance of this factor as it recognized the fact that funding pursuant to a percentage of payroll is a valid way in which to view pension funding, as it chose to pay 6% of the payroll for its contribution for 2002. The problem, however, was that the percentage was wholly inadequate, especially after over a decade of zero dollar funding to the PRS.

E. The City’s Certified Budget Amount for 1980 is Erroneous

The City’s brief asserts that the amount that should be used for the “baseline” for the Hancock Amendment argument should be \$5,886,755. This is so disingenuous as to border on misleading the Court. The City’s own Exhibit 8 to its Memorandum in Support of Defendant’s Motion for Summary Judgment shows that the amount paid to the PRS for the 1980-1981 fiscal year by the City before December 4, 1980 was \$7,854,680. That included the Normal Contribution, the Accrued Liability Contribution and the City’s one-half share of the System’s expenses. The City only refers to the normal contribution amount of \$5,886,755, ignoring the Accrued Liability Contribution of \$1,829,605 and the expenses due at that time under §86.343.2 of \$138,320.

The City relies on the decision in *State ex rel. Sayad v. Zych, supra*, but ignores the fact that it concentrated on the last certified budget before the effective date of the Hancock Amendment as the target date for determining the level of activity before Hancock. 642 S.W.2d at 911. It also uses the words “level of funding” as of December 4, 1980 but then ignores the fact that its level of funding as of that date was \$7,854,680. The affidavit of Stephen G. Olish, (L.F. 150-159) sets forth the fact that the proper

certified amount for the City's fiscal year 5/1/80 – 4/30/81 was \$7,716,360. A subsequently filed affidavit of Mr. Olish sets forth the fact that this amount did not include the PRS expenses, which were billed separately, which is why it did not match the exact amount paid by the City for that year. (L.F. 631) The second affidavit also sets forth the fact that the “Accrued Liability Contribution” was discontinued by operation of law (§ 86.340) more than a decade ago and that is why the only amount certified today is the Normal Contribution Rate. Nonetheless, this amount was an amount that made up part of the system's funding at the time and was, by the City's own admission in its own pleading, paid at the time. (L.F. 632) It is a sad state of affairs when the City attempts to use underhanded tactics to cheat its own police officers and their widows and orphans out of their hard earned monies by twisting figures and ignoring the clear realities of this case.

The Hancock Amendment specifically refers to the “increased level of activity” and not the “normal contribution.” The City has not sustained its burden of proving “a specific factual showing of both an increased level of activity required by the State, and increased costs in performing that activity.” *Taney County Dist. R-III*, 922 S.W.2d at 395. The City has not presented any evidence that there has been an increase in the level of activity here. The PRS, on the other hand, has shown that the level of activity, to fund the PRS through the determination of the normal contribution rate and other statutorily defined amounts, has not changed.

Even if the City had standing and even if this constitutional provision was applicable to the PRS, the PRS does not agree that the proper measure of “activity” for a Hancock

analysis is a raw dollar figure. However, if a Court somehow eventually ruled that one was applicable, the dollar figure used by the City is erroneous and the proper figure is \$7,854,680, not the \$5,886,755 figure submitted by the City.

Point I should be denied.

POINT III

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE PRS BECAUSE REQUIRING THE CITY TO PAY THE CERTIFIED CONTRIBUTION AMOUNT, AS DEFINED IN § 86.344, WAS NOT AN IMPROPER DELEGATION OF LEGISLATIVE POWER AND DID NOT CAUSE THE CITY TO BECOME INDEBTED BEYOND ITS INCOME IN VIOLATION OF ARTICLE VI, § 26(a), MO. CONST. AS: (1) THE PRS DID NOT HAVE UNFETTERED DISCRETION WITH ITS BUDGET REQUEST; (2) THE CITY ADDUCED NO EVIDENCE TO SUPPORT ITS CONTENTION THAT THE PRS AND NOT A MYRIAD OF OTHER BUDGET ITEMS CAUSED THE CITY'S ALLEGED INDEBTEDNESS BEYOND ITS INCOME; AND (3) THE PRS DEMONSTRATED THAT IT PROVIDED THE CITY WITH PROPER NOTICE OF THE CERTIFIED CONTRIBUTION AMOUNT LONG BEFORE THE CITY WAS FIRST REQUIRED TO APPROPRIATE AND TRANSFER THE REVENUE FROM ITS 2003-2004 BUDGET, YET THE CITY STILL IGNORED ITS STATUTORY DUTIES.

(This responds to Appellants' Point Relied On II)

A. Standard of Review

The PRS adopts the same standard of review as is set forth in Point Relied On I.

B. The PRS Budget Request Does Not Violate Article VI, § 26(a)

In its second point, the City argues that it cannot be required to appropriate the certified amount defined in § 86.344 because such a requirement would violate Art. VI, § 26(a), Mo. Const., which provides that:

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.

In support of this argument, the City relies primarily upon the unpublished circuit court opinion *State ex rel. Employees' Retirement System of the City of St. Louis v. Board of Estimate and Apportionment*, Cause No. 004-01181 (Cir. Ct. City of St. Louis, MO, 6/30/00), *aff'd pursuant to Mo. R. Civ. P. 84.16(b)*, 43 S.W.3d 887 (Mo.App. 2001) (“ERS”).

The PRS first notes that this is a circuit court opinion that carries no precedential weight and it was affirmed without a published opinion. In fact, the Memorandum Opinion issued by the Court of Appeals specifically states:

This memorandum is for the information of the parties and sets forth the reasons for the order affirming the judgment.

THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT. IT IS NOT UNIFORMLY AVAILABLE. IT SHALL NOT BE REPORTED, CITED, OR OTHERWISE USED IN

UNRELATED CASES BEFORE THIS COURT OR ANY OTHER COURT.... (Emphasis in original.)

The City, having already violated Rule 84.04 at the outset of its Point Relied On I, proceeds immediately into its Point Relied On II by violating the express terms of the above directive. It not only “cite[s]” to the unpublished decision “before th[e] court” but goes on in its brief to state what the Court of Appeals relied on in its decision, which “otherwise uses” the decision in violation of the specific mandate. The City then proceeds to make several references to alleged facts in support of its argument that have no support in the record in further violation of Supreme Court rules on good faith in pleadings. This part of the City’s argument should be struck from its brief.

Prior to addressing the City’s arguments, the PRS notes that the trial court’s sixty-two page “Memorandum, Order and Judgment” disposes of this issue with extreme detail, well researched case law and public policy considerations and respectfully requests this Court to review the same. (L.F. 685-746)

The City’s argument assumes that the PRS is attempting to force it to borrow money in order to appropriate the certified contribution. This is not true. Nothing in the statutes requires the City to borrow money for this contribution. In fact, § 86.344 requires that the contribution “**will become due and payable during the next following year ...**” [Emphasis added.] The statute requires that the PRS give the City notice of the pending obligation so that it may plan its budget. The fact that the City chose to ignore its obligation and distribute the amount that should have been budgeted for the PRS

should not be the basis for a complaint that it may have to borrow money to meet its statutory obligation to the PRS.

The City's argument is tantamount to a spouse with a child support obligation arguing that it should be able to avoid that obligation because the spouse spent his or her income on travel and entertainment and now is unable to pay child support. The City was aware of its statutory obligation to the PRS and chose to ignore it. The City had sufficient notice to allow it to prepare its budget so that the certified contribution could be made without resorting to borrowing money. If this were a defense for the City every year, the PRS could find a litany of budget items to prove that City has been unwise, if not reckless, in its spending as compared to the needs of the officers who protect the lives of its citizens. The PRS is not at fault for any alleged fiscal difficulties that the City may or may not be facing. To allow the City to say that it is a constitutional violation to make its statutory contribution solely because it did not plan well would mean that the City could eventually bankrupt the PRS by spending to its limit and leaving the PRS as the last budget item for which it had no more revenue every year.

In any case, even if it could be cited as precedent, *State ex rel. Employees' Retirement System of St. Louis*, is not dispositive. There, the Employees' Retirement System (ERS) sought mandamus to compel the City to include a contribution amount in the City's budget. The ERS was created by City ordinance, not by statute. Avoiding an obligation that the City created for itself and avoiding an obligation created by State statute are two entirely different legal propositions. Judge Dierker recognized this fact:

The difficulty with relators' position in this case is that every Missouri case relied on by relators involves the question of whether a municipality was obliged to conform to the command of a statute not an ordinance. Thus, in State ex rel. Twenty-Second Judicial Circuit v. Jones, supra, the issue was whether the City's Board of Estimate and Apportionment could disregard the terms of the County Budget Law in the matter of appropriations for the circuit court. In Missouri State Employees Retirement System v. Jackson County, 738 S.W.2d 118 (Mo. banc 1987), a statute expressly authorized mandamus to compel action by the city. In Retirement Bd. of Police Retirement System v. Kansas City, 224 S.W.2d 623 (Mo.App. K.C. 1949), the issue was whether a city could disregard statutory commands.

(L.F. 679). Thus, while the case upon which the City wants to rely may be authority for the retirement systems that are governed solely or partly by statute, it has no bearing, by its own terms, on this system which is solely based on state statute. In addition, the enabling ordinances in *ERS* had a provision permitting a reduction in benefits if the City did not make its contribution, which the trial court considered when it made its determination that the amount certified by the ERS was not mandatory. Nowhere in the PRS' enabling legislation is there a provision that would permit such a reduction in benefits. Moreover, even in the context of an enabling ordinance, Judge Dierker's opinion recognized that the City may not merely ignore its duties and argue that the budget had already been spent, as it argues in this case.

Respondents' motion to quash and dismiss asserts that the petition in mandamus seeks to compel respondents to perform acts that are no longer possible, as the final budget ordinance has been enacted, thereby precluding respondents from submitting a revised ordinance to the Board of Aldermen. As relators correctly observe, that contention is without merit. A budget ordinance, like any other ordinance, is subject to amendment in light of subsequent events. See City of St. Louis v. Smith, 228 S.W.2d 780 (Mo. banc 1950). **Respondents may not evade their express legal duties simply by 'running out the clock.'** See State ex rel. Twenty-Second Judicial Circuit v. Jones, 823 S.W.2d 471 (Mo. banc 1992).

(L.F. 0678) (Emphasis added.) The trial court rejected the City's "running out the clock" argument stating that such an argument would be an absurd reading of the statutes and constitution. *State ex rel. McNary v. Hais*, 970 S.W.2d at 495. (L.F. 722-733) The PRS agrees.

The City also ignores more recent case law interpreting article VI, § 26(a). In *Mercantile Bank of Illinois, N.A. v. School Dist. of Osceola*, 834 S.W.2d 737, 741 (Mo. banc 1992), the Court said that a fresh consideration of the demands of article VI, section 26(a), is warranted. It held that this provision "says first to a political subdivision: 'You may not borrow to increase what you have to spend in any year beyond a total of what your taxes will bring in for that year, whatever other income you may have for that year, and what you have left over from previous years that is not already encumbered. ... It also says to a political subdivision, 'You cannot spend more than you have.'" The City

has had budget requests from the PRS since 1957. For all but ten of those years it has owed millions of dollar to the PRS. Pursuant to the express terms of § 86.344, the City is put on early notice of the exact amount of that budget long before it sets its budget for the ensuing year such that it will not “spend more than it has.” The City simply decided it would arbitrarily pay less than it owed. It cannot *create* a constitutional violation. This point should be denied on this basis.

The City’s further argument that the PRS’ budget request is “an improper delegation of legislative authority,” relies upon *State ex rel. Field v. Smith*, 49 S.W.2d 74 (Mo. 1932), which held that the legislature may not delegate the power to tax and, by granting the Kansas City Police Commission unfettered discretion in setting its budget, the legislature was attempting to unconstitutionally delegate that power. The pivotal finding was that the Commission’s discretion to set its own budget was unfettered. The Court did, however, recognize that:

The Legislature may, without violating any rule or principle of the constitution, confer upon an administrative board or officer a large amount of discretion provided the exercise thereof is guided and controlled by rules prescribed therefore.

Id. at 76. [Emphasis added.] Twenty-five years after the decision in *Field*, this is exactly what the legislature provided in the PRS’ enabling legislation. The legislature provided a formula for determining the City’s contribution and required that the computation be performed by an actuary. This is *far* from the unfettered discretion proposed to be given to the Kansas City Police Commission. The legislature is presumed to know the state of

the law when it passes legislation (*Nicolai v. City of St. Louis*, 762 S.W.2d 423, 426 (Mo. banc 1988)) and its laws are presumed constitutional (*Associated Industries of Missouri v. State Tax Commission*, 722 S.W.2d 916, 918 (Mo. banc 1987)). Thus, when the legislature enacted § 86.344, it must have been aware of the *Field* case and, therefore, provided for the actuarial guidelines and board procedures to ensure that there was no unfettered discretion with the trustees.

Indeed, the legislature added three trustees appointed by the Mayor and City's Comptroller to ensure that the City was well protected from the unfettered discretion of the PRS. In previous litigation between the City and the PRS, the City hired an actuary and challenged the underpinnings of the PRS' actuarial assumptions. The City made the effort to ensure that there was no "unfettered discretion" by the PRS' trustees. In this case, the City made no such challenge. It simply "cried poor" without any proof and argued that it should not be made to pay because the budget for the 2003-04 year was already set.

In addition, the decision in *Field* has been seriously undermined by the line of cases culminating in *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471 (Mo. banc 1992). There, the Supreme Court required the City to appropriate the budget certified by the Circuit Court, without diminution, even though no limit was placed on the amount that the Circuit Court could certify. The Supreme Court found that there was a valid appeals process that the City could have followed but the City chose to simply reduce the budgeted amount and force the Circuit Court to have to fight for its proper contribution. *Id.* at 478.

The facts in *Jones* are amazingly similar to this dispute. As in *Jones*, the PRS instructed its actuary to prepare the calculation for the “normal contribution rate.” The PRS’ Board of Trustees certified that amount to the City’s Budget Director. Instead of hiring its own actuary to determine if the certified amount was correct, the City’s Budget Director simply decided, without any calculation whatsoever, that the PRS had sufficient assets for the current year and reduced the City’s contribution amount to 6% of payroll. No calculation or appeal was taken from the amount certified to the City and, as has been shown, *supra*, this interpretation of the statutes will exhaust the PRS’ assets.

As in the *Jones* case, the City has the same ability to challenge the PRS actuary’s analysis with its own actuary and has the ability to have a full trial on the merits of each budget, as it has before (see footnote 7, *infra*). The City has the ability to have its own appointed trustees on the PRS Board vote and influence the direction of the PRS on issues. The legislative definitions of the “normal contribution rate” and other terms are clear and ensure that the budget request can only reach a level that will fund the needs of those current and retired members and their dependents. The budget request is not left to the “unfettered discretion” of the Board of Trustees.

The situation is also similar to *Jackson County, supra*, in which Jackson County argued, among other things, that § 104.345, RSMo 1986 failed to provide sufficient standards for guidance and gave MOSERS arbitrary discretion and authority. Section 104.345 required that the amounts that the City of St. Louis or a county would have to contribute to MOSERS for the creditable prior service of court clerks be “actuarially determined to be sufficient to fund the creditable prior service” of the court clerks who

became state employees on July 1, 1981 and chose to participate in MOSERS. Section 104.345(b), RSMo 1986 required that amount to be contributed by the city or county “shall be determined by an actuary employed or retained by the Missouri state employees’ retirement system.” This Court found that there was no violation of the Hancock Amendment, and held that:

The amounts due depend on actuarial computation, which takes account of life expectancies and interest factors. The actuary is the person who is equipped to complete the sums required by the statute subject to review by the Court. The statute is not vague as to what is required and it does not delegate any authority to MOSERS which is not supported by actuarial computation. It makes no difference that the actuarial computations are not exact, or that certain assumptions are made about future salaries. The requirement is simply that the best computation available be furnished. The courts are open to a claim that the actuarial computation is unsound.

Jackson County, 738 S.W.2d at 120-21. Similarly, the PRS does not have unlimited and unguided power to drain revenue from the City. Instead, the PRS follows the legislative enactment and certifies the amount determined by an actuary to be required to maintain the PRS in an actuarially sound position.

It should also be noted that the trial court cited to § 86.227 as authority for the City to challenge the decisions of the Board of Trustees on any decisions they had on budget or other matters and noted that it provided “exclusive jurisdiction” for such disputes. (L.F. 694, 743) Thus, the City’s arguments on this point were arguably waived by the

City not bringing the issues concerning the budget request being too significant in its amount before the Board and appealing it pursuant to § 536.100.

Last, the City again violated the rules of appellate practice as it makes factual statements with no support in the record. For example, on page 32, the City asserts that: “In arriving at a final budget, the Board of Estimate and Apportionment and the Board of Aldermen exercised their discretion and sought to ensure that the PRS member benefits continued while preserving important City services dependent on the financial stability of the City.” There are no facts in the record to support this allegation. There is no citation to authority in the Statement of Facts and it is contradicted by the deposition testimony of Frank Jackson who stated that he came up with the 6% of payroll on his own and it was simply adopted.

The City’s brief (p. 32) also states that in order to pay the PRS, the “City would be forced to forego essential services.” The trial court ruled that the City’s uncontroverted statement of facts was admissible on the bare allegation that the city was “facing financial difficulties” (the trial court noting that it has every year for the past 50 years) and that paying the PRS “would threaten City services.” However, the City twists that bare-boned statement into a direct tie to “forcing it to forego essential services” is without support in the record. In fact, despite obvious coaching from the City’s counsel, the Budget Director would not testify that the City’s budget problems for fiscal year in question were any more or less serious than they were for any other year in the past. (L.F. 510, Tr. 82-83)

The City then goes on with hyperbole as well as facts not in the record in this same argument (pages 32-33) when it argues that “[t]aken to the extreme, continuous increases in the certified amounts could lead the City to bankruptcy and the PRS entirely worthless.” The PRS has been a jewel of a pension plan for the past 15 years with \$0 owed for 10 of those years. (L.F. 158-159) Yet now that the City must go back to making contributions, as it did for all years prior to 1992 (*Id.*), at an amount far less than it did for the 20 plus years prior to 1992, it accuses the pension plan that is the safety net for the men and women who put their lives on the line for the City every day, of forcing the City into bankruptcy, and without any factual support.

Finally, the City says (page 31) that “[u]nder the PRS’ interpretations of the funding provisions, which was adopted by the trial court, the Board of Trustees has authority to seek appropriation of the City’s *entire* revenue.” (Emphasis original.) This extreme hyperbole is again also an attempt to put in facts not in the record, as the City does not have a scintilla of evidence from any source to support such an absurd statement. As noted throughout this brief, the statutes, the Board of Trustee’s makeup of City representatives, the affidavit and deposition testimony of the PRS actuary and her attached 2002 and five-year actuarial reports all clearly set out a methodology for determining the exact amount for the City’s contribution and an appeal mechanism if the Board fails to adhere to that mechanism, which it has not done so since its inception in 1957.

Point II should be denied.

POINT IV

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE PRS BECAUSE THE CLEAR AND UNAMBIGUOUS MEANING OF THE STATUTES PROVIDES THAT THE “NORMAL CONTRIBUTION” IS MANDATORY AND THE CITY’S INTERPRETATION IS NOT CONTROLLING BUT, RATHER, WOULD LEAD TO AN ABSURD RESULT NOT *IN PARI MATERIA* WITH THE STAUTORY FRAMEWORK OF THE RELATED FUNDING PROVISIONS, WHICH IS CONTRARY TO ALL APPLICABLE RULES OF STATUTORY CONSTRUCTION.

(This responds to Appellants’ Point Relied On III)

A. **Standard of Review**

The PRS adopts the same standard of review as is set forth in Point Relied On I.

B. **Introduction**

On or before March 1 of each year, the board of trustees of the PRS determines the amount of the City’s contribution based on Mercer’s recommendation and certifies that amount to the Board of E&A pursuant to § 86.344 and “the amounts so certified shall be appropriated by the city.”⁶ The “the cost of providing all benefits” under §§ 86.200 to 86.366 are “the obligation” of the City. § 86.350. The City does not dispute these

⁶ The statutes cited in this paragraph are set out in full below.

provisions, but argues in its brief (at pages 33-34) that the second half of § 86.337 should be interpreted to mean 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.” The City: (1) ignores the fact that § 86.330 sets out the “normal contribution rate” that forms the basis for the amount necessary to fund all the benefits to keep the system actuarially sound; (2) ignores all rules of statutory construction; and (3) sets forth an argument that would deplete all assets of the PRS before the City was ever obligated to pay another penny of contributions, leaving the City with an annual obligation that would be more than ten times what it would have paid for the year in question. This is not merely an absurd result; it is an insane result.

The trial court’s memorandum opinion on this issue (L.F. 703-716) is, again, very well researched and recites how the City’s argument changed dramatically during the course of the proceeding and in oral arguments in attempt to avoid its obvious result - - a “pay as you go” funding mechanism that would not require the City to make another payment to the PRS until the system’s \$650 million, which provides actuarial soundness to the PRS, was fully depleted. (L.F. 687-688 706-710). The trial court even carefully pointed out how the City attempted to backtrack and argue that it did not contend that the PRS assets must be depleted once it realized the ramifications of this argument. The trial court pointed out the following statement in its Memorandum in support of Summary Judgment, where the City stated: “the City is only required to transfer that amount necessary to satisfy the member benefits in the *current year*, **and only then once the**

assets of the system are exhausted.” (L.F. 708; 592; emphasis original.) The City cannot and should not be able to disregard and backtrack from this statement in its pleadings now only because it has become aware that the reality, if one accepts the City’s argument, is inimical to its cause.

The City also makes several arguments concerning the economic hardship that it is suffering and the apparent need for the City to only be able to pay the arbitrary and capricious sum of 6% of payroll.⁷ Under this logic, of course, there would no need for all private pension plans in America to fund their pension systems any longer under the cry of “we can’t afford it!” The City’s argument would allow company representatives to use the money set aside for future benefits for their own personal benefit as long as they believe that they can fund the money when the benefits are due to the participants.

The most obvious problem with the City’s argument is that it contravenes the plain intent of the Missouri General Assembly, which took precautions against this “pay as you go” philosophy. The legislature provided for the use of an actuary to calculate the proper funding for the PRS in four separate statutes (§§ 86.240, 86.243, 86.247 and 86.330), in order to have the retirement system’s assets actuarially sound. As noted earlier, the

⁷ The City made this same unsupported argument (and raised many of these same defenses) when the PRS was forced to file suit and go all the way through trial over a decade ago until the City capitulated and paid. The trial court initially took judicial notice of all of the pleadings in that action at the request of the PRS but reversed itself in its Order and Judgment for fear of reversible error. (L.F. 696-697)

actuary's reports ensure that there is funding for all members in the retirement system for all future years in which benefits could be owed (at present value), not just for those who will receive benefits on the current year. These legislative enactments would be a futile exercise and absurd legislative enactments if the City's argument prevailed.

1. **Interpretation of the Legislative Scheme/General Rules of Statutory Construction**

“The primary rule of statutory construction requires a court to ascertain legislative intent by considering the plain and ordinary meaning of words used in the statute, and when the language of the statute is clear and unambiguous, there is no room for construction.” *Russell v. Missouri States Employees' Retirement System*, 4 S.W.3d 554, 556 (Mo.App. 1999), *citing State of Kansas, Secretary of SRS v. Briggs*, 925 S.W.2d 892, 895 (Mo.App. 1996). To determine whether a statute is clear and unambiguous, courts look to whether the statutes are clear to a person of ordinary intelligence. *Wheeler v. Board of Police Comm'rs of Kansas City*, 918 S.W.2d 800, 803 (Mo.App. 1996). Provisions of an entire legislative act must be construed together and related clauses must be considered when construing a particular portion of a statute. *Geary v. Missouri State Employees' Retirement System*, 878 S.W.2d 918, 922 (Mo.App. 1994). Statutory provisions relating to the same subject matter are considered *in pari materia*, and are to be interpreted together. *Lagares v. Camdenton R-III School Dist.*, 68 S.W.3d 518, 526 (Mo.App. 2001). Statutes *in pari materia* are intended to be read consistently and harmoniously. *Id.*

When read together and harmonized, §§ 86.200 to 86.366 unequivocally provide a mandate for the creation of the PRS. *Trantina v. Board of Trustees of the Firemen's Retirement System of St. Louis*, 503 S.W.2d 148, 151 (Mo.App. 1973); § 86.203. The legislature also intended that the PRS provide for periodic valuations of the assets and to receive contributions from the City to ensure that the pension plan remain actuarially sound. §§ 86.240, 86.243, 86.330, 86.337 and 86.344. These are mandatory provisions. The purpose of the mandatory establishment and funding of the PRS was to provide the member police officers a retirement benefit based on Earnable Compensation and the “normal contribution rate”, which would be available to all members at the time of their retirement. As will be shown, *infra*, the City's interpretation of the statutes would convert the PRS into a “pay as you go” system, completely contrary to the legislative intent of §§ 86.200 to 86.366.

2. Sections 86.337 and 86.344 must be read together in harmony

The City attempts to confuse this Court with its interpretation of the statutes. The City relies on § 86.337, which provides:

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. (Emphasis added.)

This statute must be read *in pari materia* with § 86.344. Both sections are mandatory and must be read together. Section 86.344 provides that the City must make a mandatory contribution that equals the amount certified as necessary for expenses under § 86.343.2 and § 86.337. It states:

On or before the first day of March of each year the board of trustees **shall** certify to the board of estimate and apportionment of the city the **amounts which will become due and payable** during the year next following for expenses pursuant to subsection 2 of section 86.343 and the cost of benefits as determined pursuant to section 86.337. The amounts so certified **shall be appropriated** by the city and transferred to the retirement system in equal payments in the first six months of the ensuing year. [Emphasis added.]

One other statute must be considered and read together with §§ 86.344 and 86.337.

Section 86.330 determines the “normal contribution rate” and it states:

After each annual valuation, the actuary engaged by the board to make the valuation required by sections 86.200 to 86.366, shall determine **the normal contribution rate**. The normal contribution rate shall be the rate percent of the earnable compensation of all members obtained by deducting from the total liabilities of the retirement system the amount members obtained by deducting from the total liabilities of the retirement system the amount of the assets in hand to the credit of the retirement system and the present value of expected future member contributions and dividing the

remainder by one percent of the present value of the prospective future compensation of all members as computed on the basis of mortality and service tables and interest assumptions adopted by the board of trustees.

When all three of these statutes are read *in pari materia*, the correct interpretation is obvious. The statutes are mandatory and require the City to appropriate not less than the “normal contribution rate” that was actuarially determined and certified by the PRS for benefits as well as one-half of the PRS’ expenses pursuant to § 86.343.2.

The more reasonable, and *only* plausible, interpretation of § 86.337, is that the City must make a contribution that is at least as large as the normal contribution rate. When, however, in circumstances where the normal contribution rate, when combined with the assets of the PRS, are not sufficient to provide the pension and other benefits payable during the current year, the City is obligated to make an additional contribution sufficient in amount to enable the PRS to pay benefits to its members, the police officers of the City of St. Louis.

Indeed, the affidavit filed by the actuary for the PRS detailed how there can be situations where the normal contribution rate is the minimum amount that the City would have to contribute and if the normal contribution rate plus the PRS assets are not sufficient to provide “pensions and other benefits payable during the then current year,” the City must make an additional contribution. (L.F. 627) She then sets out examples of the real-life situations that fit into the reasons why the language in §86.337 may have been worded in the manner in which it is worded. (L.F. 627-628)

This Court cannot construe these statutes in a way that will lead to an absurd or unreasonable result. *State ex rel. McNary v. Hais*, 970 S.W.2d at 495 (the legislature is presumed not to pass absurd laws and courts favor constructions that avoid unjust and unreasonable results). *See also State ex rel. Dravo Corp. v. Spradling*, 515 S.W.2d 512, 517 (Mo. 1974). The City’s interpretation will lead to exactly such an absurd and unreasonable result.

The PRS has averaged \$36 million in benefit payments each year over the past five years. (L.F. 629) Thus, under the City’s interpretation of the statutes, the City will not make a payment until the assets that are now set aside for current and future members are fully depleted, but it will then be required to make a yearly payment with a present value of \$36 million each year from that date forward. Obviously, if the City allegedly cannot afford the current \$9 million “normal contribution rate” payment, it will never be able to afford a request four times that amount every year thereafter.

The obvious purpose of the “normal contribution rate” and the entire statutorily mandated actuarial calculation is to ensure a pension fund that is actuarially sound. Instead, the City would have the PRS whittle its assets down to a zero balance and then find itself faced with yearly payments of a minimum of \$36 million (adjusted upward for inflation and COLA benefits) going forward *ad infinitum*, when it claims (without evidence) that it cannot pay more than \$4 million at present to the PRS for one year.

3. Use of the word “shall” in the statutory scheme is mandatory

Use of the word “shall” generally connotes a mandatory duty. *Bauer v. Transitional School Dist. of the City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003).

The City argues, however, that the statutes are directory because there is no penalty provision for failure to comply. The Missouri Supreme Court addressed this exact argument in *Bauer*, stating:

[T]he presence or absence of a penalty provision is “but one method” for determining whether a statute is directory or mandatory. *Southwestern Bell Tel. Co. v. Mahn*, 766 S.W.2d 443, 446 (Mo. banc 1989). Indeed, “[t]he absence of a penalty provision does not automatically override other considerations.” *Id.* Whether the statutory word “shall” is mandatory or directory is primarily a function of context and legislative intent. *Farmers & Merchants Bank & Trust Co. v. Director of Revenue*, 896 S.W.2d 30, 32 (Mo. banc 1995).

Id.

The Western District Court of Appeals has recently held that a county commission could be compelled to appropriate money to a statutory program, even though the commission was given complete control over its own budget. In *State ex rel. Hunter v. Lippold*, 142 S.W.3d 241 (Mo.App. 2004), the Court considered whether the DeKalb County commissioners could be compelled to allocate money for an agricultural extension program. The University of Missouri is authorized by § 262.357 to formulate and administer agricultural extension programs in each county of the State. The programs are administered by University Extension Councils, which the University may establish in each county. *See* § 262.253. Each individual council files its annual budget with the county commission, which “shall include the budget ... subject to the following

minimum appropriations: (1) In counties with assessed valuation of seventy million dollars or more, ten thousand dollars[.]” § 262.597.

The county commission argued that the statutory language is not mandatory. In addition §50.610 of the County Budget Law vests the county commission with ultimate authority over the county budget. The statute allows the commission to “revise, alter, increase or decrease the items contained in the budget and ... eliminate any item or add new items.”

The Court of Appeals found that the county commission’s interpretation disregarded the plain language of § 262.597, which “mandates an appropriation of \$10,000 for agricultural service programs in counties with an assessed valuation of at least seventy million dollars. Moreover, it requires the county commission to perform this act under these circumstances regardless of its own opinion as to the propriety of doing so.” *Id.* at 245. The Court of Appeals further found that § 50.610 did not allow the county commission to modify the amount contained in § 262.597 because the legislature was aware of the counties’ budget powers when it amended the statute. *Id.* Finally, in regard to the use of the word “shall” in the statute, the Court of Appeals found:

This mandate acts as an unambiguous limit on the county commission’s authority over the budget. Generally, the legislature’s use of the word ‘shall’ removes any discretion from the official who is directed to perform the specified act. In light of the context here in which ‘shall’ is used, we conclude that the absence of a penalty for the commission’s failure to fund

the program in the amount of \$10,000 does not transform the legislature's clear mandate into a mere suggestion.

Id. *Hunter* is directly on point. The statute in question, § 86.344, contains mandatory language requiring the City to appropriate the budget amount certified by the PRS. Nothing in the statute supports the City's contention that this is anything but mandatory. Its purpose is to limit the City's authority to impose its own will over the certification process.

As in *Hunter*, the St. Louis City Charter provision that the City contends allows it to control the budget process and decrease the amount certified by the PRS was enacted in 1959. Section 86.344 was not enacted until 1983 and was, thereafter, amended in 2000. The legislature is presumed to know the state of the law when it passed the statute (*Nicolai*, 762 S.W.2d at 426) and, therefore, intended for §86.344 to act as a limit on the City's ability to change, in any way, the certified contribution.

The City again relies on the unpublished *ERS* decision to support its theory. As stated previously, *ERS* is not controlling precedent. It is a slip opinion from a trial court that was never published. In addition, the Court of Appeals' memorandum opinion cannot be cited in this case. Yet, the City relies on this case as the basis for most of its arguments.

Regardless, *ERS* is not dispositive. *ERS* is interpreting an ordinance not a statute. The fact that the trial court determined that "shall" in the ordinance was directory and not mandatory does not apply in this case. The trial court below interpreted "shall" in § 86.337 as a mandate. In the underlying action, Judge Dowd found:

As for ERS, that case is even more distinguishable from the case at bar than it was from the companion FRS case, where - - unlike here - - the legislative scheme was based at least in part on an ordinance.

As Judge Dierker himself trenchantly noted, the legal equation is very different when the case “involves the question of whether a municipality [is] obliged to conform to the command of a statute, not an ordinance.” (ERS Judgment, at 7.) [L.F. at 704] The Missouri Constitution resolves any conflict between a charter city’s powers and a state statute in favor of the statute. Cape Motor Lodge v. City of Cape Girardeau, 706 S.W.2d 208, 211 (Mo. banc 1986); Fraternal Order of Police v. St. Joseph, 8 S.W.3d 257, 262 (Mo.App. W.D. 1999). A city may act for its own purposes, **so long as** it does not do so in a manner “contrary to statute.” Automobile Club of Missouri v. City of St. Louis, 334 S.W.2d 355, 364 (Mo. 1960). See also generally, State ex rel. Jones v. Twenty-Second Judicial Circuit, 823 S.W.2d 471, 478 (Mo. banc 1992).

(L.F. at 705). For the City to interpret or change an ordinance that it enacted is very different than the City disregarding the clear and unambiguous terms of a state legislative enactment. For that same reason, the City’s reliance on *Tomlinson v Kansas City*, 391 S.W.2d 850 (Mo. 1965), which involved a Firemen’s pension funding mechanism implemented by ordinance, is misplaced. Although the ordinance required Kansas City to make the annual pension contribution, the city could amend or repeal that ordinance at

any time and, as the Court noted, the ordinance did not prohibit amendments altering existing rights. *Id.* at 833. The City cannot amend the provisions of Chapter 86.

Point III should be denied.

CONCLUSION

The City has, without authority, reduced the amount of the funds required by state law that are necessary to fully-fund the present and future needs of the Police Retirement System. It did so without an actuarial study or any reason that is contained in the record on this appeal other than an arbitrary and capricious decision of the Budget Director to pay 6% of active officers' payroll that appears to have been simply "rubber-stamped" by his superiors. The individual member police officers and retirees of the PRS, which include by statute the widows and orphans of the officers who have been killed in the line of duty, have lived up to their end of the bargain, as they have no choice but to pay seven percent of every hard-earned paycheck as a contribution to the retirement system. The City has contributed to the PRS for all but ten of almost fifty years when the economy and adroit investments by the PRS did not require any contribution. The City has refused to pay the full contributions for the PRS 2003, 2004 and 2005 budgets and only now decided to raise certain defenses that they have never raised before in what the PRS believes is a veiled attempt at politics to force it to support legislation that the City wants to sponsor in Jefferson City. This will not work and is a terrible way to treat the men and women that put their lives on the line every day not only for Appellants but for all the citizens of the City of St. Louis.

The City did not carry its burden of proof on its affirmative defenses filed in opposition to Respondents' Motion for Summary Judgment or in support of its own motion. The City is, therefore, obligated to make its contribution in compliance with the applicable statutes.

For these reasons, the decision of the trial court should be affirmed.

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CERTIFICATION OF WORD COUNT AND ELECTRONIC FILING

The undersigned hereby certifies that the foregoing substitute brief filed by Respondent members of The Police Retirement System of St. Louis complies with the limitations prescribed in Rule 84.06(b). The brief contains 19,300 words, relying on the word processing system (Microsoft Office Word 2003) used to prepare this brief, and exclusive of the cover, table of contents, table of authorities, signature block and certificates of compliance and service. The brief was prepared in 13 point Times New Roman font.

The undersigned further certifies that the foregoing brief has been filed electronically with this court. Respondents' brief has been saved in Microsoft Word format. Pursuant to Rule 84.06(g), the disk filed herewith has been scanned for viruses and is virus free.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing, along with a disc containing the brief in electronic format, were sent, via electronic mail and first class mail, postage prepaid, this 17th day of November, 2006 to the following:

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