

IN THE SUPREME COURT OF MISSOURI

FIREMEN’S RETIREMENT SYSTEM, et al., )  
 )  
Plaintiffs/Respondents, )  
 )  
vs. ) No. SC87977  
 )  
CITY OF ST. LOUIS et al., )  
 )  
Defendants/Appellants. )

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

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

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## **JURISDICTIONAL STATEMENT**

This is an appeal from a judgment entered by the Honorable David Dowd of the Circuit Court of the City of St. Louis. The trial court's judgment, dated June 17, 2005, held that the City of St. Louis was required to pay the entire amount certified by the Plaintiffs/Respondents Firemen's Retirement System for fiscal years 2003-2004 and 2004-2005.

The appellants filed a notice of appeal to the Missouri Court of Appeals, Eastern District. Jurisdiction was vested in the Court of Appeals by Article V, Section 3 of the Missouri Constitution because this case does not involve the validity of a treaty or statute of the United States or of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or the imposition of the death penalty. The Circuit Court of the City of St. Louis is within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District. § 477.050, RSMo.

On August 22, 2006, the Court of Appeals transferred the appeal to this Court because the case presents issues of general interest and importance. Rule 83.02. This Court has jurisdiction to consider cases on transfer from the Court of Appeals under Article V, Section 10 of the Missouri Constitution.

## STATEMENT OF FACTS

The Firemen's Retirement System of the City of St. Louis ("FRS") is created and governed by sections 87.120 – 87.370, RSMo, and Chapter 4.18 of the Revised Code of the City of St. Louis. Under the statutory scheme, the FRS Board of Trustees employs an actuary to conduct a valuation of the FRS assets and liabilities. The FRS actuary also calculates an amount of a contribution to be certified, which is submitted to the City by the Board of Trustees. § 87.120 *et seq.*, RSMo.

On February 20, 2003, the FRS Board of Trustees certified to the City's Board of Estimate and Apportionment ("E&A") that the amount due and payable by the City for fiscal year 2003-2004 was \$8,913,102. L.F. at 528. On February 24, 2004, the FRS Board of Trustees certified to E&A that the amount due and payable by the City for fiscal year 2004-2005 was \$13,765,477. L.F. at 728. In 1981, the City's normal and accrued liability contribution to FRS totaled \$8,713,700. L.F. at 908.

The members of E&A are empowered to review and revise the City Budget Director's proposed budget for the ensuing year and subsequently submit the amended budget to the City's Board of Aldermen. City of St. Louis Code § 5.14.030; App. at A11. Article IV, section 25, of the City Charter requires that, in order for any appropriation ordinance to be adopted, E&A must recommend or join in recommending the ordinance. *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 472 (Mo. banc 1992).

Currently, the City is facing financial difficulties amid less revenue and greater demands for funding. L.F. at 872-73, 879. E&A exercised its discretion to propose a

budget allocating \$1,884,356 as the City's contribution and \$193,799 as the City Airport Commission's contribution to the FRS from its general funds for fiscal year 2003-2004. L.F. at 524, 939. The proposed budget was subsequently adopted by a vote of the Board of Aldermen. L.F. at 524, 529, 939. E & A also submitted the budget proposal for fiscal year July 1, 2004, through June 30, 2005, to the Board of Aldermen, which included an allocation to FRS of \$1,862,061. L.F. 525, 939. The proposed budget for fiscal year 2004-2005 was also subsequently adopted by vote of the Board of Aldermen. L.F. at 525, 729, 939.

The FRS commenced the present action based on the argument that Chapter 87 of the Revised Missouri Statutes and Chapter 4.18 of the City Code mandate that the City appropriate and pay the FRS the entire certified amount. L.F. at 17.

The trial court consolidated proceedings in this case with a case raising similar issues, *Thomas Neske et al. v. City of St. Louis* (the appeal of which is before this Court as No. SC87976). The cases were decided on opposing motions for summary judgment.

The undisputed facts showed that, despite the discrepancy between the FRS' certified amount and the City's appropriation, there were no members of FRS currently at risk of not being paid their benefits in the current year. L.F. at 791, 793, 797-98. As of September 30, 2003, the present market value of FRS assets totaled more than \$370,000,000. L.F. at 802, 814, 841. According to the FRS 2003 Audited Financial Report, the FRS incurs more than \$800,000 in administrative expenses, funded by the interest accrued on the system's invested funds. L.F. at 809, 861.

In moving for summary judgment, the City briefed the argument that the plaintiffs' claim was barred by the Hancock Amendment. L.F. at 925-27. The plaintiffs responded to the Hancock argument on the merits without objection as to whether the issue was properly before the trial court. L.F. at 957-63. The City addressed the Hancock Amendment again in its reply brief. L.F. at 1071-75.

The City also asserted the Hancock Amendment in opposition to the plaintiffs' motion for summary judgment, L.F. at 1059-60, and the plaintiffs responded to the Hancock Amendment argument in their reply memorandum, L.F. at 1091-92, again without objection as to whether the issue was properly before the trial court.

On June 17, 2005, the trial court entered a judgment in favor of the FRS on its claim for a declaratory judgment that the City was required to pay the entire amount certified by the FRS. The court held that the City waived its ability to raise the Hancock Amendment by not pleading it as an affirmative defense and, furthermore, that it lacked standing to assert that the Hancock Amendment forbids the FRS to claim an amount in excess of the level of funding in 1981.

On July 18, 2005, the City filed a motion for new trial or in the alternative to amend the judgment, L.F. at 1315, as well as a motion for leave to amend its answer to plead an affirmative defense based on the Hancock Amendment, L.F. at 1323. On September 2, 2005, the trial court denied both motions. L.F. at 1354. The City appeals.

**POINTS RELIED ON**

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

*Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982)

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

*Missouri State Employees' Retirement Sys. v. Jackson County*, 738 S.W.2d 118

(Mo. banc 1987)

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

Mo. Const. Art. X, § 21

Rule 55.33(b)

**II. IN THE ALTERNATIVE, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE CITY'S MOTION FOR LEAVE TO AMEND ITS ANSWER BY INTERLINEATION TO RAISE THE ISSUE THAT THE HANCOCK AMENDMENT BARS THE FRS' CLAIMS BECAUSE JUSTICE REQUIRED THE COURT TO GRANT LEAVE TO AMEND IN THAT THE PARTIES FULLY BRIEFED, ARGUED, AND SUBMITTED THE HANCOCK ISSUE WITHOUT ANY CLAIMS OF WAIVER, THE CITY AND ITS PEOPLE STAND TO SUFFER GREAT HARDSHIP ON ACCOUNT OF THE DENIAL OF LEAVE TO AMEND TO RAISE A VALID CONSTITUTIONAL ISSUE, THE FRS WOULD SUFFER NO INJUSTICE ON ACCOUNT OF THE AMENDMENT BECAUSE IT HAD A FULL AND FAIR OPPORTUNITY TO ADDRESS THE ISSUE ON THE MERITS IN THE SUMMARY JUDGMENT PROCEEDINGS AND ACTUALLY WAS HEARD ON THE MERITS, AND THE AMENDMENT WOULD CURE THE DEFICIENCY PERCEIVED BY THE TRIAL COURT.**

*Dwyer v. Meramec Venture Associates, L.L.C.*, 75 S.W.3d 291 (Mo. App. 2002)

*Rose v. City of Riverside*, 827 S.W.2d 737 (Mo. App. 1992)

Rule 55.33(a), (b)

**III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE FRS AND AGAINST THE CITY BECAUSE REQUIRING THE CITY TO PAY THE AMOUNT CERTIFIED BY THE FRS VIOLATES ARTICLE VI, SECTION 26(A), OF THE MISSOURI CONSTITUTION AND CONSTITUTES AN IMPROPER DELEGATION OF LEGISLATIVE POWER IN THAT ARTICLE VI, SECTION 26(A), PROVIDES THAT NO CITY MAY BECOME INDEBTED BEYOND ITS INCOME AND THE UNDISPUTED FACTS SHOW THAT THE CITY'S REVENUE FOR 2003-2004 AND 2004-2005 HAS ALREADY BEEN APPROPRIATED AND TRANSFERRED TO VARIOUS RECIPIENTS SO THAT IF THE CITY WERE REQUIRED TO PAY THE CERTIFIED AMOUNT FOR FISCAL YEARS 2003-2004 AND 2004-2005, THE CITY WOULD BE OBLIGATED IN EXCESS OF ITS REVENUES.**

*Automobile Club of Missouri v. City of St. Louis*, 334 S.W.2d 355 (Mo. 1960).

*State ex rel. Employees of Retirement System v. Board of Estimate and*

*Apportionment*, Cause No. 004-01181, aff'd at 43 S.W.3d 887 (Mo. App. 2001)

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

Mo. Const. Art. VI, § 26(a)

**IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE FRS AND AGAINST THE CITY BECAUSE THE CITY'S PAYMENT WAS ADEQUATE AS A MATTER OF LAW IN THAT SECTION 87.340, RSMO, AND CITY CODE SECTION 4.18.305, PROVIDE THAT, NOTWITHSTANDING THE CERTIFIED AMOUNT, A PAYMENT BY THE CITY IS SUFFICIENT AS A MATTER OF LAW IF, WHEN COMBINED WITH THE AMOUNT IN THE GENERAL RESERVE FUND, THERE IS ENOUGH MONEY TO PROVIDE THE BENEFITS PAYABLE DURING THE CURRENT YEAR AND THE UNDISPUTED FACTS SHOW THAT THE AMOUNT IN THE GENERAL RESERVE FUND EXCEEDS THE AMOUNT NECESSARY TO SATISFY BENEFITS PAYABLE DURING THE CURRENT YEAR.**

*State ex rel. Employees of Retirement System v. Board of Estimate and*

*Apportionment*, Cause No. 004-01181, aff'd at 43 S.W.3d 887 (Mo. App.

2001)

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

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

§ 87.340 RSMo

§ 87.355 RSMo

City of St. Louis Revised Code § 4.18.305

City of St. Louis Revised Code § 4.18.320

## ARGUMENT

This case results from the efforts of the Firemen's Retirement System to impose on the City of St. Louis a mandatory duty to pay its entire funding requests for 2004 and 2005 without any regard to the City's ability to pay. At a time when cities in this state and throughout the country were and are experiencing budget constraints as the result of national and international economic conditions, the FRS was in the happy position of possessing over \$370,000,000 in assets to satisfy its obligations. Yet despite the undisputed fact that the FRS had assets far in excess of its requirements, it sought to impose a massive increase in the City's contribution. The trial court erroneously agreed with the FRS, contrary to the constitutional, statutory, and practical impediments to the FRS' claim. The judgment of the trial court should be reversed.

The trial court's entry of summary judgment is reviewed de novo. *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707 (Mo. banc 2006). Summary judgment will only be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id.*

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

Requiring the City to pay the FRS certified amounts for fiscal years 2004 and 2005 would violate the Hancock Amendment, which prohibits the state from requiring increased activities or services of political subdivisions beyond that required at the time the Hancock Amendment went into effect in 1981:

The state is hereby prohibited from reducing the state financed proportion of the costs of any existing activity or service required of counties and other political subdivisions. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the general assembly or any state agency of counties or other political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

Mo. Const. Art. X, § 21.

On February 20, 2003, the FRS Board of Trustees certified to the City's Board of Estimate and Apportionment ("E&A") that the amount due and payable by the City for fiscal year 2003-2004 was \$8,913,102. On February 24, 2004, the FRS Board of Trustees certified to E&A that the amount due and payable by the City for fiscal year 2004-2005 was \$13,765,477. In 1981, the City made a contribution to FRS totaling \$8,713,700. If the City were required to pay the certified amount under the FRS governing provisions, such a scheme would violate the Hancock Amendment. Because the FRS certified amount is greater than the City's contribution level in 1981, such a requirement would violate the Hancock Amendment absent additional state funding

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

In *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982), this Court held that the Hancock Amendment prohibited the General Assembly from enacting legislation to increase the annual salary of collectors of second class counties by one hundred dollars unless the state paid for such an increase. The Court reasoned that if the county paid the collectors more than was required by law after the Hancock Amendment became effective in 1981, an increase in the county's level of activity would result. *Id.* at 325-26.

To the same effect is *State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982), in which the Court addressed the City's duty to fund the operations of the Police Board under a statutory certified-budget regime similar to the pension scheme at issue in this case. The Court held that the Hancock Amendment prohibits any state agency from requiring increased expenditures by counties or other political subdivisions. *Id.* at 910-

11. The Court held that the Police Board could not require the City to increase its level of funding beyond that required by law at the time that the Hancock Amendment became effective in 1981 unless the state made an appropriation to fund the increase. *Id.*

*Boone County* and *Zych* show beyond dispute that requiring an increased cost to fund activities as to which the City has an existing statutory duty would be an explicit violation of the Hancock Amendment. Further, *Boone County* and *Zych* show that entities like the City are entitled to rely on the protections of the Hancock Amendment.

Contrary to the trial court's judgment, the Hancock Amendment's standing requirements did not change in 1995. In *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 919 (Mo. banc 1995), the Court noted that a previous decision (*Rolla 31 School Dist. v. State*, 837 S.W.2d 1 (Mo. banc 1992)) had "reserved for another day the question whether a violation of [Article X, Section 21 of the Hancock Amendment] may result in a money judgment against the state in favor of a political subdivision or its taxpayers. In this case, school districts and taxpayers present that issue, claiming that the state has reduced its proportion of funding of special education services below its 1980-81 level." The Court properly held that the school district plaintiffs were not taxpayers and thus lacked standing to "bring suit in a circuit court of proper venue and additionally . . . to enforce" the Hancock Amendment. *Id.* at 921.

On the same day in 1995, the Court held that a county commission lacked standing to complain that another local taxing authority's levy on taxpayers without voter approval violated the Hancock Amendment: "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. The Commission has no standing in such a matter.” *State ex rel. Board of Health Center Trustees v. County Comm’n of Clay County*, 896 S.W.2d 627, 631 (Mo. banc 1995) (citations omitted).

*Fort Zumwalt* and *Clay County* stand for the uncontroversial proposition that government entities may not seek a tax refund under Section 21 the Hancock Amendment because they are not “taxpayers.” *Fort Zumwalt* and *Clay County* do not purport to overrule *Boone County* and *Zych*. That the Court did not intend to deny local government entities the right to seek the protections of the Hancock Amendment is shown by numerous cases after *Fort Zumwalt* and *Clay County* showing that local government entities may raise the Hancock Amendment in appropriate circumstances. *See, e.g., Missouri Mun. League v. State*, 932 S.W.2d 400 (Mo. banc 1996) (municipalities may seek declaratory judgment on whether statute violates the Hancock Amendment); *City of Jefferson v. Missouri Dep’t of Natural Resources*, 916 S.W.2d 794 (Mo. banc 1996) (city may obtain declaratory judgment on whether statute violates the Hancock Amendment); *In re Tri-County Levee Dist.*, 42 S.W.3d 779 (Mo. App. E.D. 2001) (Missouri Highway and Transportation Commission may contest whether a fee imposed by a levee district is improper under the Hancock Amendment).

This case is not appreciably different from *Kelly v. Hanson*, 959 S.W.2d 107 (Mo. banc 1997), in which the Supreme Court held that it was appropriate for a government

official (the state auditor) to seek a declaration of her obligations under the Hancock Amendment as against the claims of another government official (the state director of administration). In this declaratory judgment action, the issue is -- in part -- whether the plaintiffs' claims are barred by the Hancock Amendment. The City Defendants are directly affected by the unfunded mandate sought to be imposed by the plaintiffs. The City Defendants have not sought a refund, which would be barred by *Fort Zumwalt and Clay County*, but merely have sought to have the Court rule on the applicability of the Hancock Amendment to the plaintiffs' claims. Other than the trial court's judgment, there is no authority holding that a local government entity lacks standing to raise the Hancock Amendment in an action for a declaratory judgment.

The City finds itself in a position similar to that of the city in *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo. banc 2001), in which a taxpayer and the City of Hazelwood both argued that the Hancock Amendment prevented a fire district's tax increase from going into effect, despite the fact that the applicable election statutes rendered the election valid at the time that the tax was imposed. Hazelwood had an agreement with the fire district with payments based on the amount of the tax. The Court held that the taxpayers were entitled to a refund because of a Hancock violation. *Id.* at 40.

The Court noted that "Hazelwood is without standing to sue under the Hancock Amendment." *Id.* Nevertheless, the Court held that the Hancock Amendment "prohibits any increase in the District's tax rate without the approval of the qualified voters. Therefore, the District's annual tax rate never increased, and the District collected fees in excess of the statutory amount and the Fire Service Agreement. The city of Hazelwood

timely filed suit for the disputed amount. It is entitled to recover.” *Id.* The Court concluded, however, that Hazelwood could not recover under the Hancock provision that allows awards of attorney fees to taxpayers. *Id.* at 41.

The *Hazelwood* case shows that, even if a governmental entity lacks standing to assert a refund claim under the Hancock Amendment, it is not foreclosed from arguing the Hancock Amendment as a basis for relief. Other than the trial court’s judgment, there is no authority holding that a local government entity lacks standing to raise the Hancock Amendment in an action for a declaratory judgment. The Court should reverse the judgment of the trial court to correct this error.

**B. The City did not waive the Hancock issue.**

The trial court erred in holding that the City waived the Hancock issue by failing to raise it in its answer. L.F. at 1282. A brief review of the facts shows that the Hancock issue was properly before the court for determination.

On August 30, 2004, the FRS moved for summary judgment. L.F. at 263. The City’s memorandum in opposition argued that the Hancock Amendment barred the FRS’ claim. L.F. at 1059-60. The FRS did not claim that there was anything wrong with the City’s raising the issue; instead, the FRS filed a reply memorandum addressing the Hancock issue on the merits. L.F. at 1091-92.

At the same time that the FRS’ motion was pending, the City’s motion for summary judgment was before the trial court. L.F. at 522. The City’s memorandum in support argued that the Hancock Amendment barred the FRS’ claim. L.F. at 925-27. The FRS did not claim that there was anything wrong with the City’s raising the issue;

instead, the FRS filed a memorandum in opposition extensively addressing the Hancock issue on the merits. L.F. at 957-63. Without objection, the City filed a reply memorandum addressing the Hancock issue on the merits. L.F. at 1071-75.

In its judgment, the trial court acknowledged that the FRS had raised no issue as to whether the City was entitled to raise the Hancock Amendment. L.F. at 1241. The court held that the issue was waived because the City's answer did not plead the Hancock as an affirmative defense. L.F. at 1282. In so holding, the court acknowledged that the City had attempted to raise the issue in good faith: "While the Court acknowledges that the City has made what appears to be an entirely good faith attempt to raise this legal argument, and also acknowledges that at least to some degree the Court is able to grasp the gist of the parties' contentions regarding the Hancock Amendment issue, nevertheless, on balance the Court concludes that the issue has not been adequately raised." L.F. at 1282.

The court erred in declaring that the Hancock issue was waived for three reasons. First, contrary to the trial court's assumption, a constitutional issue is not waived if it is raised for the first time at the summary judgment stage. *Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868, 869 (Mo. banc 1995); *Dye v. Division of Child Support Enforcement*, 811 S.W.2d 355, 358 (Mo. banc 1991). In *Dye*, the Court explicitly rejected the suggestion that a constitutional point not set out in an initial pleading cannot be added by amendment: "It is the sense of our rules that amendments be liberally allowed and that the principle of relation back be freely applied." *Dye*, 811 S.W.2d at 358. A constitutional issue is not waived when the parties had the full

opportunity to contest the constitutional issue at the summary judgment stage and the trial court had the constitutional issue squarely presented and argued. *Anheuser-Busch*, 899 S.W.2d at 869.

Second, to the extent that any amendment of the pleadings was necessary to bring the issue before the court, the pleadings were automatically amended when the parties fully briefed and presented the issue to the court for determination. “When issues not raised by the pleadings are tried by express or implied consent of the parties, they *shall be treated in all respects as if they had been raised in the pleadings.*” Rule 55.33(b) (emphasis added). With respect to trial by implied consent, Rule 55.33(b) gives direction to the trial court both in situations where no objection is made to evidence of unpleaded facts or claims and in situations where objection is made. If there is an objection, then the trial court has substantial discretion in determining whether to allow the pleadings to be amended. *Heritage Roofing, LLC v. Fischer*, 164 S.W.3d 128, 132 (Mo. App. 2005). But where, as here, there is no objection, the trial court’s discretion is limited to the determination of whether the issue was tried by implied consent of the parties. If so, the pleadings shall be treated as if the issues had been properly raised. *Id.*

In this case, the judgment effectively concedes that the Hancock Amendment was presented by the consent of the parties. L.F. at 1282. Rule 55.33(b) applies to issues raised in summary judgment proceedings. *See Dwyer v. Meramec Venture Associates, L.L.C.*, 75 S.W.3d 291, 293 n.1 (Mo. App. 2002); *Rose v. City of Riverside*, 827 S.W.2d 737 (Mo. App. 1992). Thus, the Hancock issue was not waived by any pleading

deficiency because the pleadings “shall be treated” as if they were amended by the operation of Rule 55.33(b).

Third, the trial court’s sua sponte waiver determination is grossly unjust under the circumstances. The parties were content to brief the issue fully and present it to the court for determination on the merits without any suggestion of waiver. This is a case of great public interest relating both to the welfare of the beneficiaries of the FRS and to the City and its residents in general. The narrow issue in this case is whether the City is required to make an immediate additional payment to the FRS in the amount of millions of public dollars that the cash-strapped City has committed to other needs. The broader issue is whether a Missouri entity like the City has the right to raise the Hancock Amendment in opposition to a claim of an unlimited right to demand payment in excess of 1981 funding levels. In light of these important issues, it was unfair and contrary to the interests of the people for the court to declare the Hancock issue waived sua sponte.

Adding to the unfairness, the trial court recognized that it had the right to entertain a post-judgment motion for leave to amend the City’s answer, L.F. at 1283, but denied the City’s motion, L.F. at 1323, 1357. If this Court determines that the City waived the Hancock issue despite the foregoing argument, the denial of leave to amend should be reversed as an abuse of discretion as discussed in the City’s alternative Point II.

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

If the City were required to pay the certified amount under the FRS governing provisions, such a scheme would violate the Hancock Amendment. Because the FRS

certified amount is greater than the City's contribution level in 1981, such a requirement would violate the Hancock Amendment absent additional state funding.

Section 87.340, RSMo, and City Code section 4.18.305 provide, in part, that the total amount payable by the City is no less than the sum of the normal and accrued liability contributions. In 1981, the City paid \$8,713,700, exclusive of administrative expenses<sup>1</sup>.

As noted, *Boone County* holds that the Hancock Amendment prohibits the General Assembly from enacting legislation to increase the annual salary of collectors of second class counties by one hundred dollars unless the state paid for such an increase. The Court reasoned that if the county paid the collectors more than was required by law after the Hancock Amendment became effective in 1981, an increase in the county's level of activity would result. *Boone County*, 631 S.W.2d at 325-26.

Even more notable is *Zych*, in which the Court addressed the City's duty to fund the operations of the Police Board under a statutory certified-budget regime similar to the FRS pension scheme. The Court held that the Hancock Amendment prohibits any state agency from requiring increased expenditures by counties or other political subdivisions. *Zych*, 642 S.W.2d at 910-11. The Court held that the Police Board could not require the City to increase its level of funding beyond that required by law at the time that the

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<sup>1</sup> Administrative expenses are now paid by the Board of Trustees from interest and other earnings on assets of the retirement system pursuant to 87.350, RSMo, and Code section 4.18.320.

Hancock Amendment became effective in 1981, unless the state made an appropriation to fund the increase. *Id.*

In this case, the Hancock Amendment forbids the FRS, as an entity created and governed by state statute, from requiring the City to increase its level of funding beyond that required in 1981. Requiring an increased cost to fund activities as to which the City has an existing statutory duty would be an explicit violation of the Hancock Amendment under *Boone County* and *Zych*. See also *Missouri State Employees' Retirement Sys. v. Jackson County*, 738 S.W.2d 118, 121 (Mo. banc 1987). Absent additional state funding, the \$8,713,700 total therefore provides the maximum amount that may be sought by the FRS in accordance with the Hancock Amendment. See *Boone County*, 631 S.W.2d at 325-26; *Zych*, 642 S.W.2d at 910-11. The amounts certified by the FRS for fiscal year 2003-2004 totaled \$8,913,102, and for fiscal year 2004-2005 totaled \$13,765,477. As in *Zych*, the FRS may not require the City to fund the system in an amount in excess of that required in 1981 without a corresponding appropriation by the state to fund such an increase.

**D. The FRS is a state agency under the Hancock Amendment.**

In the trial court, the FRS argued that it is not a state agency subject to the restrictions of the Hancock Amendment because the FRS was created by ordinance. According to the FRS, the City had a choice in establishing the pension system rather than a state mandate and therefore the FRS is not a state agency. However, as part of the enabling legislation, if the City decided to create the FRS, it was forced to abide by the statutory scheme:

Any city in this state that now has or may hereafter have seven hundred thousand inhabitants or more and that has an organized fire department is hereby authorized, *subject to the provisions of sections 87.120 to 87.370*, to provide by ordinance for the pensioning of members of any such organized fire department and of the dependents of deceased members thereof and to take from its municipal revenue a fund for such purpose.

Section 87.125, RSMo (emphasis added). *Trantina v. Board of Trustees of Firemen's Retirement System of St. Louis*, 503 S.W.2d 148, 151-52 (Mo. App. 1973), recognized that if the City chose to create a pension system for its firemen, "it must comply with the provisions of the enabling statute which is in effect at the time the ordinance is adopted."

In *Zych*, the Court analyzed whether the Police Board was a state agency for purposes of the Hancock Amendment. The Court considered factors such as the membership on the Police Board, the fact that the powers and duties of the Police Board were prescribed, the Police Board was made responsible for the establishment and control of the police force, the City was prohibited from interfering with exercise of the Police Board's powers, and the City was required to appropriate the Police Board's certified amount. *Zych*, 642 S.W.2d at 909.

Like the FRS, the Police Board, created pursuant to Chapter 84, RSMo, serves the City of St. Louis, not the entire state. Like the Police Board, the FRS was made

responsible for the establishment and control of the FRS and the City has been prohibited from interfering with the exercise of the FRS' powers. The creation and establishment of the FRS is dictated by state law. The duty to fund the FRS is imposed on the City by state statutes. Thus, similar to *Zych*, the state has compelled the City to fund the pension system. The General Assembly delegated this authority to the FRS; therefore the FRS is a state agency for purposes of the Hancock Amendment.

**E. The judgment should be reversed.**

As a matter of law, the FRS was not entitled to the declaratory judgment it sought because any requirement for the City to pay the certified amount would violate the Hancock Amendment. The Court should reverse the judgment. At the very least, the Court should reverse the judgment and remand the case to the trial court for a ruling on the merits of the Hancock Amendment issue.

**II. IN THE ALTERNATIVE, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING THE CITY'S MOTION FOR LEAVE TO AMEND ITS ANSWER BY INTERLINEATION TO RAISE THE ISSUE THAT THE HANCOCK AMENDMENT BARS THE FRS' CLAIMS BECAUSE JUSTICE REQUIRED THE COURT TO GRANT LEAVE TO AMEND IN THAT THE PARTIES FULLY BRIEFED, ARGUED, AND SUBMITTED THE HANCOCK ISSUE WITHOUT ANY CLAIMS OF WAIVER, THE CITY AND ITS PEOPLE STAND TO SUFFER GREAT HARDSHIP ON ACCOUNT OF THE DENIAL OF LEAVE TO AMEND TO RAISE A VALID CONSTITUTIONAL ISSUE, THE FRS WOULD SUFFER NO INJUSTICE ON ACCOUNT OF THE AMENDMENT BECAUSE IT HAD A FULL AND FAIR OPPORTUNITY TO ADDRESS THE ISSUE ON THE MERITS IN THE SUMMARY JUDGMENT PROCEEDINGS AND ACTUALLY WAS HEARD ON THE MERITS, AND THE AMENDMENT WOULD CURE THE DEFICIENCY PERCEIVED BY THE TRIAL COURT.**

As noted in Point I, the City did not waive the issue of the Hancock Amendment, and the trial should have ruled in favor of the City on the merits. As further discussed in Point I, to any extent that an amendment of the City's answer was required, the pleadings were automatically amended to conform to the evidence under Rule 55.33(b). In the alternative, the judgment should be reversed because the trial court abused its discretion in denying the City's motion for leave to amend its answer to raise the Hancock Amendment in opposition to the FRS' claims.

Rule 55.33(a) permits a party to amend its pleading by leave of court and states that leave shall be freely given when justice so requires. *See Rose v. City of Riverside*, 827 S.W.2d 737, 739 (Mo. App. 1992). The trial court has broad discretion to grant a party leave to amend its answer, and it is an abuse of discretion to not grant such leave when justice requires. *Id.* The factors to be considered in deciding whether to grant leave to amend a petition include hardship to the moving party if leave is not granted, reasons for failure to include any new matter in earlier pleadings, timeliness of the application, whether an amendment could cure any inadequacy of the moving party's pleading, and injustice resulting to the party opposing the motion, should it be granted. *Walton v. City of Berkeley*, 158 S.W.3d 260, 263 (Mo. App. 2005).

In this case, the undisputed facts show that the trial court abused its discretion in denying the City's motion for leave to amend. As noted in Point I, the parties extensively briefed the issue of the Hancock Amendment in connection with the FRS' motion for summary judgment, L.F. at 263, 1059-60, 1091-92, as well as the City's cross motion, L.F. at 925-27, 957-63, 1071-75. Neither the FRS nor the court raised any issue as to whether the City was entitled to raise the Hancock Amendment at any time prior to the entry of judgment. L.F. at 1241. Sua sponte, and without notice to the City, the court held that the issue was waived because the City's answer did not plead the Hancock Amendment as an affirmative defense. L.F. at 1282. Upon entry of the judgment, the City moved for leave to amend its answer, L.F. at 1323, but the court denied leave, L.F. at 1357.

The City suffered great hardship as a result of the trial court's denial of leave to amend. The City's 1981 funding level for the FRS was \$8,713,700. L.F. at 908. For fiscal years 2003-2004 and 2004-2005, the years at issue in this case, the FRS's certified amounts were \$8,913,102 and \$13,765,477. L.F. at 528, 728. Combined, these certified amounts exceed the 1981 funding level by over five million dollars. If these public dollars are diverted from the City's budget, the inevitable result will be reduced services for the people of the City at a time of grave budget constraints. The City's motion for leave to amend was timely in that it was filed along with the City's other post-judgment motions as soon as the trial court's judgment declared that the Hancock issue was waived. The requested amendment would cure the only inadequacy in the City's pleading identified by the trial court. The FRS would suffer no injustice by the inclusion of a paragraph about the Hancock Amendment in the City's answer in light of the fact that the FRS fully explained its position on the issue in response to the City's motion for summary judgment and in support of its own cross motion.

Amendment is appropriate under these circumstances. In *Rose v. City of Riverside*, 827 S.W.2d 737, 738 (Mo. App. 1992), the plaintiffs owned a tract of land that they had inherited from Mr. Hornback. In 1971 or 1972, while Mr. Hornback owned the land, the Army Corps of Engineers promulgated regulations that classified the land as a flood plain and caused flood insurance to become impossible to obtain. *Id.* In 1977, the city of Riverside adopted a flood plain ordinance that restricted any new construction on the land without first obtaining the appropriate variance. *Id.* The plaintiffs filed an action for inverse condemnation claiming that the ordinance hampered their efforts to sell

the property and constituted an unconstitutional taking of the property. *Id.* The city filed a motion for summary judgment claiming that the statute of limitations had run, and the trial court entered judgment in the city's favor.

On appeal, the plaintiffs argued that the city's answer did not raise the affirmative defense of the statute of limitations, although they conceded that the defense was raised in the city's motion for summary judgment. *Id.* at 739. The appellate court held that, under the circumstances, it would be an abuse of discretion for the trial court to deny the city leave to amend: "Appellants were well aware the defense existed since the respondent raised it in its motion for summary judgment. It would be an abuse of discretion to refuse to allow the respondent to amend its answer to include a statute of limitations defense. Therefore, it would serve no useful purpose to remand the case to the trial court. Summary judgment is appropriate in this case and the appeal is denied accordingly." *Id.*

To the same effect is *Dwyer v. Meramec Venture Associates, L.L.C.*, 75 S.W.3d 291, 293 (Mo. App. 2002), in which the creditor obtained a judgment against the debtor in 1992. The debtor engaged in a series of transactions to divest itself of its assets, and the creditor filed suit alleging a fraudulent conveyance. Before the creditor's case could be heard, the debtor filed for bankruptcy protection, which stayed the fraudulent conveyance action. The creditor obtained an order lifting the bankruptcy stay, thereby permitting the creditor to proceed with his action. The debtor later received a discharge in bankruptcy. Based upon the discharge, the trial court dismissed the creditor's fraudulent conveyance action.

The appellate court noted that although the trial court granted the joint motion to dismiss, the ruling would be considered a summary judgment because the trial court considered matters outside the petition, namely the bankruptcy proceeding. *Id.* at 293 n.1. The court held that the affirmative defense of discharge in bankruptcy could properly be considered despite the fact that the defendant never asserted it in a pleading: “Further, while we recognize that the defendants did not raise in their answers the discharge in bankruptcy as an affirmative defense, the bankruptcy defense was raised in the defendants' motion for summary judgment. . . . Because we find it would be an abuse of discretion to refuse to allow the defendants to amend their answers to include the discharge in bankruptcy defense, we find the defense sufficiently raised.” *Id.*

In this case, as in *Dwyer* and *Rose*, the parties fully addressed the issue on summary judgment and submitted it to the trial court for determination on the merits. As it held in *Dwyer* and *Rose*, the Court should hold that the denial of leave to amend in this case was an abuse of discretion.

**III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE FRS AND AGAINST THE CITY BECAUSE REQUIRING THE CITY TO PAY THE AMOUNT CERTIFIED BY THE FRS VIOLATES ARTICLE VI, SECTION 26(A), OF THE MISSOURI CONSTITUTION AND CONSTITUTES AN IMPROPER DELEGATION OF LEGISLATIVE POWER IN THAT ARTICLE VI, SECTION 26(A), PROVIDES THAT NO CITY MAY BECOME INDEBTED BEYOND ITS INCOME AND THE UNDISPUTED FACTS SHOW THAT THE CITY'S REVENUE FOR 2003-2004 AND 2004-2005 HAS ALREADY BEEN APPROPRIATED AND TRANSFERRED TO VARIOUS RECIPIENTS SO THAT IF THE CITY WERE REQUIRED TO PAY THE CERTIFIED AMOUNT FOR FISCAL YEARS 2003-2004 AND 2004-2005, THE CITY WOULD BE OBLIGATED IN EXCESS OF ITS REVENUES.**

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

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

Mo. Const. Art. VI, § 26(a).

The error in this case is illustrated in *State ex rel. Employees of Retirement System v. Board of Estimate and Apportionment*, Cause No. 004-01181, aff'd at 43 S.W.3d 887 (Mo. App. 2001) (“ERS”), in which the Board of Trustees for the Employee Retirement System sought to compel the City to appropriate the amount the system certified to the City, arguing that such an appropriation was mandatory under the ordinance at issue. (A copy of the ERS opinion is included in the appendix to this brief.) In rejecting the argument of the ERS, Judge Dierker reasoned that the City’s budget is adopted on an annual basis, and, as a municipality, it cannot obligate itself in excess of its anticipated revenues in any given fiscal year except through proper bond issues. *See ERS* at 8. Furthermore, imposing such a requirement on the City would constitute an improper delegation of legislative power and the specific power of appropriation. *ERS* at 5.

Judge Dierker relied on *State ex rel. Field v. Smith*, 49 S.W.2d 74 (Mo. 1932), in which this court quashed a writ seeking to compel Kansas City to appropriate the amount certified by the police commissioners as due under the statute governing the police board. The Court held that the statute gave the police board unlimited power to determine the amount to be appropriated by the city for maintenance of the police department and therefore was void as an improper delegation of the legislative power to tax. *Id.* at 78-79. The Court observed that under the broad and unrestricted terms of the statute at issue in *Smith*, “the entire revenue of the city is subject to appropriation by the board of police commissioners,” which could leave the city’s municipal functions “greatly impaired, if not wholly destroyed.” *Id.*

The statutory and code provisions governing the FRS similarly fail to provide any reasonable limitation on the amount of money that may be sought from the City. Any restrictions on the amount sought as a result of the actuarial computation are unreasonable and deceptive because they are tied to the pension funds without any reference to the City's revenue. Under the FRS' 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. This interpretation constitutes an improper delegation of the power of appropriation.

As a constitutional charter city, the City and its Board of Aldermen may use their discretion in exercising all powers of general assembly, to the extent consistent with the State Constitution and statutes. *Fraternal Order of Police Lodge #2 v. City of St. Joseph*, 8 S.W.3d 257, 262 (Mo. App. 1999). A "city may, for its own purposes, lawfully divide its funds or allocate them in any manner it sees fit or subject its general revenue funds to particular public purposes, so long as it does not do so contrary to statute or its charter." *Automobile Club of Missouri v. City of St. Louis*, 334 S.W.2d 355, 364 (Mo. 1960).

Under the interpretation urged by the FRS and adopted by the trial court, the City was faced with two options, one of which would violate the Constitution or state statute. The City could appropriate the amount certified, which would violate the Hancock Amendment and Article VI, section 26(a), and leave the City with a substantial loss in finances and services. Or, the City could appropriate a lesser amount, which would still allow system members to receive their full benefits while the City maintains its budget and continues to provide necessary municipal services. 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 FRS member benefits continued while preserving important City services dependent on the financial stability of the City.

If the provisions governing the FRS are read to mandate appropriation of the FRS certified amount by the City, those provisions are unconstitutional. As noted in Point I, where the amount certified by the FRS requires the City to appropriate an amount in excess of the amount it paid in 1981, the funding provisions violate the Hancock Amendment. Furthermore, the funding provisions improperly obligate the City in excess of anticipated revenues and improperly delegate the legislative power to appropriate. As a result, the FRS was not entitled to declaratory or injunctive relief as a matter of law, and the summary judgment in favor of the FRS should be reversed.

If this Court agrees with the FRS' interpretation, the City would be compelled -- now and in the future -- to appropriate the certified amount without the ability to weigh the numerous obligations of the City and to exercise its discretion in making appropriations it deems necessary. The City would be forced to forego essential services in favor of a pension system that maintains over \$370,000,000 in assets. Such an interpretation not only constitutes an improper delegation of the power of appropriation, but it leads to unjust results. The implication that the elected officials of the City, from now on, should never be permitted to deviate from the certified amount to "smooth out" abrupt, unexpected, and material contribution increases caused by sudden changes in actuarial assumptions is absurd. Taken to the extreme, continuous increases in the

certified amounts could lead the City to bankruptcy and leave the FRS entirely worthless.

The trial court committed reversible error in failing to recognize these realities.

**IV. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE FRS AND AGAINST THE CITY BECAUSE THE CITY'S PAYMENT WAS ADEQUATE AS A MATTER OF LAW IN THAT SECTION 87.340, RSMO, AND CITY CODE SECTION 4.18.305, PROVIDE THAT, NOTWITHSTANDING THE CERTIFIED AMOUNT, A PAYMENT BY THE CITY IS SUFFICIENT AS A MATTER OF LAW IF, WHEN COMBINED WITH THE AMOUNT IN THE GENERAL RESERVE FUND, THERE IS ENOUGH MONEY TO PROVIDE THE BENEFITS PAYABLE DURING THE CURRENT YEAR AND THE UNDISPUTED FACTS SHOW THAT THE AMOUNT IN THE GENERAL RESERVE FUND EXCEEDS THE AMOUNT NECESSARY TO SATISFY BENEFITS PAYABLE DURING THE CURRENT YEAR.**

In addition to the constitutional infirmities discussed above, the judgment of the trial court must be reversed because it is contrary to the plain language of the relevant statutes and code provisions. The Court erred in finding that the language of section 87.355, RSMo, and City Code section 4.18.320 require that the City must appropriate and transfer the entire FRS certified amount without exception. The City Defendants do not dispute the actuary's calculation of the normal contribution and the accrued liability contribution, nor do the City Defendants deny that the City is responsible for any unfunded accrued liability. The City is not required, however, to appropriate the entire FRS certified amount each year when read in conjunction with section 87.340, RSMo and Code section 4.18.305. The plain language of these provisions provides that, notwithstanding the certified amount, a payment by the City is sufficient as a matter of

law if, when combined with the amount in the system's general reserve fund, there is enough money to provide the benefits payable during the current year.

**A. The judgment is contrary to the plain language of section 87.340, RSMo, and Code Section 4.18.305.**

The FRS based its entire claim on section 87.355, RSMo, and Code section 4.18.320, which provide that the FRS Board of Trustees shall certify the amount it determines to be due and payable to the FRS for the following year, to be appropriated by the City and transferred to the retirement system. The FRS claimed that these sections impose mandatory duties on the City and that the City lacks any discretion in determining whether to appropriate and transfer the certified amount. However, under the plain language of the provisions explaining how much the City is required to *pay*, a payment by the City is sufficient-- as a matter of law-- if, when combined with the assets in the general reserve fund, there is enough money to provide the benefits payable during the current year:

The total amount payable in each year to the general reserve fund shall not be less than the sum of the rates percent known as the normal contribution rate and the accrued liability contribution rate of the total compensation earnable by all members during the year, and the *aggregate payment by the City shall be sufficient when combined with the amount in the fund to provide the retirement allowances and other benefits payable out of the fund during the then current*

*year.* The City may contribute at any time from bond issue or other available funds an amount equal to the unfunded accrued liability as certified by the actuary in which event no further accrued liability contribution will be required or may contribute any lesser amount which will be used to proportionately reduce future accrued liability contributions.

Section 87.340, RSMo (emphasis added). Code Section 4.18.305 provides an identical limitation.

When a statute is unambiguous, courts must give effect to the language used by the legislature. *Keeney v. Hereford Concrete Prods., Inc.*, 911 S.W.2d 622,624 (Mo. banc 1995); *see Hughes Dev. Co. v. Omega Realty Co.*, 951 S.W.2d 615, 617 (Mo. banc 1997). The Court must consider the words of the statute in their plain and ordinary meaning. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995). Courts are without authority to read into a statute legislative intent contrary to the intent made evident by the statute's plain language. *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. banc 1993). Courts must construe statutes relating to the same subject harmoniously. *Farmer's Elec. Co-op, Inc. v. Missouri Dept. of Corrections*, 977 S.W.2d 266, 270 (Mo. banc 1998). Statutory provisions relating to the same subject matter are considered in *pari materia* and must be read consistently and harmoniously. *Reece v. Reece*, 890 S.W.2d 706, 709-10 (Mo. App. 1995).

Accordingly, the statutory sections relied upon by the FRS must be construed in harmony with section 87.340, RSMo, and Code section 4.18.305. When read together, the plain language of the statutory sections allows the City to pay an amount, in a given year, that is sufficient when added to the general reserve fund assets to satisfy the benefits payable in that given year.

In the trial court, the FRS contended that its ability to provide future benefits might be impaired if the City did not appropriate the entire certified amount. However, this is not what the statutory provisions require. The City is simply required to appropriate and transfer an amount sufficient to satisfy the benefits payable during the current year, less the other assets in the system. § 87.340; City of St. Louis Revised Code § 4.18.305. Speculation about what could happen in future years is not relevant to determining what the City is to pay this year.

The plain language of section 87.340, RSMo, and Code section 4.18.305 suggest that the legislature contemplated a situation in which the City would not be in a position of funding the entire requested amount in a given year. These sections allow the City to contribute at *any time* from bond issue or other available funds to pay the unfunded accrued liability *or* the City may contribute a *lesser* amount used to proportionately reduce future accrued liability contributions. The plain language indicates that the amount to be paid by the City need not be funded in the current year as long as the fund can meet its current obligations. The unfunded accrued liability contribution from the City may be carried over to a future year.

Construed together, the plain language of the governing FRS provisions shows that the amount to be paid by the City need not be funded in the current year as long as the fund can meet its current obligations. The City is not required to pay the certified amount if it exceeds the amount necessary to satisfy benefits payable during the current year.

The trial court's judgment characterizes the City Defendants' reading as strained and in conflict with other provisions, but as the provision that defines the City's payment obligation, section 87.340 and Code section 4.18.305 need not trump or supersede any other provision in order to be enforced according to their plain meaning. Indeed, the trial court's reading of the statute requires language to be implied that is nowhere in the text. The court's reading would engraft a provision that allows the City to make a payment greater than the certified amount but would not allow the City to pay less, but the words of the statute certainly do not say so. This interpretation is not supported by the statutory language and renders the words used in section 87.340 and Code section 4.18.305 meaningless.

**B. The statute's use of "shall" is directory.**

Section 87.355 and Code section 4.18.320 provide that the City "shall" appropriate and transfer the certified amounts to the FRS. However, the plain language of the FRS governing provisions demonstrates that this use of "shall" was intended to be directory rather than mandatory. In *ERS*, Judge Dierker refused to issue a writ of mandamus to compel the City to appropriate the amount certified by the St. Louis City Employees Retirement System. The Employees Retirement System used the same argument

advanced by the FRS in claiming that the language of City of St. Louis Revised Code section 4.16.500 mandated such an appropriation. Code section 4.16.500 generally provided that the ERS certified amount “shall” be included in the City’s annual budget estimate and that the City “shall” appropriate and transfer said amount to the ERS. However, this contention was rejected. *See ERS* at 6; *see also Firemen’s Retirement System v. St. Louis*, 789 S.W.2d 484, 490 (Mo. banc 1990) (rejecting City’s argument that FRS enabling statute improperly limited City’s home rule powers, reasoning that statute was directory rather than mandatory).

The use of the word “shall” in a statute or ordinance indicates either a mandate or a mere direction, depending on the context. *See ERS* at 6. Where a statute or ordinance does not prescribe a specific result as a consequence of a failure to act in accordance with a statutory directive that something “shall” be done, such an omission robs the word “shall” of any mandatory meaning and gives the statute or ordinance only directory status. *Id.*; *see also Farmers & Merchants Bank v. Dir. of Revenue*, 896 S.W.2d 30, 32-33 (Mo. banc 1995).

Here, the FRS governing provisions do not specify or provide for a consequence should the City determine that it is unable to pay the FRS certified amount, which indicates that the legislature intended such provisions to be directory. As a result, the City is not required to fund the entire contribution sought by the FRS in any given year.

This interpretation of the plain language avoids conflict between the governing provisions and the Missouri Constitution, as set forth above. Equally as important, such an interpretation also allows for proper treatment of public policy considerations. *ERS*

placed great emphasis on the fact that the retirement system was not at risk of insolvency and, in fact, had an “enormous surplus.” See *ERS* at 4, 11. Judge Dierker observed that, “It is at least arguable that, when the retirement system’s assets greatly exceed liabilities, the City’s contribution should be zero, until such time as there is an actual unfunded accrued liability.” See *ERS* at 3 n.2. As in this case, no retiree member of the ERS was faced with any loss of benefits.

This Court similarly considered public policy matters in holding that, under the predecessors of the present FRS statutes, Kansas City was not required to appropriate the sums certified by Kansas City’s firemen’s pension fund. *Tomlinson v. Kansas City*, 391 S.W.2d 850, 853 (Mo. banc 1965). In *Tomlinson*, the Court held that the Kansas City ordinance did not impose upon the City a contractual obligation that would give rise to an action for a money judgment against the City for failure to contribute in accordance with the terms of the ordinance. *Id.* “Constitutional and charter provisions for the management of the City’s fiscal affairs require that abrogation of council control over the municipal budget should not be presumed absent a clearer intention to such effect than is here apparent. ***Actuarial soundness is a creditable objective for a pension system, but over-all municipal financial stability is a consideration which cannot be ignored.***” *Id.* (emphasis added). The Court’s decision was also bolstered by the fact that the pension system had adequate funding: “In this case there is no contention that the beneficiaries of the system are not receiving the pensions which the ordinance grants. The claim is based solely on the fact that the City’s contribution was not made at the rate determined by the actuary to be necessary to maintain the actuarial soundness of the system.” *Id.*

The judgment that the City is required to pay over \$8,000,000 disregards the City's fiscal realities. The 2003-2004 and 2004-2005 certified amounts sought by the FRS increased substantially compared to the certified amounts sought in the preceding years, without any consideration of what is needed to fund the current benefits or of the fact that the FRS continues to maintain well over \$370,000,000 in total assets. At the same time, the City is facing less revenue and greater demands for funding.

Courts cannot overlook the importance of maintaining any city's financial stability. Notably, the FRS does not claim that the system is facing insolvency during the current year or at risk of denying benefits to its members. The actuaries hired by the FRS readily concede that the City's substantial appropriation is entirely adequate to meet the system's outlay of benefits in the current year, when combined with the balance of the fund.

The FRS seeks to bind the City with an inflexible and immutable formula for annual contributions that would deprive the City of critically necessary flexibility. The City must be able to make ongoing contributions in amounts that insure the system's financial soundness while taking into account both the substantial surplus assets held by the system and transitory financial exigencies facing the City.

*ERS* and *Tomlinson* show that the Court should strongly consider the implications to the City's financial state -- as well as the fact that the FRS and its members are not at risk -- in determining this appeal. Further, because the plain language of the FRS governing provisions is directory and does not require the City to pay the certified amount, summary judgment in favor of the FRS should be reversed.

The City does not dispute the FRS' broad authority to manage its funds and oversee the daily operations of the pension system. The dispute arises over the FRS' attempt to exercise its authority *carte blanche* over the City's budget. Contrary to the FRS' assertion, the City did not ignore the statutory language. Rather, the City was properly exercising its discretion. If the City determines that an increase in the certified amount is so abrupt and sudden that payment of the full amount in the year certified would disrupt the budget and undermine necessary services and that benefits are not endangered because plan reserves are so ample, the City must have discretion -- as permitted by section 87.340 and Code section 4.18.305 -- to pay less than the entire certified amount in the current year.

**C. The Trantina and Firemen's Retirement System cases are irrelevant.**

In the trial court, the FRS heavily relied upon *Trantina* and *Firemen's Retirement System v. City of St. Louis*, 789 S.W.2d 484 (Mo. banc 1990) ("*Firemen's Retirement*"), in suggesting that the City has an obligation to appropriate the certified amount. *Trantina* simply recognized that the City's creation of the FRS was not mandatory, but that when the City chose to create the FRS, the ordinance was required to conform to the enabling statute. *Firemen's Retirement* acknowledged the FRS Board of Trustees' authority over daily operations, and, in citing to Code section 4.18.320 commented in dicta that it is the Trustees who are responsible for determining a certified amount rather than the City. *Id.*

Interpretation of code section 4.18.320 in conjunction with the other FRS provisions was not at issue in either case, nor was the issue of the actual amount to be *paid* by the City in any given year. *Trantina* and *Firemen's Retirement* do not address

the present questions of statutory interpretation and constitutionality and thus do not represent controlling law as to those issues.

**D. The FRS' interpretation is fiscally irresponsible.**

The FRS asserted that the City's interpretation amounts to "illegally balancing the budget on the back of the FRS." The FRS warned of potential terror attacks such as 9/11 that would lead to a large number of widows and disabled firefighters entitled to benefits which impliedly would not be available because of the City's funding. These speculations entirely misrepresent the effect of the City's argument. The City has never argued that the FRS' assets should be depleted to zero before the City makes a contribution. As noted, the City continues to make contributions to the FRS. The undisputed facts show that the FRS is in no danger of going bankrupt or failing to pay member benefits. The exaggerated claim that the FRS will be unable to pay its benefits should the City refuse to pay the certified amount this year ignores the fact that the FRS managed very well without any contribution from the City for the past decade.

Rather, it is the FRS' interpretation that leads to an absurd and unreasonable result. According to the FRS, it exercises unlimited authority over the City's budget and may increase its requests from year to year without considering the state of the City's financial affairs. The City's entire budget is at the mercy of the FRS rather than the elected City officials who may be held accountable for their decisions. No doubt, the FRS, its members, and the community will fare far worse under the FRS' interpretation if the City is forced to eliminate jobs and important services to satisfy massive increases in the FRS' certified amounts every year. If the number of firemen were to be downsized,

FRS' membership would be lowered, defeating the very purpose of the FRS to provide benefits to its members.

Unlike the FRS' position, the City's interpretation of Chapter 87, RSMo and Code Chapter 4.18 recognizes the importance of a City's financial stability and the necessary discretion in deciding which programs to fund. The City does not contend that it is unable to afford the certified amount; rather, the City needs to be able to plan its budget and annual expenses to maintain stability. As recognized by the Court, actuarial soundness of a pension plan is a lofty goal, but the City's financial stability cannot be ignored. *Tomlinson v. Kansas City*, 391 S.W.2d 850, 853 (Mo. banc 1965). The FRS' claims the City's budgetary constraints are irrelevant should be rejected.

**CONCLUSION**

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

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of this brief, a disc containing a copy of this brief, and a copy of the separate appendix were served via U.S. mail, postage prepaid, on October 30, 2006, to the following attorneys for respondents:

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**CERTIFICATE OF COMPLIANCE**

The undersigned certifies that this Substitute Brief of Appellants includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 10,787, exclusive of the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

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

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