

IN THE SUPREME COURT OF MISSOURI

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

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

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 summary judgment 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 was required to pay the entire amount certified by the Plaintiffs/Respondents Police Retirement System for the fiscal year 2003-2004. The trial court rejected the City's arguments, with the exception of entering judgment in favor of the City on the individual plaintiffs' claims.

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 City of St. Louis Police Retirement System (“PRS”) is created and governed by sections 86.200 – 86.366, RSMo. Under the statutory scheme, the PRS Board of Trustees employs an actuary to conduct a valuation of the PRS assets and liabilities. The PRS actuary also calculates the amount of contribution, which is submitted to the City by the Board of Trustees. § 86.200 et seq., RSMo.

On February 27, 2003, the PRS Board of Trustees certified to the City’s Board of Estimate and Apportionment (“E&A”) that the amount due and payable by the City was \$9,575,892. L.F. at 210. In 1981, the City paid a normal contribution to PRS totaling \$5,886,755. L.F. at 207, 542.

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 A10. 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 207, 504 (a) – (c), 510. E&A exercised its discretion to propose a budget allocating \$4,115,600 as the City’s contribution to the PRS from its general funds. L.F. at 206. The proposed budget was subsequently adopted by a vote of the Board of Aldermen. L.F. at 206, 216.

The PRS commenced the present action based on the argument that Chapter 86 of the Missouri Revised Statutes mandates that the City appropriate and pay the PRS certified amount. L.F. at 16. Five members of the PRS Board of Trustees individually alleged that the City's appropriation impairs the obligation of their contracts of employment. L.F. at 16.

The trial court consolidated proceedings in this case with a case raising similar issues, *Fireman's Retirement System v. City of St. Louis* (the appeal of which is before this Court as No. SC87977). The cases were decided on opposing motions for summary judgment.

The undisputed facts showed that, despite the discrepancy between the PRS' certified amount and the City's appropriation, there were no members of PRS currently at risk of not being paid their benefits in the current year. L.F. at 419. As of September 30, 2003, the present market value of PRS assets totaled more than \$630,000,000. L.F. at 430, 476, 576-77. According to the PRS 2003 Audited Financial Report, the PRS incurs more than \$974,000 in administrative expenses (or \$1.1 million according to the 2003 Actuarial Valuation), funded by the interest accrued on the system's invested funds. L.F. at 435, 477.

On June 17, 2005, the trial court entered a judgment in favor of the PRS on its claim for a declaratory judgment that the City was required to pay the entire amount certified by the PRS. L.F. at 685. The court held that the City lacked standing to assert that the Hancock Amendment forbids the PRS to claim an amount in excess of the level

of funding in 1981 and rejected the City's other arguments. The court entered judgment in favor of the City on the claims of the individual plaintiffs. L.F. at 685.

The City appealed to the Missouri Court of Appeals, Eastern District, which transferred the case to this Court because the case presents issues of general interest and importance.

POINTS RELIED ON

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

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

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

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Mo. Const. Art. X, § 21

§ 86.810 RSMo

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

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)

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

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)

§ 86.337 RSMo

§ 86.344 RSMo

ARGUMENT

This case arises from the efforts of the Police Retirement System to impose on the City of St. Louis a mandatory duty to pay its entire funding request for 2004 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 PRS was in the happy position of possessing over \$630,000,000 in assets to satisfy its obligations. Yet despite the undisputed fact that the PRS 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 PRS, contrary to the constitutional, statutory, and practical impediments to the PRS' 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 PRS AND AGAINST THE CITY BECAUSE REQUIRING THE CITY TO PAY THE AMOUNT CERTIFIED BY THE PRS VIOLATES THE HANCOCK AMENDMENT (ARTICLE X, SECTIONS 16-24, OF THE MISSOURI CONSTITUTION) IN THAT THE HANCOCK AMENDMENT PROHIBITS THE STATE FROM REQUIRING INCREASED EXPENDITURES BY OTHER POLITICAL SUBDIVISIONS BEYOND THE FUNDING LEVEL IN 1981, AND THE UNDISPUTED FACTS SHOW THAT THE PRS CERTIFIED AMOUNT EXCEEDS THE FUNDING LEVEL IN 1981.

Requiring the City to pay the PRS certified amount for 2004 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 27, 2003, the PRS Board of Trustees certified to the City's Board of Estimate and Apportionment ("E&A") that the amount due and payable by the City was \$9,575,892. In 1981, the City paid \$5,886,755 as the normal contribution set forth under section 86.337 RSMo, excluding administrative expenses provided pursuant to section 86.343, RSMo. If the City were required to pay the certified amount under the PRS governing provisions, such a scheme would violate the Hancock Amendment, absent additional state funding, because the PRS certified amount is greater than the City's contribution level in 1981.

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

Cases recognize the standing of entities like the City to assert the Hancock Amendment in opposition to improper state actions. 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 this 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* holding 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 this 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.

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 to base payments 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.

Further, section 86.810, RSMo (enacted after *Fort Zumwalt* and *Clay County*), explicitly grants a political subdivision standing to seek a declaratory judgment as to the application and effect of the Hancock Amendment on any provision in Chapter 86:

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.

Under section 86.810, there is no doubt that the City, as a “political subdivision which funds” the PRS, has standing to raise the Hancock Amendment in this declaratory judgment action.

B. 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 PRS governing provisions, such a scheme would violate the Hancock Amendment. Because the PRS certified amount is greater than the City’s normal contribution level in 1981, such a requirement would violate the Hancock Amendment absent additional state funding.

1. The PRS is a state agency under the Hancock Amendment.

In the trial court, the PRS argued that it is not a state agency subject to the restrictions of the Hancock Amendment because its functions are purely local. The PRS attempted to distinguish itself from the Police Board, which this Court determined to be a state agency subject to the Hancock Amendment. *See Zych*, 642 S.W.2d at 907. In determining the Police Board’s status as a state agency for purposes of the Hancock Amendment, this Court emphasized that the state had the power to compel municipalities

to fund a police force. *Zych*, 642 S.W.2d at 910. The General Assembly then delegated that authority to the Police Board. *Id.*

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

Regardless of whether the PRS is a state agency, the plaintiffs’ claims are based upon the mandate of a statute. The General Assembly passed sections 86.344 and 86.337, which set forth the City’s obligations. The Hancock Amendment prohibits the state from requiring new or increased activities of political subdivisions beyond that provided in 1981 without additional state funding. There is a Hancock violation in this case because the General Assembly purports to impose the duty to fund the system upon the City, and the certified amount exceeds that which was paid in 1981.

2. The activity required of the City has increased since 1980.

Section 86.337, RSMo, provides, in part, that the total amount payable by the City in any given year shall not be less than the “normal contribution rate” of the total compensation earnable by all members during the year. In 1981, the City paid \$5,886,755 as the normal contribution set forth under section 86.337 RSMo, excluding administrative expenses provided pursuant to section 86.343, RSMo.

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. This 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 this Court addressed the City's duty to fund the operations of the Police Board under a statutory certified-budget regime similar to the PRS 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 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 PRS, 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, \$5,886,755 is the maximum amount that may be sought by the PRS in accordance with the Hancock Amendment. See *Boone County*, 631 S.W.2d at 325-26; *Zych*, 642 S.W.2d

at 910-11. The amount certified by the PRS for fiscal year 2003-2004, which the trial court declared the City must pay, totaled \$9,575,892, an amount substantially in excess of what the City can be required to pay under the Hancock Amendment. As in *Zych*, the PRS may not require the City to pay that amount without a corresponding appropriation by the state to fund such an increase.

The PRS also took the position that Article X, Section 21, does not include pension benefits within its scope. The plain language of the Hancock Amendment does not support this argument. The PRS claimed that the Hancock Amendment's reference to increase in activity relates to the operation of the government in performing services and that pension benefits do not relate to the operation of government. However, it is the increase in the *funding* of the benefits that reflects the increased activity, which undoubtedly affects the operation of the government since the PRS is seeking more than \$9.5 million from the City's budget. *Zych* explicitly addressed the City's duty to fund the Police Board and held that requiring an increased cost to fund activities as to which the City has an existing statutory duty is an explicit violation of the Hancock Amendment. 642 S.W.2d at 910-911; *see also Missouri State Employees' Retirement Sys. v. Jackson County*, 738 S.W.2d 118, 121 (Mo. banc 1987). In addition, this Court in *Boone County* (the very case relied upon by the PRS) held that "to the extent that the county court is mandated to pay the collector more, an increase in the level of governmental operation results and therefore the salary increase is "an increase in the level of any activity" under the Hancock Amendment.

The PRS also argued that cost-of-living adjustments (“COLAs”) in retirement benefits should not be deemed an increased activity because voters approved of such adjustments following passage of the Hancock Amendment. Quite to the contrary, voters simply enabled political subdivisions to provide for COLAs out of public funds if the pension systems would remain actuarially sound. Mo. Const. Art. VI, § 25. Voters did *not* require the provision of these COLAs; rather, the voters simply left political subdivisions to determine whether and when the adjustments could be provided. Unlike the first exception in section 25, which grants the *General Assembly* power to authorize cities, counties, or political subdivisions to provide for pensions, the last exception does not even refer to the General Assembly, which indicates that the voters sought to leave the determination of whether to provide COLAs up to cities and counties. Here, the City did not “authorize” or approve such a provision -- it was forced upon the City by the state legislature, which is not a city, county, or a political subdivision. Section 25 makes no mention of what entity should bear the cost when the state legislature forces COLAs upon a city without city approval. Accordingly, the COLAs must be taken into consideration when determining whether the City has been required to fund an increase in activity mandated by the state without corresponding state appropriations.

3. The City’s increased activity is determined by raw dollars.

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

The PRS relied on *Missouri State Employees' Retirement System v. Jackson County*, 738 S.W.2d 118, 121 (Mo. banc 1987) (“*MOSERS*”), as support for the proposition that the test for the increase in the activity of a pension system is the “net fiscal effect.” The PRS cited to *MOSERS* in arguing that the Court should compare the City’s contribution to the pension system as a percentage of the active members’ payroll. The PRS’ reliance on *MOSERS* is misplaced. In *MOSERS*, the Court held that the Hancock Amendment did not allow the county to withhold funding to clerks for past service credits because the state had provided the requisite appropriation. 738 S.W.2d at 121. According to the Court, the county was sufficiently compensated by the state since the county was relieved of compensating the clerks in the future pursuant to a new statute. *Id.* Nowhere did the Court hold that the test for increased activity should be based on a percentage calculation. Indeed, this assertion is directly contrary to the Court’s analysis in *Zych*. 642 S.W.2d at 909-10.

The people of Missouri determined that the effect of inflation is not relevant in dealing with the unfunded mandates provisions of the Hancock Amendments. For example, section 22 deals with alterations in the levy of various taxes when revenue from the items subject to the Hancock Amendment increases faster than the rate of inflation. *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 303 (Mo. banc 1991). Section 21 of the Hancock Amendment deals in absolute dollars, making no provision for the effect of inflation in connection with unfunded mandates. If the drafters of the Hancock Amendment had intended to include inflation as a factor in barring unfunded mandates, they could have done so.

The PRS previously asserted that the City's certified budget amount for 1980 is erroneous, but the City did not argue that the normal contribution rate constituted the entire certified budget amount. Rather, the PRS' dispute lies with the City's argument that only the normal contribution in 1980 should be used as the base from which to judge whether and how much the City's activity has increased since the Hancock Amendment was enacted. Section 86.337, RSMo, provides, in part, that the total amount payable by the City in any given year shall not be less than the "normal contribution rate" of the total compensation earnable by all members during the year. In 1981, the City paid \$5,886,755 as the normal contribution set forth under section 86.337, excluding administrative expenses provided pursuant to section 86.343, RSMo. L.F. at 207, 542. The PRS urges the Court to use \$7,854,680 as the base figure, which is the entire amount paid by the City in 1981 to the PRS, including the City's portion of administrative expenses. As the PRS recognizes, the certified amount in 1981 included an accrued liability contribution, which has been discontinued today. The PRS is comparing apples to oranges.

Absent additional state funding, \$5,886,755 total is the maximum amount that may be sought by the PRS in accordance with the Hancock Amendment. *See Boone County*, 631 S.W.2d at 325-26; *Zych*, 642 S.W.2d at 910-11. The amount certified by the PRS for fiscal year 2003-2004 totaled \$9,575,892. L.F. at 210. This amount is almost \$4 million more than the normal contribution required in 1981. As in *Zych*, the PRS may not require the City to fund the system in an amount in excess of that required in 1981 without a corresponding appropriation by the state.

C. The judgment should be reversed.

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

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

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

Mo. Const. Art. VI, § 26(a).

The 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 ERS argument, 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 and the Court of Appeals 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 provisions governing the PRS 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 PRS' interpretation 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 PRS 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 \$3.6 million loss in finances and services (the difference in the amount certified and the amount appropriated). 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 PRS member benefits continued while preserving important City services dependent on the financial stability of the City.

If the provisions governing the PRS are read to mandate appropriation of the PRS certified amount by the City, those provisions are unconstitutional. As noted in Point I, where the amount certified by the PRS 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 PRS was not entitled to declaratory or injunctive relief as a matter of law, and the summary judgment in favor of the PRS should be reversed.

If this Court agrees with the PRS' 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 \$630,000,000 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 PRS entirely worthless. The trial court committed reversible error in failing to recognize these realities.

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

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. The Court erred in finding that the language of section 86.344, RSMo, requires that the City must appropriate and transfer the entire PRS 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 PRS certified amount each year when read in conjunction with section 86.337, RSMo. The plain language of Section 86.337 provides

that, notwithstanding the certified amount, a payment by the City is sufficient as a matter of law if, when combined with the assets of the retirement system, there is enough money to provide the benefits payable during the current year.

A. The judgment is contrary to the plain language of section 86.337.

The PRS based its entire claim on section 86.344, RSMo, which provides that the PRS Board of Trustees shall certify the amount it determines to be due and payable to the PRS for the following year, to be appropriated by the City and transferred to the retirement system. The PRS claimed that Section 86.344 imposes 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 of the entire system, there is enough money to provide the benefits payable during the current year:

The total amount payable to the retirement system for each fiscal year shall be not less than the normal contribution rate of the total compensation earnable by all members during the year; provided, however, that *the aggregate payment by the said cities shall be sufficient when combined with the assets of the retirement system to provide the pensions and other benefits payable during the then current year.*

§ 86.337 RSMo (emphasis added).

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 also 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 PRS must be construed in harmony with section 86.337. 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 other pension fund assets to satisfy the benefits payable in that given year.

In the trial court, the PRS 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. § 86.337 RSMo. Speculation about what

could happen in future years is not relevant to determining what the City is to pay this year.

Construed together, the plain language of sections 86.344 and 86.337 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 86.337 need not trump or supersede any other provision in order to be enforced according to its 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 and 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 86.337 meaningless.

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

Section 86.344 provides that the City "shall" appropriate and transfer the certified amounts to the PRS. However, the plain language of the PRS 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 PRS 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 PRS governing provisions do not specify or provide for a consequence should the City determine that it is unable to pay the PRS certified amount, which indicates that the legislature intended such provisions to be directory. Indeed, the statutory scheme provides a remedy for the PRS other than a mandatory payment of the certified amount -- the PRS has a right to make a new certification in the following year. The PRS actuary takes the financial condition of the system into account in making each certification. The effect of one year’s payment, in whatever amount, will be reflected in the subsequent certification. The statutory remedy is another certification that the City

may balance in light of its then-existing responsibilities and financial condition. As a result, there is no requirement on the City to fund the entire amount certified by the PRS in any given year.

Such an 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. In *ERS*, great emphasis was placed 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, *ERS* noted that no retiree member of the ERS was faced with any loss of benefits.

The 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 \$9,000,000 disregards the City’s fiscal realities. The 2003-2004 certified amount sought by the PRS 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 PRS continues to maintain well over \$630,000,000 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 PRS does not claim that its system is facing insolvency during the current year or at risk of denying benefits to its members. The actuaries hired by the PRS 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 PRS 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 PRS and its members are not at risk -- in determining whether to entertain the PRS' requests for relief. Further, because the plain language of the PRS governing provisions is directory and does not require the City to pay the certified amount, summary judgment in favor of defendants is appropriate on all counts as a matter of law.

The City does not dispute the PRS' broad authority to manage its funds and oversee the daily operations of the pension system. The dispute arises over the PRS' attempt to exercise its authority *carte blanche* over the City's budget. Contrary to the PRS' 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 86.337 -- to pay less than the entire certified amount in the current year. Under the statutory scheme, the PRS actuary then will consider the amount of the City's actual payment in making the next certification, thus balancing the sovereignties of both the City and the PRS.

C. The *Jones* case is distinguishable.

In the trial court, the PRS primarily relied on *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471 (Mo. banc 1992), in support of its statutory-interpretation argument. In *Jones*, the Court held that the City's Board of Estimate and Apportionment had a duty to include the budget estimates for the Twenty-Second Judicial Circuit in the proposed budget without change. 823 S.W.2d at 478. *Jones* is distinguishable for several reasons.

The funding provisions in *Jones* involved different statutes with very different language. The key statutes in *Jones* explicitly restricted the ability of the county budget officer to change the circuit court estimates:

The budget officer or the county commission ***shall not change the estimates*** of the circuit court or of the circuit clerk without the consent of the circuit court or the circuit clerk, respectively, but ***shall appropriate in the appropriation order the amounts estimated as originally submitted or as changed, with their consent.***

§ 50.640.1, RSMo (emphasis added).

The inflexibility of the statutory scheme was highlighted by another provision:

The estimates of the circuit court referred to in section 50.640 which are to be included within the county budget by the budget officers and the county commissions ***without change shall include*** those categories of expenditures to support the

operations of the circuit court which are attributable to the business of the circuit judges, associate circuit judges and the staffs serving such judges.

§ 50.641.1, RSMo, (emphasis added).

The *Jones* case makes no reference to any provision like section 86.337, RSMo, which states that an amount other than the one derived by the actuary's calculations may be "sufficient" for purposes of the City's appropriation. Further, the Circuit Court's budget is a recurring expense that must necessarily be paid every year. The retirement systems are distinguishable in that they each have a vast fund from which to pay claimants such that no additional payment from the City is required to meet current expenditures.

Jones supports the City's contention that the City determines how much to pay, subject to statutory limitations:

The Board of E and A is the agency of the City to which annual budget estimates of the various offices, including that of the circuit court, must be submitted. The Board of E and A prepares and submits the annual appropriation bill to the Board of Aldermen. The Board of Aldermen may decrease any item in the appropriation bill but may not increase any item or insert any new item unless the Board of E and A has failed to perform its duty in a timely fashion. Items of appropriation are subject to veto by the mayor unless

overridden by a vote of two-thirds of the Board of Aldermen.

Thus, the Board of E and A, the Board of Aldermen, and the mayor share responsibility for approval of the budget.

Jones, 823 S.W.2d at 473 (citations omitted). Thus, in the absence of a statutory provision that the certified amount cannot be changed (such as the statute involved in the *Jones* case), the City has discretion in its budgeting. As noted, under the statutes at issue in this case, the City has discretion to pay the pension fund in any amount equal to or greater than the legally “sufficient” sum. The City agrees that it cannot pay less than the amount that is legally sufficient, but the PRS cannot force the City to pay more.

In *State ex rel. Sayad v. Zych*, 642 S.W.2d 907 (Mo. banc 1982), the Court said of the Police Board appropriation statute, “The City is required by section 84.210.1 RSMo 1978, to appropriate the certified amount unless the proposed expenditure is illegal, or a particular discretionary power given by the state to the Police Board has been arbitrarily or unreasonably exercised.” In the present case, it would be illegal to compel the City to make a contribution to the pension fund in excess of what would be “sufficient” under the terms of the statute. *Jones* does not address whether requiring an appropriation of the certified amount in this matter is constitutional, rendering *Jones* irrelevant.

D. The PRS’ interpretation is fiscally irresponsible.

The PRS repeatedly asserts that the City’s interpretation would lead to the PRS’ eventual bankruptcy. This is an exaggerated conclusion that entirely misrepresents the effect of the City’s argument. The City has never argued that the PRS’ assets should be depleted to zero before the City makes a contribution. As previously noted, the City

continues to make contributions to the PRS. The undisputed facts show that the PRS is in no danger of going bankrupt or failing to pay member benefits. The exaggerated suggestion that the PRS will face bankruptcy should the City refuse to pay the certified amount this year ignores the fact that the PRS managed very well without any contribution from the City for the past decade.

Rather, it is the PRS' interpretation that leads to an absurd and unreasonable result. According to the PRS, 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 PRS rather than the elected City officials who may be held accountable for their decisions. No doubt, the PRS, its members, and the community will fare far worse under the PRS' interpretation if the City is forced to eliminate jobs and important services to satisfy massive increases in the PRS certified amounts every year. If the police force were to be downsized, PRS' membership would be lowered, defeating the very purpose of the PRS to provide benefits to its members.

Unlike the PRS' position, the City's interpretation of Chapter 86 and specifically section 86.337 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 this 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 PRS' claims that 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, 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 9,517, 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.
