IN THE CIRCUIT COURT OF COLE COUNTY

MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 21AC-CC00461
KENNETH ZELLERS, Commissioner of Administration,	)	
Defendant.	)	

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JUDGMENT

This case comes before the Court on cross-motions for judgment on the pleadings. "The issues thus raised are purely question of law and, in the final analysis, all depend upon the construction to be given" to the constitutional provision at issue. *State ex rel. Board of Fund Commrs. v. Smith*, 96 S.W.2d 348, 349 (Mo. 1936). The constitutional provision about which the parties disagree is Art. IV, § 30(b)1 of the Missouri Constitution. The parties ask whether that provision is sufficient to allow the plaintiff Missouri Highways and Transportation Commission to approve spending from the State Road Fund, and whether, once the Commission approves spending, the defendant Commissioner of Administration[1] must approve warrants to have amounts

[1] The named defendant was, at the time the case was filed, the Acting Commissioner. He was confirmed Commissioner on March 10, 2022. Because he is sued in his official capacity, the discussion and holding here pertains not to him as

paid from the state treasury. The Court originally heard argument on this matter on February 10, 2022; after its Judgment in another matter but for reasons apparent and discussed herein, this decision was held until further argument on October 5, 2023.

The question raised in this case overlaps with the one addressed by this Court in *Conservation Commission v. Schmitt*, No. 20AC-CC00342. This case was briefed and argued while an appeal in *Conservation Commission* was under consideration by the Supreme Court of Missouri (No. SC99092). The Supreme Court handed down its decision in the renamed *Conservation Commission v. Bailey* on June 13, 2023. 669 S.W.3d 51. In addition to the record previously made, this Court has now heard argument from the parties regarding the impact of the *Conservation Commission* decision on this case.

The Court declares that the Commissioner of Administration shall approve warrants for payments for the State Highway System purposes listed in Art. IV, § 30(b)1, upon the request or instruction of the Missouri Highways and Transportation Commission, when the request is for a constitutionally authorized purpose and there is a sufficient balance in the State Road Fund. That result is compelled not just by the language of Art.

Acting Commissioner or as Commissioner, but to the office of Commissioner of Administration. Thus the court refers to that office—simply "Commissioner"—rather than to Mr. Zellers, whether in his acting or his senate-confirmed role.

IV., but by the logic of the Missouri Supreme Court's holding – and even the dissenting opinion – in *Conservation Commission v. Bailey*.

BACKGROUND

The Commission has adopted a pay plan intended to increase wages and salaries for many Missouri Department of Transportation (MoDOT) employees, having determined that such increases are necessary to attract and retain the employees necessary for MoDOT to maintain and improve the State Highway System. To implement that plan, the Commission intends to use funds from the constitutionally-established State Road Fund. The plan would require, however, the use of more money from the State Road Fund than has been appropriated by the Missouri General Assembly.

The Commission and MoDOT asked the then-Acting Commissioner of Administration if he would authorize payments from the State Road Fund beyond the current legislative appropriation to ensure that the pay plan could be implemented during this fiscal year. The Commissioner said no, leaving the Commission unable to implement the pay plan without leaving positions vacant. That is because if the Commission both implemented the plan and hired the new personnel the Commission concluded were needed, the legislative appropriation would be exhausted before the end of the fiscal year, and payments from the State Road Fund from the legislative

appropriation would then cease—including not just those for payroll, but for other expenses incurred under the authority of the Commission.

To obtain the certainty it required to implement the pay plan, the Commission asked this Court for a declaratory judgment pursuant to Chapter 527, RSMo. In the Commission's view, a legislative appropriation is not required for—and thus cannot constitute a cap on—payments from the State Road Fund that are approved by the Commission. The Commissioner argues that a legislative appropriation is required, despite the language of Art. IV, § 30(b)1. Although we have now moved into another fiscal year, the disagreement continues. It creates a dispute sufficient to enable the Court to consider a declaratory judgment.

THE COMMISSION'S CONSTITUTIONAL AUTHORITY

The flow of money into the State Road Fund, the authority of the Commission to expend and use that Fund, and the appropriation status of that Fund are set out in Art. IV, § 30(b)1:

> 1. For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting those portions of the sales tax on motor vehicles and trailers which are not distributed to

the state road fund pursuant to subsection 2 of this section 30(b) and further excepting all property taxes), less the (1) actual cost of collection of the department of revenue (but not to exceed three percent of the particular tax or fee collected), (2) actual cost of refunds for overpayments and erroneous payments of such taxes and fees and maintaining retirement programs as permitted by law and (3) actual cost of the state highway patrol in administering and enforcing any state motor vehicle laws and traffic regulations, shall be deposited in the state road fund which is hereby created within the state treasury and stand appropriated without legislative action to be used and expended by the highways and transportation commission for the following purposes, and no other:

First, to the payment of the principal and interest on any outstanding state road bonds. The term state road bonds in this section 30(b) means any bonds or refunding bonds issued by the highways and transportation commission to finance or refinance the construction or reconstruction of the state highway system.

Second, to maintain a balance in the state road fund in the amount deemed necessary to meet the payment of the principal and interest of any state road bonds for the next succeeding twelve months.

The remaining balance in the state road fund shall be used and expended in the sole discretion of and under the supervision and direction of the highways and transportation commission for the following state highway system uses and purposes and no other:

(1) To complete and widen or otherwise improve and maintain the state highway system heretofore designated and laid out under existing laws;

(2) To reimburse the various counties and other political subdivisions of the state, except incorporated cities and towns, for money expended by them in the construction or acquisition of roads and bridges now or hereafter taken over by the highways and transportation commission as permanent parts of the state highway system, to the extent

of the value to the state of such roads and bridges at the time taken over, not exceeding in any case the amount expended by such counties and subdivisions in the construction or acquisition of such roads and bridges, except that the highways and transportation commission may, in its discretion, repay, or agree to repay, any cash advanced by a county or subdivision to expedite state road construction or improvement;

(3) In the discretion of the commission to plan, locate, relocate, establish, acquire, construct and maintain the following:

(a) interstate and primary highways within the state;

(b) supplementary state highways and bridges in each county of the state;

(c) state highways and bridges in, to and through state parks, public areas and reservations, and state institutions now or hereafter established to connect the same with the state highways, and also national, state or local parkways, travelways, tourways, with coordinated facilities;

(d) any tunnel or interstate bridge or part thereof, where necessary to connect the state highways of this state with those of other states;

(e) any highway within the state when necessary to comply with any federal law or requirement which is or shall become a condition to the receipt of federal funds;

(f) any highway in any city or town which is found necessary as a continuation of any state or federal highway, or any connection therewith, into and through such city or town; and

(g) additional state highways, bridges and tunnels, either in congested traffic areas of the state or where needed to facilitate and expedite the movement of through traffic.

(4) To acquire materials, equipment and buildings and to employ such personnel as necessary for the purposes described in this subsection 1; and

(5) For such other purposes and contingencies relating and appertaining to the construction and maintenance of such state highway system as the highways and transportation commission may deem necessary and proper.

Subsection (1) establishes these principles:

- Certain revenues flow directly into the State Road Fund in the state treasury, without legislative action or direction.
- The State Road Fund then "stands appropriated without legislative action."
- The Commission must pay the principal and interest on any outstanding state road bonds using the State Road Fund.
- The Commission must also maintain a balance in the State Road Fund sufficient to make required payments of principal and interest of any state road bonds for the next succeeding twelve months.
- Then Commission may, at its sole discretion, use and expend the remainder of the State Road Fund for any or all of five additional listed State Highway System purposes.

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Those provisions ensure that the Commission, not the General Assembly, decides whether, when, and how to use and expend the State Road Fund, within the constitutional strictures.

In response, the Commissioner cites to the court Article IV, § 28, and argues that section requires the opposite result. Section 28 provides that "[n]o money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law."

The Commissioner maintains that "appropriation made by law" means only an appropriation made by the General Assembly, by bill, and signed by the governor. The Commissioner's argument would require that the court hold that the two sections conflict. But we cannot do that, so long as there is an alternative reading that brings the two provisions into harmony. And here, there is such a reading.

"[A]n amendment to the Constitution becomes a part of the fundamental law...." *Fisher v. Reorganized School Dist. No. R-V of Grundy Cty.*, 567 S.W.2d 647, 649 (Mo. 1978) (cleaned up). And as amended the Constitution declares the State Road Fund "appropriated *without legislative action*" by Art. IV, § 30(b)1 (emphasis added). The Constitution is a "law" sufficient to meet the requirement of Art. IV, § 28 that the commissioner has before him "an appropriation made by law."

That means that so long as there is a sufficient amount in the State Road Fund to make a payment, the payment is for a constitutionally permissible use of the State Road Fund, and the payment has been authorized by the Highway and Transportation Commission pursuant to its constitutional authority, the request is made pursuant to an appropriation made by law and the Commissioner must certify it for payment pursuant to Art. IV, § 28.

Reading Art. IV, § 30(b)1 and Art. IV, § 28 that way is consistent with what the attorney general, speaking for the Commissioner or Administration, told the Supreme Court of Missouri in the *Conservation Commission* appeal. As to Art. IV, § 28, the Commissioner told the Supreme Court that "automatic appropriations," *i.e.*, those that "stand appropriated" like the State Road Fund, are "consistent with the language of Article IV, § 28." Appellant's Brief at 36-37. That conclusion conflicts with the attorney general's argument here that automatic appropriations are *in*consistent with § 28. *See, e.g., Aldrich v. Aldrich*, No. WD84127 (Mo. App. W.D. Nov. 2, 2021), p.6, *quoting Union Manor v. Mo. Dept. of Health & Senior Servs.*, 596 S.W.3d 673, 682 (Mo. App. W.D. 2020) (re application of equitable estoppel).

If the Commissioner were right and there was an irreconcilable conflict between Art. IV, § 30(b)1 and Art. IV, § 28, we would look to canons of

construction to choose which to enforce – and three canons lead to the conclusion that Art. IV, § 30(b)1 would overrule any conflicting language in Art. IV, § 28.[2]

The first such canon is the bar on interpretations that render words "meaningless and superfluous." *Mottet v. Dir. of Revenue*, 635 S.W.3d 862, 886 (Mo. App. W.D. 2021). The Commissioner's position would, if adopted, render meaningless the words "without legislative action" in the phrase, "stands appropriated without legislative action." "Legislative action" in the form of an appropriations bill (the only way in which the General Assembly can act, *see* Art. III, § 21 ("No law shall be passed except by bill....")) would be required before the Commission could fulfill its constitutional duty to make payments on bonds and interest from the State Road Fund, and before the Commission could use its constitutional authority to use and expend the State Road Fund for other purposes stated in the Constitution. That would change the words to "stand appropriated [by] legislative action"—a result that the Court must avoid. *E.g.*, *Mo. Bond Co. v. Devore*, 641 S.W.3d 397, 403

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[2] Regarding the application of such statutory construction rules to constitutional provisions, *see, e.g.*, *DeMere v. Mo. Hwy. & Transp. Comm'n*, 876 S.W.2d 652, 655 (Mo. App. S.D. 1994); *Missourians for Tax Justice Educ. Proj. v. Holden*, 959 S.W.2d 100, 106 (Mo. 1997).

(Mo. App. E.D. 2022) ("Court[s] must avoid statutory interpretations that are unjust, absurd, unreasonable, or render statutory language meaningless.").

The second canon gives later amendments precedence. *See State v. Guinotte*, 204 S.W. 806, 810 (Mo. 1918) ("One rule is that, if a later law conflicts with an earlier one, the later law operates to repeal or modify the earlier one to the extent of the conflict.") The general statement in Art. IV, § 28 has been unchanged in our constitution since 1972. In November 2004 voters approved Amendment 3, enacting the current version of Art. IV, § 30(b)1. It became effective July 1, 2005, becoming the more recent of the two allegedly conflicting provisions.

The third canon is the "fundamental rule of statutory construction that the definite and specific phrase or word takes precedence over the general." *Short v. Short*, 947 S.W.2d 67, 72 (Mo. Ct. App. 1997), citing *Pollard v. Board of Police Commissioners*, 665 S.W.2d 333, 341 n. 12 (Mo. banc 1984); *see also Robinson v. Health Midwest Dev. Grp.*, 58 S.W.3d 519, 522 (Mo. banc 2001) ("[T]he rules of statutory construction are clear that in situations where the same subject matter is addressed in general terms in one statute and in specific terms in another, and there is a 'necessary repugnancy' between statutes, the more specific statute controls over the more general."), quoted with approval, *Peoples v. Med. Protective Co.*, 584 S.W.3d 339, 346 n.5

(Mo.App. W.D. 2019); *State ex rel. Fort Zumwalt Sch. Dist. v. Dickherber*, 576 S.W.2d 532, 536-37 (Mo. 1979). The appropriations rule in Art. IV § 28 applies generally. But the rule announced in Art. IV, § 30(b)1 is specific to the State Road Fund.

Spending from the State Road Fund can and must conform to the later-enacted, more specific Art. IV, § 30(b)1, even if that means finding § 30(b)1 to be an exception from some portion of the general rule set out in § 28.[3] Any other reading of the two provisions would defeat the key purpose of § 30(b)1 as amended in 2004: to ensure that the Commission can construct and maintain Missouri highways using *the full resources* **the people of Missouri** have placed in the State Road Fund.

Declaring that the Commissioner can and must certify payments from the State Road Fund as requested or directed by the Commission because the State Road Fund has, by the Constitution itself, been "appropriated by law" is consistent with the holding of the Supreme Court of Missouri in *Conservation Commission v. Bailey*. In fact, it is consistent with even the dissenting opinion in *Conservation Commission*, in which three judges cited the "stands

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[3] That question was before the voters, who were "advised that the proposed constitutional amendment changes, repeals or modifies by implication, or may be construed to change, repeal or modify by implication the following provisions of the Constitution of Missouri -- ... Section[] ... 28 ... of Article IV...." Laws of Missouri, 2005, p.1600.

appropriated" language found in Art. IV, § 30(b)1 and elsewhere as the basis for an exemption from the general rule of Art. IV, § 28. 669 S.W.3d at 71-72 and n.2 (Breckenridge, J. dissenting).

The Commissioner has no basis for distinguishing *Conservation Commission*.

In the alternative, the Commissioner asserts that even if it is true that payments on bonds and interest can be made without a legislative appropriation, that is not true as to other purposes listed in Art. IV, § 30(b)1. But § 30(b)1 makes no such distinction. It declares that the entire State Road Fund, not just the amount required to make payments on bonds, "stand[s] appropriated without legislative action." And it gives the Commission—*not* the General Assembly—"sole discretion" to decide whether, when, and how to use and expend the remainder of the State Road Fund, so long as the uses of the Fund are among those authorized by the Constitution.

CONCLUSION / DECLARATION

In *Conservation Commission v. Bailey*, the Supreme Court of Missouri held that authorization giving the Conservation Commission authority to "use and expend" the Conservation Fund is enough to empower that Commission to make payment decisions that go beyond the scope of legislative approval in appropriations bills. The same result must be required

here, where the Constitution not only gives the Highways and Transportation Commission, like the Conservation Commission, express and exclusive authority to "use and expend" the State Road Fund, but also declares *both* that the Fund "stands appropriated without legislative action" *and* that the Fund is subject to the "sole discretion" of the Highways and Transportation Commission.

This Court therefore declares:

- The Highway and Transportation Commission's submission of requests for payments from the State Road Fund for salaries, wages, and benefits for qualifying Missouri Department of Transportation employees constitutes an "appropriation by law" sufficient to authorize and require the Commissioner of Administration to certify those payments to the State Treasurer even if the amount set out in the appropriations bills for the appropriate fiscal year from the State Road Fund has been exhausted;
- The authority of the Commissioner of Administration to certify payments from the State Road Fund approved by the Missouri Highways and Transportation Commission is not restricted by appropriations bills enacted by the General Assembly nor by Art. IV, § 28; and

- The Commissioner of Administration shall certify such payments so long as they are for purposes mandated or authorized in Art. IV, § 30(b)1, and there is a sufficient balance in the State Road Fund.

Hon. S. Cotton Walker
Circuit Court Judge, Division III
19th Judicial Circuit, State of Missouri

Date: October 31, 2023

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