



# In the Missouri Court of Appeals Eastern District

## DIVISION ONE

FIREMEN'S RETIREMENT SYSTEM,	)	No. ED86921
et al.,	)	
	)	
Plaintiffs/Respondents,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
vs.	)	
	)	
CITY OF ST. LOUIS, et al.,	)	Hon. David Dowd
	)	
Defendants/Appellants.	)	FILED: August 22, 2006

Before Mary K. Hoff, P.J., Clifford H. Ahrens, J., and Patricia L. Cohen.

The City of St. Louis ("City") and Francis G. Slay, James Shrewsbury, and Darlene Green ("Officers"), acting in their capacity as officials of City, appeal from the judgment of the trial court granting the motion of the Firemen's Retirement System ("FRS") of City for summary judgment on its claim for declaratory judgment. City and Officers (collectively "Defendants") contend that the trial court erred in finding that Defendants waived the issue of the Hancock Amendment, in not permitting them to amend their pleadings, and in interpreting and applying the relevant statutes and ordinances.<sup>1</sup> We transfer this case to the Missouri Supreme Court.

The FRS was created through the enabling authority of sections 87.120 through 87.370 RSMo 1959, which permitted City to establish by ordinance a retirement system

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<sup>1</sup> The Hancock Amendment is incorporated into the Missouri Constitution as Article X, sections 16 through 24.

for firefighters.<sup>2</sup> The establishment of the FRS was not mandated by statute, but once created by ordinance, changes to the system are constrained by the enabling statutes. An actuary computes the value of the assets and liabilities of the FRS, as well as the amount of contribution due from the City to the FRS, pursuant to Chapter 4.18 of the ordinances of City ("City Code"). The FRS Board of Trustees ("Board") then certifies and submits to the City the contribution amount due for the following year.

On February 20, 2003, the Board certified to the City's Board of Estimate and Apportionment ("E&A") that the amount of contribution to the FRS that was due and payable from the City for the 2003-2004 fiscal year ("FY2004") was \$8,913,102. On February 24, 2004, the Board certified to the City E&A that the contribution due and payable by City for the 2004-2005 fiscal year ("FY2005") was \$13,765,477. In both FY2004 and FY2005 the City did not budget, appropriate or pay the amounts of contribution certified to the City by the FRS Board. Instead, for FY2004 the City enacted a budget ordinance that authorized a contribution of \$1,884,356 as a direct contribution from City, and \$193,799 as a contribution on behalf of the City Airport commission. For FY2005, the City enacted a budget ordinance that contributed \$1,862,061 to the FRS.

FRS filed suit against City and several individual officers of the City in their official capacities on August 12, 2003, for declaratory judgment that the City was obligated under Chapter 87 RSMo and City Code 4.18 to appropriate the amount of the City's contribution to the FRS as certified by the actuary and the Board, and to pay that amount to the FRS for FY2004 and FY2005. The suit also requested that the trial court enter a money judgment against City, and that an injunction be issued against Officers in their capacity as the City E&A to authorize the allocation of funds necessary to maintain

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<sup>2</sup> Unless otherwise noted, all further statutory citations are to RSMo 2000.

the actuarial soundness of the FRS general reserve fund and to appropriate those funds. Defendants filed an answer to the second amended petition of FRS on July 15, 2004. This answer did not assert the Hancock Amendment as an affirmative defense to FRS's claims. Both FRS and Defendants filed motions for summary judgment, along with statements of uncontroverted facts and memoranda in support of their motions. Both sides filed a number of responses. In their motion for summary judgment, Defendants summarily raised the issue of the Hancock Amendment as a limit on the City's contribution, though it was never asserted as an affirmative defense in Defendants' pleadings.

The trial court issued a 131-page judgment on June 17, 2005. The trial court denied the motion for summary judgment of Defendants, and sustained FRS's motion for summary judgment in part.<sup>3</sup> The trial court declared that the relevant statutory and ordinance provisions, construed as a whole, require that the City budget, appropriate, and pay to FRS the contribution amount that the Board has certified. It further found that the language "shall" as used in section 87.355 and City Code 4.18.320 is mandatory, not directory or advisory. The trial court declared that the City's budget ordinances for FY2004 and FY2005 also conflicted with the relevant provisions of the enabling act, section 87.120 *et seq.*, and to that extent were illegal and void.

The trial court declared that the relevant statutes and ordinances do not violate Article VI, section 26(a) of the Missouri Constitution, and that those same statutes and ordinances do not operate as an unconstitutional delegation of legislative authority. It

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<sup>3</sup> The trial court denied FRS's prayer for pre-judgment interest, stating that FRS had not alleged or shown a basis that would entitle it to pre-judgment interest. The trial court also denied the request for an injunction regarding any amounts owed to FRS for FY2005, stating that it would not presume in advance that the Defendants would not comply with the trial court's judgment.

also found that Defendants waived the assertion of the Hancock Amendment by failing to properly plead and raise it as an affirmative defense. Further, the trial court found that Defendants lack standing to assert the Hancock Amendment as an affirmative defense, and that it accordingly lacked jurisdiction to reach the merits of the Hancock Amendment. The trial court further declared that the affirmative defenses pleaded by Defendants lacked legal merit. The trial court specifically found that the budget ordinances adopted by the Defendants for FY2004 and FY2005 are illegal and void under Trantina v. Board of Trustees of Firemen's Retirement System of St. Louis, 503 S.W.2d 148 (Mo. App. 1973), and did not override the provisions of City Code 4.18.320.<sup>4</sup>

The trial court found that City did not appeal the actuarial soundness or reasonableness of the amount certified by the Board for FY2004, \$8,913,102, and only contributed \$2,078,155 for that fiscal year. Accordingly, the trial court declared that City breached its legal obligations to FRS, and owes FRS and its General Reserve Fund \$6,834,947 in arrearages for FY2004. The trial court entered judgment in favor of FRS for that amount and ordered City to pay it. The trial court also found that the amount certified by the Board for FY2005 was \$13,765,477, and that City did not administratively appeal this certified amount, and asserted an intention to pay only \$2,055,201. The trial court decreed that FRS is lawfully entitled to be paid by City the full certified amount of \$13,765,477 prior to the end of FY2005. It further declared that to the extent that City paid FRS any amount less than \$13,765,477 by the end of FY2005, it would be in violation of its legal obligations "under the FRS statute and ordinance."

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<sup>4</sup> Defendants asserted as an affirmative defense that, to the extent that there were any inconsistencies or incompatibilities between City Code 4.18.320 and the budget ordinances for FY2004 and FY2005, which were enacted after City Code 4.18.320, the budget ordinances were controlling as a matter of law, apparently because they were more recent legislation.

Defendants thereafter filed a motion for a new trial or in the alternative, to amend the judgment, and a motion for leave to amend their pleadings by interlineation to include the Hancock Amendment as an affirmative defense. FRS filed a motion for reconsideration. The trial court denied all of these post-trial motions.

Defendants now appeal from this judgment.

Summary judgment is designed to permit the trial court to enter judgment without delay when the moving party has demonstrated, based on facts about which there is no genuine dispute, a right to judgment as a matter of law. ITT Commercial Finance v. Mid-American Marine, 854 S.W.2d 371, 376 (Mo. banc 1993); Rule 74.04. Our review of the granting of a motion for summary judgment is essentially *de novo*. ITT, 854 S.W.2d at 376. This Court takes as true every fact set forth in the moving party's motion unless the non-movant has denied it in its response to the motion. Id. The non-moving party's response must show the existence of some genuine dispute about one of the material facts necessary to the moving party's right to recover. Id. at 381. This Court may affirm the grant of summary judgment under any theory that the record supports. Id. at 387-88.

In their first point relied on, Defendants contend that the trial court erred in granting FRS's motion for summary judgment because requiring City to pay the amount certified by the Board violates the Hancock Amendment, specifically Mo. Const. Art. X, section 21. Defendants claim 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 amounts for FY2004 and FY2005 certified by the Board exceed the funding level in 1981.

FRS contends that Defendants lacked standing to raise the Hancock Amendment as an affirmative defense. We agree. Article X, section 23 of the Missouri Constitution provides in pertinent part:

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

In two 1995 decisions, the Missouri Supreme Court stated clearly that in order to have standing to assert the Hancock Amendment as a plaintiff or as a defendant, a party has to be a taxpayer. In Fort Zumwalt School District v. State, 896 S.W.2d 918, 921 (Mo. banc 1995), the Missouri Supreme Court held that:

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

In State ex rel. Board of Health Center Trustees of Clay County v. County Commission of Clay County, 896 S.W.2d 627 (Mo. banc 1995), the County Commission of Clay County was the defendant in a mandamus action. It asserted as a defense that the Hancock Amendment prohibited an increase in the tax levy without voter approval. Id. at 631. The Missouri Supreme Court held that it did not have to reach a decision as to whether the Hancock Amendment had been violated in that case “because the Commission has no standing to bring such a challenge.” Id. It went on to add that the class of persons who can bring suit to enforce the Hancock Amendment is limited to taxpayers. Id. (citing Fort Zumwalt, 896 S.W.2d at 921)). The import of these two cases is that in order to have standing to raise the Hancock Amendment either offensively or

defensively, a party has to be a taxpayer. City is not a taxpayer, and Officers, who are parties in this case in their official capacity only, are also not taxpayers.

Defendants assert that they do have standing because the Missouri Supreme Court has considered the Hancock Amendment to be an issue in some cases involving municipalities. See City of Jefferson v. Missouri Department of Natural Resources, 916 S.W.2d 794 (Mo. banc 1996); and Missouri Municipal League v. State, 932 S.W.2d 400 (Mo. banc 1996). However, in both cases there were also taxpayers involved as plaintiffs, even if not from all of the municipalities involved in the cases, and the Missouri Supreme Court did not address the standing issue.<sup>5</sup> Id. Defendants argue that the Missouri Supreme Court implicitly has relaxed the standing requirement as a result of these cases because the municipal plaintiffs without taxpayers from their municipalities also included as plaintiffs were not dismissed from the cases for lack of standing. We disagree. The Missouri Supreme Court in Missouri Association of Counties v. Wilson, 3 S.W.3d 772 (Mo. banc 1999), a case decided after both City of Jefferson and Missouri Municipal League, specifically reaffirmed the standing requirement of Fort Zumwalt, 896 S.W.2d at 921, holding that:

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

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

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<sup>5</sup> The Missouri Supreme Court made an explicit reference to the existence of an individual taxpayer in City of Jefferson, 916 S.W.2d at 796. It did not make such a reference in its opinion in Missouri Municipal League, 932 S.W.2d 400, but in Exhibit 1 to FRS's memorandum in opposition to Defendants' motion for a new trial, which is included in the legal file, the caption for the case includes several individuals listed separately as plaintiffs, presumably taxpayers.

Missouri Association of Counties, 3 S.W.3d at 776-77 (citing Fort Zumwalt, 896 S.W.2d at 921).

Defendants also cite to Kelly v. Hanson, 959 S.W.2d 107 (Mo. banc 1997) and In re Tri-County Levee District, 42 S.W.3d 779 (Mo. App. 2001) as support for their position that they have standing to raise the Hancock Amendment. In Kelly, the Missouri Supreme Court did not hold that the State Auditor had standing to bring suit or defend a suit on the basis of the Hancock Amendment. Rather, the Missouri Supreme Court in Kelly held that the State Auditor had standing to file an action for declaratory judgment regarding her duties as State Auditor relating to the Hancock Amendment under article IV, section 13 of the Missouri Constitution. Kelly, 959 S.W.2d at 110. Kelly is not applicable to the present case. In Tri-County, this Court held that the Hancock Amendment was not applicable to the case as the special assessments were not a tax. Tri-County, 42 S.W.3d at 786. We did not hold that the Tri-County Levee District had standing to bring suit under the Hancock Amendment. Following the decisions of our Supreme Court, we hold that Defendants did not have standing to raise the Hancock Amendment as an affirmative defense. Point denied.<sup>6</sup>

In their second point relied on, Defendants assert that the trial court erred in denying their motion for leave to amend their pleadings by interlineation to raise the issue of the Hancock Amendment 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

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<sup>6</sup> The trial court also found that Defendants did not properly plead the Hancock Amendment as an affirmative defense in their answer, but rather raised it summarily in their motion for summary judgment, and found that Defendants waived the issue of the Hancock Amendment. Because we hold that Defendants

denial of leave to amend..., the FRS would suffer no injustice...because it had a full and fair opportunity to address the issue on the merits in the summary judgment proceedings..., and the amendment would cure the deficiency perceived by the trial court.”

A pleading may be amended once before a responsive pleading is filed, or any time within thirty days after it is served if no responsive pleading is permitted. Rule 55.33(a). “Otherwise, the pleading may be amended only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Id. It is within the trial court’s broad discretion to grant leave to amend pleadings at any stage of the proceedings, even after the verdict. See Jennings v. Chatsworth Apartments Project, Ltd., 186 S.W.3d 457, 463 (Mo. App. 2006); Estate of Anderson v. Day, 921 S.W.2d 35 (Mo. App. 1996). This Court will not disturb the decision of the trial court to grant or to deny leave to amend absent a showing the trial court obviously and palpably abused its discretion. Stewart Title Guaranty Co. v. WKC Restaurants Venture Co., 961 S.W.2d 874, 887-88 (Mo. App. 1998). There are several factors that the trial court should consider in determining whether to grant leave to amend a pleading, which include the hardship to the moving party if leave to amend is denied, the moving party’s reasons for failing to include any new matter in earlier pleadings, the timeliness of the motion for leave to amend, whether the proposed amendment would cure the moving party’s inadequate pleading, and any injustice to the opposing party if the motion for leave to amend is granted. Id. at 888. The trial court does not err when it denies a motion to amend a pleading to assert a non-meritorious claim. Id.

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lack standing to raise the Hancock Amendment as an affirmative defense, we need not address this particular finding of the trial court.

We note initially that as we discussed in our analysis of Defendants' first point relied on, Defendants did not have standing to raise the Hancock Amendment as an affirmative defense, so denying them leave to amend did not result in any hardship to them. This alone was a sufficient basis to deny Defendants' motion for leave to amend, as the trial court does not err when it denies a motion to amend a pleading to assert a non-meritorious claim. See Stewart Title Guaranty Co., 961 S.W.2d at 888. In addition, an examination of the other factors that a trial court should consider in determining whether to grant leave to amend shows that the trial court did not abuse its discretion on this issue.

In its order and judgment the trial court stated that while the City made an effort to raise the issue, it had not been adequately raised. It had not been pleaded at all, and definitely not at "the earliest opportunity" as is required of a constitutional issue, and not with the level of detail required. The trial court noted that Defendants did not even identify the specific part of the Hancock Amendment purportedly violated until their reply summary judgment memorandum, which it believed to be inconsistent with both the timeliness and level of specificity intended by "the earliest opportunity" rule.

Timeliness is a factor of particular import when the issue involved is a constitutional one. Constitutional questions must be raised at the earliest possible opportunity that good pleading and orderly procedure will permit given the circumstances. Lindquist v. Scott Radiological Group, Inc., 168 S.W.3d 635, 654 (Mo. App. 2005) (citing Callier v. Director of Revenue, 780 S.W.2d 639 (Mo. banc 1989)). To properly raise a constitutional issue, a party must: (1) raise the question at the first available opportunity; (2) specifically designate the constitutional provision alleged to have been violated, such as by explicit reference to the article and section, or by

quotation from the particular provision; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review. United C.O.D. v. State, 150 S.W.3d 311, 313 (Mo. banc 2004); Lindquist, 168 S.W.3d at 564. “The reason for this requirement is to prevent surprise to the opposing party and to permit the trial court an opportunity to fairly identify and rule on the issues.” State ex rel. Tompras v. Board of Election Commissioners of St. Louis County, 136 S.W.3d 65, 66 (Mo. banc 2004), *cert. denied*, 543 U.S. 991, 125 S.Ct. 501, 160 L.E.2d 378 (2004).

There was no reason given for the failure to move to amend the pleadings. The motion to amend was untimely, particularly so given that a constitutional issue was involved. The proposed amendment would work an injustice on FRS, for despite Defendants’ contentions that the issues involving the Hancock Amendment were fully briefed and argued, the trial court found to the contrary. The trial court noted that FRS did not even know the particular section of the Hancock Amendment on which the Defendants were relying until Defendants filed their reply memorandum in opposition to FRS’s motion for summary judgment. The trial court did not abuse its discretion in denying the motion for leave to amend. Point denied.

In their third point relied on, Defendants assert that the trial court erred in entering judgment against the City because requiring the City to pay the amounts certified by the Board violates Article VI, section 26(A) of the Missouri Constitution, constituting an improper delegation of legislative power. Specifically, Defendants assert that Article VI, section 26(A) provides that no city may become indebted beyond its income, and that the undisputed facts show that City’s revenues for FY2004 and FY2005 have already been

appropriated and transferred, such that if City is required to pay the certified amounts for FY2004 and FY2005, it would be obligated in excess of its revenues.

Defendants initially refer to State ex rel. Employees of Retirement System v. Board of Estimate and Apportionment, Cause No. 004-01181, *aff'd* 43 S.W.3d 887 (Mo. App. 2001), in accordance with Rule 84.16(b), which has no precedential value. In addition to not having precedential value, that case is also distinguishable from the present case in that the retirement system (“ERS”) at issue in Retirement System is purely a creature of ordinance, not established pursuant to a permissive enabling statute. In addition, the ordinances in Retirement System had a provision permitting a reduction in benefits if City did not make its contribution, a provision that the trial court in Retirement System considered in determining that the amount certified by the ERS was not mandatory. Neither City Code 4.18 nor the enabling statutes for FRS contain a similar provision. In addition, ERS had an actuarial surplus of \$67,000,000 at the time that that case was litigated, whereas FRS had an unfunded accrued liability of nearly \$39,000,000.

Defendants also rely on State ex rel Field v. Smith, 49 S.W.2d 74 (Mo. banc 1932). In Smith, 49 S.W.2d at 77-79, the Missouri Supreme Court held that the statutes that established the police board for Kansas City delegated legislative power to the police board were in violation of Article X, section 1 of the Missouri Constitution. The Missouri Supreme Court found that the statutes gave the police commissioners “an unlimited authority and uncontrolled discretion with respect to appointing, organizing, arming and equipping a permanent police force for Kansas City[.]” Id. at 76-77. While the statutes limited, for example, the number of captains, lieutenants, and sergeants for each police district within Kansas City, they did not limit the number of districts that the

police board could establish. Id. at 75-77. The Missouri Supreme Court found that the statutes permitted the police board to hire as many police officers and matrons as it wished. The police board was to estimate the amount of money that it needed each fiscal year, and certify that amount to the municipal assembly, which was required to set apart and appropriate the amount required in the first apportionment ordinance of that fiscal year. Id. at 77. The police board also was authorized to make monthly financial requisitions upon the appropriate municipal authorities as it deemed necessary, “and the sum so required shall be appropriated and by said disbursing officer or officers placed to the credit of the police department.” Id. (quoting section 7516 RSMo 1919). This, the Missouri Supreme Court held, was effectively the power to tax. Smith, 49 S.W.2d at 77.

However, the factual situation in the present case is noticeably different. FRS and the Board do not have unlimited discretion in determining the amount requested, but rather must request and certify the amount determined by an actuary that is required for the FRS to remain actuarially sound. Defendants do not contest that the amount certified by the Board was properly determined by an actuary, or claim that the actuary’s computations are unsound.

The situation here is similar to that in Missouri State Employees’ Retirement System v. Jackson County, 738 S.W.2d 118 (Mo. banc 1987), in which Jackson County argued, among other things, that section 104.345 RSMo 1986 failed to provide sufficient standards for guidance and gave MOSERS arbitrary discretion and authority. Section 104.345(a) RSMo 1986 required that the amounts that the City of St. Louis or a county would have to contribute to MOSERS for the creditable prior service of court clerks be “actuarially determined to be sufficient to fund the creditable prior service” of the court

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

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

The county, however, does not challenge the soundness of MOSERS’ actuarial computations....The computations of MOSERS actuary are sufficient to support the judgment.

Id. at 120-21.<sup>7</sup> Similarly in the present case, the Board does not have unlimited and unguided power to drain revenue from the City, but rather is constrained to certify the amount determined by an actuary to be required to maintain the FRS in an actuarially sound position. This is a sufficient, if not precise, guideline and check on the power of the Board, such that there is not an unconstitutional delegation of power to the Board. While the Board has a great deal of power, having a large amount of power does not make its actions unconstitutional, as the Missouri Supreme Court stated in Smith,

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

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<sup>7</sup> We note that standing was apparently not raised as an issue in this case, and that it was decided prior to the holding in Fort Zumwalt that a party had to be a taxpayer to have standing to raise the Hancock Amendment in a case.

Smith, 49 S.W.2d at 76 (citations omitted). The key is guidance and control, and the requirement that the amount to be contributed by City be determined by an actuary meets the requirement of Smith. The City could have contributed the amounts for FY2004 and FY2005 that the Board certified and that City was obligated to pay. Doubtless it would have forced the City to make some difficult choices, but these are choices that City must make to satisfy its obligations to FRS under the enabling statute and City Code. While it is true that Article VI, section 26(A) does provide that no city may become indebted beyond its income, there is no evidence that City's income is insufficient to pay its current indebtedness. To follow the City's logic it could evade almost any debt by failing to timely appropriate the money for it in the fiscal year when due, and then claim that it cannot be forced to pay it in succeeding fiscal years. We hold that the enabling act and the ordinances of the City that require the City to pay to the FRS the amounts certified by an actuary and the Board are not an improper delegation of legislative power to the Board, and do not violate Article VI, Section 26(A) of the Missouri Constitution. Point denied.

In their fourth point relied on, Defendants contend that the trial court erred in entering judgment in favor of FRS because City's payments to FRS were adequate as a matter of law. Defendants argue that section 87.340 and City Code 4.18.305 provide that a payment by City is sufficient as a matter of law if, when combined with the amount in the FRS general reserve fund, there is enough money to provide the benefits payable for the current fiscal year. They assert that the undisputed facts show that amount in the FRS general reserve fund exceeded the amounts necessary to pay benefits for those fiscal years.

Statutory construction is a matter of law. City of St. Joseph v. Village of Country Club, 163 S.W.3d 905, 907 (Mo. banc 2005). We review questions of law *de novo*. Otte v. Missouri State Treasurer, 141 S.W.3d 74, 76 (Mo. App. 2004). The primary rule of statutory construction is to determine the intent of the legislature by considering the plain and ordinary meaning of the words used in the statute. State ex rel. Womack v. Rolf, 173 S.W.3d 634, 638 (Mo. banc 2005). “[E]ach word, clause, sentence and section of a statute should be given meaning.” Id. (quoting Jones v. Dir. Of Revenue, 832 S.W.3d 335, 337 (Mo. banc 1993)). Courts will reject a statutory interpretation that requires ignoring the very words of the statute. Id. In ascertaining the meaning of a city ordinance, we apply the same rules used in construing a state statute. State ex rel. Killingsworth v. George, 168 S.W.3d 621, 623 (Mo. App. 2005). This Court seeks generally to determine the intention of the lawmakers by giving the words used their ordinary meaning, by considering the whole act and its purposes, and by seeking to avoid unjust, unreasonable, absurd, confiscatory or oppressive results. Id. In addition, in determining the meaning of a particular statute, this Court may look to the established policy of the legislature as disclosed by a general course of legislation. Id.

Defendants argue that the trial court erred in finding that section 87.355 and City Code 4.18.320 require City to appropriate the entire amount certified by the Board in that when read in conjunction with section 87.340 and City Code 4.18.305, City is not required to appropriate the entire amount certified by the Board. Rather, Defendants contend, the plain language of section 87.340 and City Code 4.18.305 provide that notwithstanding the certified amount, the City’s payment is adequate at law if, when

combined with the amount in the FRS general reserve fund, there is a sufficient amount to provide the benefits payable during the fiscal year.

Looking at the statutes and ordinances at issue, section 87.355 provides that:

On or before the first of March of each year the board of trustees **shall** certify to the proper city authorities the amount which will become due and payable during the year next following to the general reserve fund. The amount so certified **shall** be included by the city authorities in their annual budget estimate. The amount so certified **shall** be appropriated by the city and transferred to the retirement system for the ensuing year. (Emphasis added).

Section 87.340 states that:

The total amount payable in each year to the general reserve fund shall be not 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.

City Code sections 4.18.320 and 4.18.305 precisely track the language of sections 87.355 and 87.340 respectively.<sup>8</sup> City Code 4.18.290 provides that:

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<sup>8</sup> City Code 4.18.320 provides that:

On or before the first of March of each year the Board of Trustees **shall** certify to the proper City authorities the amount which will become due and payable during the year next following to the general reserve fund. The amount so certified **shall** be included by the City authorities in their annual budget estimate. The amount so certified **shall** be appropriated by the City and transferred to the Retirement System for the ensuing year. (Emphasis added).

City Code 4.18.305 states that:

The total amount payable in each year to the general reserve fund shall be not 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

Contributions to and payments from the general reserve fund shall be as follows: On account of each member there shall be paid annually into the fund by the City an amount equal to a certain percentage of the earnable compensation of the member to be known as "the normal contribution" and an additional amount equal to a percentage of his earnable compensation to be known as "the accrued liability contribution." The [percentage rates] of the contributions shall be fixed on the basis of the liability of the Retirement System as shown by actuarial valuations.

Defendants concede that the actuary's calculations of the normal contribution and the accrued liability contribution are correct. The trial court found that the language of City Code 4.12.320 in using "shall" indicates that the contribution is mandatory. We agree.

The proposed construction by Defendants would cause City Code 4.18.305 to conflict with City Code 4.18.320. The plain language of City Code 4.18.320 requires that the City budget and appropriate the amount certified by the actuary and the Board. Defendants' construction of 4.18.305 is that City does not have to appropriate that amount and can make a lesser payment if there are sufficient assets in the FRS general reserve fund. This construction would also make City Code 4.18.305 internally inconsistent, as the opening clause of that section requires the total amount payable "shall not by less than the sum of the rates percent known as the normal contribution rate and the accrued liability rate[.]" For the Defendants' proposed construction not to be in conflict or inconsistent, this Court would have to read additional qualifying language into both the City Code 4.18.305 and section 87.340 RSMo that "notwithstanding anything to the contrary in this section or elsewhere," or limiting language in City Code 4.18.320 and section 87.355 such as "except as otherwise provided in this Act."

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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.

Courts avoid interpreting statutes to include qualifying language “where ‘[s]uch an interpretation impermissibly adds language to the statute.’” BHA Group Holding, Inc. v. Pendergast, 173 S.W.3d 373, 379 (Mo. App. 2005) (quoting Kincade v. Treasurer of State of Missouri, 92 S.W.3d 310, 312 (Mo. App. 2002)). This Court is not permitted to “engraft upon the statute provisions which do not appear in explicit words or by implication from the words in the statute.” State Department of Social Services, Division of Medical Services v. Brundage, 85 S.W.3d 43, 49 (Mo. App. 2002) (quoting Wilson v. McNeal, 575 S.W.2d 802, 810 (Mo. App. 1978)).

Defendants’ construction of the statutes and ordinances would result in an irreconcilable conflict between City Code 4.18.305 and 4.18.325 and their statutory counterparts, sections 87.340 and 87.360 respectively. City Code 4.18.325 states that:

The creation and maintenance of reserves in the general reserve fund and the maintenance of benefit reserves as provided for and the payment of all benefits granted under the provisions of this chapter are hereby made **obligations** of the City. (Emphasis added).

The City’s proposed construction of 4.18.305 would render these obligations a nullity. There would be no “obligation” to maintain reserves in the general reserve fund if the City has no obligation to budget, appropriate, and transfer any money to the FRS in any fiscal year unless there is no money left in the FRS general reserve fund. Defendants’ proposed construction of section 87.340 and City Code 4.18.305 violates the principle that one part of a statute or ordinance should not be read in isolation, but rather in the context of the whole act, and should be read to harmonize all provisions and give effect to every word, sentence and clause of the legislation, if reasonably possible. The statutes and ordinances as a whole support the view that the principle at the heart of the funding provisions of the FRS is actuarial soundness. This assumes that the City will make, and

is required to make, its annual contribution of the actuarially-determined amount certified by the Board.

Defendants argue that actuarial soundness, while a creditable objective, should not be a basis for requiring City to contribute the amounts certified by an actuary and the Board to the FRS, citing to Tomlinson v. Kansas City, 391 S.W.2d 850, 853 (Mo. 1965). Defendants make a public policy argument, which is not the same as a legal argument, and cite Tomlinson for that purpose. Tomlinson is distinguishable from the present case. Most notably, the Missouri Supreme Court in Tomlinson, in which individual firefighters sued Kansas City seeking a money judgment, held that the Kansas City ordinance did not create a contractual obligation that would give rise to a claim for a monetary judgment. Here, the FRS, not individuals, is seeking a declaratory judgment based on a claim that City has a statutory obligation to contribute to the FRS. The Missouri Supreme Court in Tomlinson also implicitly based its holding on the view that the police pension funds at issue in that case were “gratuities,” a view which that Court subsequently declined to adopt in Police Retirement System of Kansas City v. Kansas City, 529 S.W.2d 388, 391 (Mo. banc 1975). The modern trend is to view such pension rights as contractual in nature and not as gratuities. See 3 McQuillin Mun. Corp., section 12.144.05 (3rd ed. 2001); 5 Antieau on Local Government Law, section 78.02[4] (2d. ed. 2002). We note that the ordinance in the present case makes the creation and maintenance of reserves in the general reserve fund, the maintenance of benefit reserves, and the payment of all benefits under City Code 4.18 obligations of the City. See City Code 4.18.325. Further, this Court in Trantina v. Board of Trustees of Firemen’s Retirement System of St. Louis, 503 S.W.2d 148, 151-52 (Mo. App. 1973) noted that while the establishment of the FRS

under the enabling statutes was permissive and not mandatory, the ordinance adopting such a system must comply with the enabling statutes, and that ordinances to amend the pension plan must conform with the extant enabling statutes. The Missouri Supreme Court has endorsed the Trantina decision in Firemen's Retirement System of St. Louis v. City of St. Louis, 789 S.W.2d 484, 487 (Mo. banc 1990).

The construction of section 87.340 and City Code 4.18.305 suggested by FRS can be harmonized with the rest of the respective legislation. The opening clause of the statute and ordinance sets forth the minimum amount payable based on the normal contribution rate and accrued liability contribution rate, as defined elsewhere in the statutes and ordinances. This reinforces the obligation established in City Code 4.18.320. The clause that Defendants seize upon in City Code 4.18.305, "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[.]" modifies the first part of the sentence by requiring City to contribute more than the minimum amount ordinarily payable "whenever the amount certified, when combined with the assets in the System's reserves, does not equal an amount sufficient to cover the pension and other benefits payable during the current year[.]" It is possible that City can comply with both directives in that sentence under this construction, while it is not possible for the City to comply with both directives using its proposed construction.

Defendants also assert that the use of the word "shall" in section 87.355 and City Code 4.18.320 is directory and not, as the trial court found, mandatory. Generally the use of the word "shall" connotes a mandatory duty. Bauer v. Transitional School District of City of St. Louis, 111 S.W.3d 405, 408 (Mo. banc 2003). Where the legislature fails to

include a penalty for failure to do that which “shall” be done, courts have said that “shall” is directory, not mandatory. Id. Defendants point to the lack of a sanction or penalty in the statute and ordinance and argue that the use of “shall” is simply directory. However, the absence or presence of a penalty provision is only one method for determining if a statute is directory or mandatory. Id. “Indeed, ‘[t]he absence of a penalty provision does not automatically override other considerations.’” Id. Whether the use of the word “shall” in a statute is mandatory or directory is primarily a function of context and legislative intent. Id. Accordingly, the lack of a penalty provision is not automatically decisive. We also note that in Firemen’s Retirement System of St. Louis v. City of St. Louis, 789 S.W.2d at 486, the Missouri Supreme Court stated that according to the ordinance, “[i]t is the Trustees [of the FRS], not the City, who certify each year the amount the City is **required** to appropriate for the following year[.]” (emphasis added) which suggests that the Missouri Supreme Court considers “shall” in the context of the ordinance to be mandatory. Examining the use of “shall” in both section 87.355 and City Code 4.18.320 in the context of the acts and the purpose of that legislation, this Court holds that “shall” is mandatory and not directory. The enabling statutes and the ordinances of the City mandate that the City budget and appropriate as the City’s contribution to the FRS the amount certified by the actuary and the Board as necessary for the FRS to remain actuarially sound. Point denied.

We would affirm the judgment of the trial court. Because of the general interest and importance of the issues involved in this case, we transfer the case to the Missouri Supreme Court pursuant to Rule 83.02.

PER CURIAM