IN THE CIRCUIT COURT FOR THE CITY OF ST. LOUIS
STATE OF MISSOURI

CHARLES A. LANE, and JAMES CRAWFORD,	)	
Plaintiffs,	)	Case No.: 2122-CC00751
v.	)	
POLICE RETIREMENT SYSTEM OF THE CITY OF ST. LOUIS, et al.,	)	
Defendants.	)	

DEFENDANT POLICE RETIREMENT SYSTEM OF THE CITY OF ST. LOUIS'S MOTION TO DISMISS CRAWFORD'S FIRST AMENDED PETITION

Defendant Police Retirement System of the City of St. Louis ("PRS"), by and through its undersigned counsel, moves this Court to dismiss Plaintiff James Crawford's ("Crawford") Amended Petition for Declaratory Judgment and Injunctive Relief ("Petition") for failure to state a claim upon which relief can be granted. In support of its Motion, PRS states as follows:

Introduction

Crawford's Petition, *in toto*, seeks to have this Court declare that he, on behalf of the City of St. Louis ("City"), is entitled to a money judgment against the State of Missouri ("State") because certain alleged changes in the law since 1981 regarding the benefits paid by PRS to retired or disabled City police officers are unfunded mandates under the Hancock Amendment. Looking past the doubtful merits of Crawford's Petition, it should be dismissed because it is an attempt by the City to get a second bite at the apple.

The issues in this case were previously raised, or could have been raised, in the case of *Neske v. City of St. Louis*, 218 S.W.3d 417 (Mo. banc 2007), where the City argued that requiring

it to make payments to the PRS were unfunded mandates. Crawford's arguments here are precluded under the doctrine of *res judicata* and, thus, should be dismissed, with prejudice.

Standard

To determine whether a petition states a cause of action upon which relief can be granted, courts test the adequacy of the petition. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001). "In order to avoid dismissal, the petition must invoke substantive principles of law entitling plaintiff to relief and . . . ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial." *Jordan v. Bi-State Development Agency*, 561 S.W.3d 57, 59 (Mo. App. E.D. 2018). "[T]he facts contained in the petition are assumed true and construed in favor of the plaintiffs." *Ward v. West County Motor Co., Inc.*, 403 S.W.3d 82, 84 (Mo. banc 2013).

A court may take judicial notice of its records involving prior proceedings between the same parties on the same basic facts involving the same general claims for relief. *State v. Dillon*, 41 S.W.3d 479, 482 (Mo. App. E.D. 2000). "A pleader may literally plead himself out of court . . . when facts constituting a defense appear affirmatively on the face of the petition" and the defense may be interposed by a motion to dismiss. *Freeman v. Leader Nat'l Ins. Co.*, 58 S.W.3d 590, 598 (Mo. App. E.D. 2001). Although *res judicata* is an affirmative defense, a motion to dismiss for failure to state a claim is appropriate, even though matters outside the pleadings are considered by the court taking judicial notice of the earlier judgment. *Chesterfield Village, Inc. v. City of Chesterfield*, 64 S.W.3d 315, 318 n. 1 (Mo. banc 2002).

Law and Argument

Crawford's claims here, made on behalf of the City, are barred by the doctrine of *res judicata*. "*Res judicata* operates as a bar to the reassertion of a cause of action that has been

previously adjudicated in a proceeding between the same parties or those in privity with them." *Commonwealth Land Title Ins. Co. v. Miceli*, 480 S.W.3d 354, 362–63 (Mo.App. E.D. 2015). In addition to issues previously adjudicated, "[r]es judicata also precludes all points 'properly belonging to the subject matter of the litigation and which the parties, exercising reasonable diligence, might have brought forth at the time.'" *Id.* at 363.

Res judicata applies where the "four identities" are present: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons or parties to the action; and (4) identity of the quality or status of the person for or against whom the claim is made." *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. banc 1991). The first two identities seek to determine the same central question: "what is the 'thing' – the claim or cause of action – that has been previously litigated?" *Epice Corp. v. Land Reutilization Authority of City of St. Louis*, 608 S.W.3d 725, 730 (Mo.App. E.D. 2020). The third and fourth identities seek to determine whether the parties to the first suit and the current suit have "an identity of interests in the subject matter of the litigation." *American Polled Hereford Ass'n v. City of Kansas City*, 626 S.W.2d 237, 241 (Mo. 1982). *Res judicata* applies to bar not only the same party from raising claims that should have been raised in the previous suit, but all of those in privity with them. *King Gen. Contractors*, 821 S.W.2d at 501.

I. *Crawford is Bound to the Judgment in Neske*

Addressing the third and fourth elements, the question is whether Crawford is bound by the decision in *Neske*. Admittedly, Crawford was a not a party to *Neske*. However, an exception exists regarding suits for or against municipalities and other political subdivisions, when the case

involves matters of general interest to all the people within the municipality. Therefore, Crawford need not be a party to *Neske* for its judgment to preclude the present suit.[1]

Specifically, the long-held law in Missouri, regarding the *res judicata* effect of judgments in cases involving political subdivisions, is that a judgment against a political subdivision "in a matter of general interest to all the people thereof, as one respecting the levy and collection of a tax, is binding not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof though not made parties defendant by name." *State ex rel. Wilson v. Rainey*, 74 Mo. 229, 235 (1881).

This rule was applied in *Drainage Dist. No. 1 Reformed, of Stoddard County v. Matthews*, 361 Mo. 286 (1950). There, a drainage district, as well as various landowners and taxpayers located within the drainage district, brought suit to enjoin the treasurer and collector of Stoddard County from making payment on sixty-six (66) warrants drawn and issued by the county court of Stoddard County for payment of maintenance on drainage ditches located within the district, on the theory that the warrants were procured by fraud and were otherwise invalid. *Id*. at 296. The trial court dismissed the suit at the pleadings stage because a default judgment had already been entered against the drainage district in a previous suit brought by a bank to enforce the warrants. *Id.* at 300. The trial court held that the previous suit precluded the current suit because challenges to the propriety of the warrants could have been brought in that suit, even though the drainage district did not assert any defenses in that case by virtue of its default. *Id*. Notably, the trial court held that the judgment from the previous suit precluded the landowners and taxpayers from

[1] Alternatively, Crawford argues in Count III that he should be allowed to bring his claims derivatively on behalf of the City. If such is allowed, Crawford would be barred by *res judicata* because he would be, for all intents and purposed, the City.

challenging the propriety of the warrants, despite the fact that they were not parties to the previous suit. *Id*.

On appeal, the court affirmed the judgment of the trial court, finding that the drainage district had a "full opportunity" to litigate all issues regarding the warrants in the previous case and therefore could not raise them in the current case. *Id.* at 302. Turning to whether the judgment in the previous suit barred the suit on behalf of taxpayers, who were not parties to the previous suit, the court held it did. *Id*. "In the absence of fraud or collusion[,] a judgment for or against a municipal corporation, county, town, school or irrigation district, or other governmental agency or district, or board or officers properly representing it, is binding and conclusive on all residents, citizens, and taxpayers in respect to all matters adjudicated which are of general or public interest such as question relating to public property, contracts or other obligations." *Id*. at 303. "The rule is applicable to persons who have notice of the suit and even to persons without actual notice of the suit." *Id*. To determine whether a taxpayer is precluded from relitigating issues that were or could have been litigated in a previous suit, the question is whether "the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them." *Id*.

Here, the third and fourth identities are present under the rule espoused in *Drainage District*. Hancock Amendment claims are claims of general or public interest. The language of the Hancock Amendment allows claims to be brought by "any taxpayer," which demonstrates that claims of unfunded mandates and the unconstitutional levy of taxes are matters of general and public interest.

Further, the injuries to City, argued in *Neske*, are wholly derivative of Crawford's alleged injuries. As discussed in *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995), the Hancock Amendment, by allowing taxpayers to bring suits challenging unfunded mandates, "recognizes that any apparent injury to the [political subdivision] is merely derivative of the taxpayer's injury." There, the Supreme Court of Missouri dismissed the political subdivision, but allowed the case to continue on the claims of the taxpayers. *Id.* The same is true of *Neske*. There, the City was allowed to proceed, presumably because it was derivatively representing the alleged injuries to its taxpayers from a violation of the Hancock Amendment. In *Neske*, the City fully litigated the issue of whether the Hancock Amendment was violated by requiring it to make payments to PRS, the exact same issue at bar here. And further, as stated in *Fort Zumwalt*, any alleged injury in *Neske* was to taxpayers, such as Crawford, not to the City. Because there is a complete identity of interest, Crawford is bound by the judgment in *Neske*.

II. *Neske Precludes Crawford's Claims.*

Having determined that Crawford is bound by the judgment in *Neske*, the next question for this Court is whether *Neske* precludes the claims made by Crawford in his Petition. As noted, the first two elements in the *res judicata* analysis seek to determine what is the "thing" that was sued for in the previous action. *Epice Corp.*, 608 S.W.3d at 730 (*quoting Chesterfield Village*, 64 S.W.3d at 318). To determine that question, the Court is to look to the "operative facts – those facts that give rise to an enforceable right and a basis for the lawsuit" and compare them to the facts from the previous lawsuit. *Id.* "To determine whether a claim is barred by a former judgment, the question is whether the claim arises out of the same act, contract or transaction."[2]

[2] The claims asserted by the City in *Neske* were in the nature of an affirmative defense while Crawford's claims in the present case are as a plaintiff. However, *res judicata* applies to claims that were, or could have been, asserted as affirmative defenses. *Xiaoyan Gu v. Da Hau Hu*, 447

In the present case, the first two identities are present between *Neske* and Crawford's Petition. The first identity is satisfied because Crawford seeks a determination that statutes governing the PRS constitute an unfunded mandate in violation of the Hancock Amendment. The City sought the same declaration in *Neske*. The second identity is present because *Neske* and Crawford's Petition are based on the same "same act, contract, or transaction" and Crawford's claims here are based on the same "factual bases" as the City's defenses in *Neske*. The judgment entered by the trial court, and affirmed by the Court of Appeals and Supreme Court, shows that in *Neske* the factual bases of City's defenses were the statutes creating the PRS, including their effect on benefits and the actuarial calculation to determine the City's annual payment to the PRS. The Memorandum, Order, and Judgment from *Neske* is attached hereto and incorporated herein by reference as **Exhibit A**.

In *Neske*, the Court did a thorough analysis of the statutes creating the PRS and the effect of those statutes on the funding the City must pay to the PRS, including §§ 86.330, 86.337, 86.344 and numerous others. Here, Crawford's Petition admits that he seeks to relitigate whether these same statutes create an unfunded mandate. *Petition* at ¶ 15 (Alleging that changes since 1981 created an unfunded mandate). Because Crawford's Petition is based on the same facts (the statutes governing the PRS) and acts (changes to those statutes since 1981) as *Neske*, the first and second identities are present here.

S.W.3d 680 (Mo.App. E.D. 2014). Because Missouri has adopted a broad rule of *res judicata, id.* at 688, "*[r]es judicata* applies to bar the assertion of a defense properly belonging to the subject matter of the litigation that a party, exercising reasonable diligence, could or should have raised in the prior litigation." *Id.*

Conclusion

WHEREFORE, for the above and forgoing reasons, the PRS respectfully requests that this Court dismiss Plaintiff's Amended Petition with prejudice, award the PRS its costs and attorney's fees, and enter such other and further relief as the Court deems just and appropriate.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served on all parties of record by operation of the Court's electronic case filing and case management system on this 7th day of June, 2021.

/s/ *David H. Luce*

2005 WL 5480888 (Mo.Cir.) (Trial Order)
Circuit Court of Missouri,
Twenty-Second Judicial Circuit.
City of St. Louis.

Thomas G. NESKE, et al., Plaintiffs,
v.
CITY OF ST. LOUIS, et al., Defendants.

No. 034-02186.
June 17, 2005.

Division No. 5

Memorandum, Order and Judgment

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David L. Dowd, Circuit Judge.

This matter comes before the Court on Plaintiffs' and Defendants' cross motions for summary judgment in the above-referenced cause. Having reviewed the record, as well as the parties' motions, pleadings, memoranda and arguments, the Court now rules as follows.

BACKGROUND

Plaintiffs are the ten individual members of the Board of Trustees of the Police Retirement System of the City of St. Louis ("PRS"). PRS is a public retirement system established pursuant to state statute for the purpose of transacting all business related to police retirement, disability and death benefits for PRS members and their families. Three of the Plaintiffs--Thomas G. Neske, John T. Gaffigan. and James H. Long--are actively serving police officers, whose rights to retirement benefits have vested. Two of the Plaintiffs--James R. Wurm and Joseph E. Ponder--are retired police officers who are currently receiving retirement benefits.

Defendants include the City of St. Louis, along with its Mayor (Francis G. Slay), its President of the Board of Aldermen (James Shrewsbury), and its Comptroller (Darlene Green) [1], all of whom are sued in their official capacities and all of whom together constitute the members of the Board of Estimate and Apportionment ("Board of E & A"), the chief fiscal body for the City of St. Louis.

Plaintiffs have brought the instant action, wherein they allege that the Defendants, for the fiscal period of July 1, 2003 through June 30, 2004 ("Fiscal Year 2004"), have failed to fully appropriate and transfer the amount due and owing to PRS as certified by the PRS Board of Trustees and its actuary and have thereby failed to comply with their legal obligations under § 86.200 through 86.366 RSMo [2], which statutory provisions govern the PRS and (Plaintiffs allege) mandate that the City authorize and

pay the PRS-certified amount. Most particularly, Plaintiffs allege that the Defendants' actions constitute a violation of § 86.344 RSMo. That section reads as follows:

86.344 Certification of amounts due and payable, when, to whom--city to appropriate funds, when

> On or before the first day of March of each year the board of trustees shall certify to the board of estimate and apportionment of the city the amounts which will become due and payable during the year next following for expenses pursuant to subsection 2 of section 86.343 and the cost of benefits as determined pursuant to section 86.337. The amounts so certified shall be appropriated by the city and transferred to the retirement system in equal payments in the first six months of the ensuing year. [3]

Plaintiffs have asserted theories under two counts in which they seek, essentially, the same relief. In Count I all of the Plaintiffs, acting in their official capacities as PRS Board of Trustees members, seek general declaratory and injunctive relief asking the Court to find that the governing provisions of Chapter 86 of the Revised Statutes of Missouri mandate that the City appropriate and pay the PRS-certified amount. As supplemental related relief, which is allowed (or as separate relief, presumably, in the event the Court would find declaratory relief to be unnecessary), Plaintiffs also seek a money judgment for the alleged shortfall amount of $5,459,682, together with pre-judgment interest.

In Count II, five members of the PRS Board of Trustees--members Neske, Gaffigan, Long, Wurm and Ponder--individually allege that the City's decision to appropriate and pay less than the PRS-certified amount is an unconstitutional impairment of heir contracts of employment, in violation of Article I, § 13 of the Missouri Constitution. Count II seeks only declaratory relief and "such other relief as the Court deems just and proper."

The City denies Plaintiffs' claims, arguing *inter alia* that if the relevant sections of Chapter 86 RSMo are properly construed the City is not required to pay the full PRS-certified amount---and indeed is not required to pay PRS anything, in any given year, as long as there is enough money on hand in the PRS general reserve fund to pay the System's benefits obligations for the current year. Alternatively, the City contends, if the governing statutes are construed to-require that the City must pay the certified amount under § 86.344, such a statutory requirement would be unconstitutional on at least three separate grounds: as an improper delegation of legislative appropriations authority, as a violation of Article VI, § 26(a) of the Missouri Constitution, and as a violation of the Hancock Amendment. [4] Defendants' Answer also poses several other alleged affirmative defenses as well.

Pursuant to the choice of the parties, this matter has been submitted to the Court on cross motions for summary judgment. [5] In general, there appears to be little disagreement between the parties as to the basic underlying facts.

The Court believes it also is important to carefully note the relationship of this case to its "companion" case, *Firemen's* Retirement System of St. Louis, *et al. v. City of St. Louis, et* al. (hereinafter, *"FRS"*), Cause No. 034-02165, wherein judgment is being entered by this Court on the same date as this case. This case and *FRS* were consolidated for purposes of discovery and other pre-trial procedural matters, but not consolidated for purposes of trial or other ultimate disposition on the merits. As all of the parties recognize, however, even though there are some notable differences between the two cases and the issues raised therein [6], there are also a great many very substantial overlaps and similarities. These similarities include many of the same basic features regarding the overall legislative scheme and structure of the FRS and PRS pension plans; as well as many of the near-identical issues raised in both cases concerning the proper statutory construction thereof and whether the legislation would be unconstitutional if interpreted as Plaintiffs urge.

In working on these closely related twin cases, the Court chose to do its research, analysis and writing in the *FRS* case first. The analysis in *FRS* was extensive and exhaustive; the Court therefore is not going to repeat that analysis to quite the same extent in this Order. The reader is thus advised that much of the discussion herein is made with background reference in mind to the

Court's "Memorandum, Order and Judgment" in *FRS.* In addition, the Court will also at times expressly refer herein to its order in the companion case, using the term "*FRS Companion* Case Order" to denote the order in that case.

A. City Budget Process; PRS Structural Overview; and Summary Judgment Record

As noted in the *FRS Companion Case Order,* the City has its own rather unique budgetary and appropriations process. In general, the Board of E & A is the City's chief fiscal body. The members of the Board of E & A are empowered to review and revise the City Budget Director's proposed budget for the ensuing fiscal year, and subsequently the amended proposed budget to the Board of Aldermen. The Board of Aldermen may reduce line items in the budget, but not increase them or add new ones without the consent of E & A. Any final budget ordinance, authorizing annual City expenditures, cannot be adopted unless E & A recommends it. See also *Jones v. Twenty-Second Judicial Circuit,* 823 S.W.2d 471, 473 (Mo. banc 1992).

The City of St. Louis Police Retirement System was created and is governed by §§ 86.200 through 86.366 RSMo; those statutes mandate the creation of the System. See *Trantina v. Board of* Trustees of Firemen's Retirement System, 503 S.W.2d 148, 152 (Mo.App.1973) (noting that, unlike FRS, the PRS is mandated by state statute).

All persons who become policemen in the City are required to become members of PRS, as a condition of their employment. § 86.207 RSMo. Apart from the investment income derived from its assets, the PRS is funded by annual contributions from two sources: (a) its active duty members [7], and (b) the City. Very similar to the FRS legislative scheme, the PRS statute thus contemplates that the City will make regular annual contributions from its general revenue. The amount of these annual contributions is determined by the PRS Board of Trustees, based on the computation of the actuary the Board selects. Apart from the amount of one-half of the PRS's annual expenses (a provision of the statute not in controversy in this lawsuit), the annual contributions by the City consist of a "normal contribution rate" that is calculated by the actuary according to statutory guidelines.

Further, it is readily apparent from any close scrutiny of the statutory provisions that the whole PRS system--and in particular the provisions pertaining to the contemplated annual City contribution to the System and the statutory criteria set forth for determining the amount thereof--is *actuarially* based. That is, the statutory scheme is based on actuarial tables, formulas, assumptions and computations, with an underlying purpose (one that is implicit but inherent in the statute) of achieving and maintaining a Police Retirement System that is actuarially sound. The following provisions of Chapter 86, among others, are relevant regarding the contemplated annual City contributions to the System:

> 86.243 Regular actuarial surveys--adoption of mortality tables--certification of contribution rates
>
> At least once in each five-year period the actuary shall make an actuarial investigation into the mortality, service and compensation experience of the members and beneficiaries of the retirement system and shall make a valuation of the assets and liabilities of the system and taking into account the results of such investigation and valuation the board shall:
>
> (1) Adopt for the retirement system such mortality, service and other tables as shall be deemed necessary;
>
> (2) Certify the rates of contribution payable by the said cities.
>
> 86.247 Annual valuation of assets and liabilities
>
> On the basis of such tables as the board of trustees shall adopt, the actuary shall make an annual valuation of the assets and liabilities of the system created by sections 86.200 to 86.366.
>
> 86.330 Normal rate of contribution, how determined

> After each annual valuation, the actuary engaged by the board to make the valuation required by sections 86.200 to 86.366, shall determine the normal contribution rate. The normal contribution rate shall be the rate percent of the earnable compensation of- all members obtained by deducting from the total liabilities of the retirement system the amount of the assets in hand to the credit of the retirement system and the present value of expected future member contributions and dividing the remainder by one percent of the present value of the prospective future compensation of all members as computed on the basis of mortality and service tables and interest assumptions adopted by the board of trustees." [8]

> 86.337 Amount Payable to Retirement System
> 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.

86.344 Certification of amounts due and payable, when, to whom--city to appropriate funds, when

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

(emphasis added)

Additionally,- § 86.350 makes clear that it is an obligation of the City to pay its share of the PRS annual contributions aimed at having enough funds on hand to satisfy the System's present and future benefit obligations. That section reads.

> The payment of the cost of providing all benefits granted under the provisions of sections 86.200 to 86.366, as determined pursuant to section 86.337, and the payment of fifty percent of all expenses described in subsection 2 of section 86.343 incurred in connection with the administration and operation of the retirement system are hereby made obligations of the cities. [9]

Finally, although neither party has specifically cited it in their briefs to the Court, the Court notes that the Act also contains a specific provision which appears to afford the City a right of administrative challenge and/or judicial review, in the event the City believes that the amount certified is incorrect---i.e., if the City wishes to dispute the amount as being either actuarially unsound and/or not in compliance with the legislative guidelines established by § 86.337. That statutory provision is § 86.227. It reads [10] . in pertinent part:

> 86.227 Jurisdiction of board--decisions subject to judicial review
> The board of trustees has exclusive original jurisdiction in all matters relating to or affecting the funds herein provided for, including, in addition to all other matters, all claims for annuities, benefits, refunds of pensions

> under this law, and its action, decision or determination in any matter is reviewable under chapter 536, RSMo, only, and any party to the proceedings has a right of appeal from the decision of the reviewing court.

Given the above overview of the basic structure and most relevant features of the PRS legislative scheme, the Court now turns to an examination of the specific summary judgment record in this case.

The Court will begin its examination of the record by first explaining why it is now reversing itself and overruling the Plaintiffs' untimely request asking that it take judicial notice of its files in a long-ago case allegedly involving some of the same issues as the instant case.

On or about December 17, 2004, long after summary judgment briefing was closed and after oral argument on the parties cross motions was completed, but with the Court's advance permission to at least file the *request,* [11] Plaintiffs filed their "Motion to Take Judicial Notice of Previous Pleadings" along with supporting memorandum, requesting that this Court take judicial notice of all of the pleadings and memoranda in a roughly 18-year old case, *Bierne, et al, v. City of St. Louis, et al.,* Cause No. 874-0424, from 1987-88. *Bierne* was a case which, like this one, also involved a legal dispute between PRS and the City over whether the City would have to pay in full the PRS-certified -amount. *Bierne* was eventually settled by Consent Decree. Plaintiffs attached voluminous pleadings, motions and memoranda from the *Bierne* case along with their motion for judicial notice.

In the supporting memorandum attached to their motion, Plaintiffs argue generally that the Court should take judicial notice of the papers in *Bierne* for two reasons: (1) to show that "the City has a viable remedy to question any amount certified" by the PRS (and that it thus is not true that the statutory scheme amounts to an improper delegation of the legislative power to tax); and (2) to show that "the City has never [before] raised almost all of the defenses in this action in the 47 years that the Police Retirement System has been in existence ... In this regard Plaintiffs argue that the previous pleading would show that "the City is aware that, if it objects to a certified budget amount, it should provide evidence of its own actuarial calculation and present it to the Circuit Court. While this was done in 1988, there was no such evaluation performed in the present case." Similarly, the Plaintiffs argue that the prior pleadings would show that the City has never in the past raised an argument that the statutes, if interpreted as PRS urges, would amount to an unconstitutional delegation of the power to tax. Plaintiffs thus argue that the City "chose to waive this argument by submitting to (the statutory) procedure over the years."

On December 27. 2004, one day before Defendants filed a still-timely "Memorandum in Opposition to Plaintiffs' Motion to Take Judicial Notice," the Court signed an entry at the bottom of Plaintiffs' motion for judicial notice granting the motion.

Upon reviewing the Memorandum in Opposition, however, and upon further reflection, the Court is very concerned that granting the motion to take judicial notice of the pleadings in *Bierne* might well invite reversal. Granting the motion not only would likely be technically improper but, in addition, might in some ways actually be unfair to the Defendants. Moreover, the Plaintiffs' arguments for such judicial notice are largely off the mark, and it is difficult for the Court to see what if any purpose would be served thereby. Plaintiffs are right that the statutes at issue very plainly do not delegate to PRS "unlimited" discretion to certify any amount of money they wish; but the Court doesn't need to rummage through the files of some 18-year old case in order to see that the statutes do not allow such unfettered discretion.

Likewise, the fact that the City may have never before raised the constitutional arguments or certain other defense claims it is now asserting in the case at bar does not have the legal significance that Plaintiffs wish to attribute to it. The City is free to raise those arguments even if it has never raised them before. History and tradition are not the same as legal precedent; the former is not binding on parties like the latter is. In the prior litigation, the issue was whether the PRS's certified amount was an actuarially sound calculation; here, in contrast, Defendants have expressly stated to the Court that the appropriateness of the actuary's calculation is not an issue in this case. (See "Defendants' Memorandum in Opposition to Plaintiffs' Motion to Take Judicial Notice," at 3.) There thus is no indication that the prior litigation could have any res *judicata* effect in the instant case, which Plaintiffs concede.

The Court is concerned as well because the request to take judicial notice of the court file in *Bierne* would amount to using judicial notice in a primarily evidentiary way [12] ---but in a way that, as Defendants' opposing memorandum points out, would directly violate Rule 74.04. A party may cite alleged facts in a summary judgment motion and its accompanying SUMF by asking the court to take judicial notice of one or more allegedly uncontroverted facts, if such facts are the type which can properly be judicially noticed. See, e.g., *Bakewell v. Missouri* State Employees Retirement System, 668 S.W.2d 224, 226 (Mo.App. W.D.1984). But a party may only do so in a manner that is timely and otherwise complies with Rule 74.04. See *Blunt v. Gillette,* 124 S.W.3d 502, 504 (Mo.App. S.D.2004). Here, the motion seeking judicial notice would not be in compliance with Rule 74.04 for a variety of reasons. Further, it would only needlessly delay resolution of this case if the Court were to now allow the judicial notice and then re-open the summary judgment record and briefing cycle in order to give Defendants a chance to properly respond thereto.

Accordingly, acting on its own motion, the Court hereby sets aside and vacates its prior order of December 27, 2004, which had granted Plaintiffs' motion to take judicial notice. Plaintiffs' motion for such judicial notice is denied.

Turning now to the summary judgment record proper, the Court finds that the summary judgment record establishes that the following facts are not in genuine dispute [13] :

1. On or about January 23, 2003, Mercer Human Resources Consulting ("Mercer"), the actuarial consultant to the PRS, indicated in an explanatory letter to PRS that the .calculated annual contribution amount due from the City to the PRS for Fiscal Year 2004 (the period of July 1, 2003 to June 30, 2004) was $9,575,892.

2. The PRS Board of Trustees held a meeting on January 31, 2003, at which time the Board reviewed the letter from Mercer and by motion formally approved the findings in Mercer's 1-23-03 letter to the Board regarding the amount owed by the City for Fiscal Year 2004.

3. On February 27, 2003, the PRS Board of Trustees, by letter, formally certified to the Board of E & A that the amount due and payable by the City for Fiscal Year 2004 was $9,575,892.

4. In each of the preceding ten or more years, PRS had certified to the City an annual contribution amount of zero dollars. Defendants have thus alleged in their Statement of Uncontroverted Material Facts (paragraph 4 thereof) that the $9.575,892 certified amount "was a dramatic increase over the zero dollar amounts certified by the PRS for the preceding ten years." Some might consider use of adjectives such as "dramatic" at least slightly argumentative. Here, however, given the rise

9. The City derived the $4,115,600 amount based on using a percentage of the active police officers' aggregate payroll for the fiscal year in question. No actuarial calculations were used by the City to arrive at that number.

10. The City allocated and paid to the PRS General Reserve Fund $4,115,600 for Fiscal Year 2004 (the period of July 1, 2003 to June 30, 2004). The PRS accepted a payment of this amount from the City on or about September 23, 2003, but made clear by the manner in which it accepted said payment that it considered the payment "only a portion" of the funds that were due and owing for the fiscal year in question.

11. The PRS has received no other contributions from the City (other than those for expenses, which are not at issue in this action) for the fiscal year in question.

12. Prior to the $4,115,600 contribution in September of 2003, the City had not been asked by the PRS to make any annual contribution to the Police Retirement System (other than for one-half of its annual expenses) since 1992.

13. Despite the discrepancy in the certified amount for Fiscal Year 2004 ($9,575.892) and the amount of the actual appropriation ($4,115,600), the City's payment of the lesser amount did not impair the PRS's ability to pay all *current* benefits due to the System's beneficiaries during the then current year.

14. As of September 30, 2003, the present market value of the PRS's assets totaled more than $630,000,000.

15. According to recent figures from the PRS 2003 Audited Financial Report and its 2003 Actuarial Valuation, PRS incurs argument in the companion *FRS* case. The Court, however, is not going' to go through and repeat the same exhaustive analysis here as it did in that case. [14] Suffice to say, rather, that the lack of such a "built-in" sanction or penalty is not controlling; it is clear in the context of the statute as a whole that "shall," as expressed in § 86.344, is used in a mandatory sense. See *Bauer v. Transitional School District v. City of St. Louis,* 111 S.W.3d 405, 408 (Mo. banc 2003); *Hunter v. Lippold,* 142 S.W.3d 241, 245 (Mo.App. W.D.2004). As for *ERS,* that case is even more distinguishable from the case at bar than it was from the companion *FRS* case, where--unlike here--the legislative scheme was based at least in part on an ordinance.

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

Defendants also offer their own proposed construction of the PRS statutory funding provisions, one that is fundamentally different from the one urged by Plaintiffs. Defendants' proffered construction centers around the language of § 86.337 RSMo. That section reads:

> 86.337 Amount Payable to Retirement System
>
> The total amount payable to the retirement system for each fiscal year shall be not less than the normal contribution rate of the total compensation earnable by all members during the year; provided, however, that the aggregate payment by the said cities shall be sufficient when combined with the assets of the retirement system to provide the pensions and other benefits payable during the then current year.

(emphasis added)

In an argument that is extremely similar to the one Defendants raised in the *FRS Companion Case* with respect to their proposed interpretation (in that case) of city code section 4.18.305 and § 87.340 RSMo, Defendants argue here that the above-highlighted language from § 86.337 should be interpreted as meaning that "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." (See 8/30/04 "Memorandum in Support of Defendants' Motion for Summary Judgment," at 7.)

Thus, the City argues:

> Accordingly, the statutory sections relied upon by PRS must be construed in harmony with section 86.337 RSMo. 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. The PRS contends that it might impair the ability of the system to pay future benefits if the City does not appropriate the certified amount. Second Amended Petition at para-graph 15. 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. Speculation about what could happen in future years is not relevant to determining what the City is to pay this year.

("Memorandum in Support of Defendants' Motion for Summary Judgment." at 8.) (emphasis in original)

Thus, it is clear that under Defendants' statutory interpretation of § 86.337, the second clause thereof is modifying language to the first clause. The first clause unequivocally states that the amount payable by the City to PRS for each fiscal year shall be *"not less than* the normal contribution rate" of the total earnable compensation of all members---i.e., not less than the amount for benefits that is to be certified by the PRS Board of Trustees under § 86.344, which in turn is actuarially computed by using the "normal contribution rate" that is statutorily defined in § 86.330 RSMo. (emphasis added) But according to Defendants, the second clause modifies the first clause (and thus also modifies the meaning of § 86.344) in a way that means in essence the following: "Although the City hopefully will be in a position to be able to contribute the entire certified amount each year, nevertheless, the City has discretion to contribute a lesser amount (including zero dollars) in any given year, and such lesser amount will be deemed minimally sufficient as a matter of law if that amount, when combined with whatever funds are on hand in the PRS, is enough to pay all of the PRS's retirement allowances and other benefits obligations that are due and payable to its beneficiaries in the current year."

In other words, the City's core position as to the proper construction of the statutes at issue in this case, just as in the *FRS Companion Case,* is that despite any seemingly contrary language in § 86.344 RSMo and elsewhere in the statute, its interpretation of the second clause of § 86.337 trumps everything else in the statute, and that accordingly the City (aside from expenses) is not required to contribute *ANY* amount to PRS---not so much as one dime---until and unless there is not enough money left in the PRS's reserves to pay the current year's obligations; and that even then, the City is only obligated to pay whatever amount is needed to make up the shortfall in payment of the current year's obligations. Or, stated even more bluntly, the City's position is that the City is not legally obligated to pay anything until and unless the funds for benefits in the PRS are depleted to zero. [15]

That this is in fact the City's position is demonstrated by numerous statements made in its briefs, such as: "The PRS governing statutory provisions do not require that the City appropriate and transfer the full amount certified by the PRS. Rather, the City is only required to transfer that amount necessary to satisfy the member benefits in the *current year,* and only then once the assets of the system are exhausted. (emphasis added) ("Memorandum in Support of Defendants' Motion for Summary Judgment," filed 8-30-04, at 15.) See also "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment," at 12, wherein the identical statement is repeated.

As in the *FRS Companion Case,* the Court does not find the City's statutory interpretation to be at all persuasive or meritorious. Although plaintiffs' arguments as to statutory construction might perhaps be slightly stronger in the *FRS* case [16], nevertheless, in both cases---and for essentially the same reasons---the proposed construction offered by the Defendants doesn't hold up.

Here, as in FRS, Defendants' proposed construction is not truly a "harmonizing" construction. It takes provisions of the Act that clearly would be in conflict with the second clause of § 86.337 (if that clause were to be interpreted as the City urges), and then, through that strained interpretation, proposes--without any language in the statute to expressly evidence such a supposed legislative intent--that that single discordant clause somehow trumps and supersedes all of the other conflicting language in the statute, whose plain import is that the City must and will annually pay the "normal contribution rate" as determined by the actuary and duly certified by PRS. The City's interpretation simply is not convincing.

Rather, a straightforward and sensible interpretation of the related funding provisions of Chapter 86--and in particular §§ 86.330, 86.337 and 86.344--is that these statutes, when read in *pari materia,* mandate and require that the City appropriate the "normal contribution rate" that was actuarially determined and certified by the PRS for benefits, along with one-half of the PRS's expenses pursuant to § 86.343.2.

The City's argument that § 87.337 allows it to contribute less than the "normal contribution rate" when the assets of the Police Retirement System are sufficient to pay the pension and other benefits that are payable during the current year is, the Court believes, for any number of reasons, a highly strained and implausible argument.

Not least among those reasons, in the Court's view, is its agreement with Plaintiffs that the City's interpretation of the statutes, if carried to its logical conclusion in practice, would eventually leave the Retirement System either insolvent or near-insolvent, and then in effect convert the System to a "pay as you go" system once such depletion of assets had occurred---a result which seems completely contrary to the underlying legislative intent of a system whose whole scheme and structure is actuarial-based and premised upon regular contributions by both employer (the City) and employees.

This would, by the same token, lead to a System that was not able to guarantee payments to current members, some of whom may still be many years away from retirement but who are *themselves* now making mandatory contributions towards the benefit of present and future members. Under the City's interpretation of § 86.337, by which the City would never have to contribute anything for benefits as long as the Police Retirement System's assets were adequate to cover current year obligations, the City would eventually be in the position of having to make yearly contributions equal to all of the benefits due in any given year, because the PRS's assets would be depleted.

When this case was orally argued before the Court, it was stated, and the City did not disagree, that in the past several years the Police Retirement System has averaged about $36 million per year in annual benefit payments. Thus, under the City's interpretation of what the statute requires, the City would not be obliged to make a payment until the PRS assets that are now set aside for current and future retired, disabled and widowed beneficiaries are fully depleted, but then from that date forward the City would be required to make a yearly payment with a present value of at least $36 million---an amount almost four times greater than the $9 million "normal contribution rate" payment that the City now says it is unable to pay. Is this consistent with what the Legislature intended and had in mind, when they enacted the provisions of Chapter 86? The Court thinks not.

Instead, the Court agrees with Plaintiffs that the plain and readily apparent underlying purpose of the statute's "normal contribution rate," and of the whole actuarial valuation and calculation process, are to achieve and maintain a pension fund that is actuarially sound. Thus, similar to what it found in the *FRS Companion Case Order* [17], the Court finds here that it is both implicit and inherent, in the related funding provisions of Chapter 86 RSMo, that the police pension systems created thereunder were intended to operate on the basis of actuarial soundness. [18] Defendants' proposed construction of the statute is unpersuasive, in no small part, because it flies in the face of this underlying principle of actuarial soundness.

Defendants, in responding to Plaintiffs' contention that the City seeks to abandon the statute's underlying goal of actuarial soundness, in turn accuses the Plaintiffs of what the City calls a "fiscally irresponsible" statutory interpretation. [19] This is a line of argument that is heavily policy-based. In order to give it its fairest and most objective possible characterization, the Court below quotes at some length from the City's argument on this point in its reply memorandum:

> The PRS repeatedly asserts that the City's interpretation would lead to the PRS's 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 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.

(emphasis added)

> Rather, it is the PRS's interpretation that leads to an absurd and unreasonable result. According to the PRS, it exercises unlimited authority over the City 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 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's interpretation if the City is forced to eliminate jobs and important services to satisfy the massive increases in the PRS certified amounts every year. If the police were to be downsized, FRS's (sic) membership would be lowered, defeating the very purpose of the PRS to provide benefits to its members.

("Reply Memorandum in Support of Defendants" Motion for Summary Judgment,: at 5-6).

Elsewhere in its Reply Memorandum (page 1 to be exact), in the very opening paragraph thereof, and much to the same effect, the City tells the Court:

> In its response, the PRS repeatedly misrepresents or misconstrues the City's position and exaggerates the impact on the PRS members. Contrary to the PRS's interpretation, the City has never argued that it is unable to pay; nor has the City argued that the PRS's assets must be depleted before it makes a contribution to the fund. Rather, the City is simply exercising its statutory discretion, which is necessary for responsible fiscal planning. If the City is required to pay the certified amount without the ability to balance the need for other programs and services, ultimately the citizens of St. Louis and members of the PRS suffer through increased expenses, loss of jobs, and decreased community services. Under the PRS's interpretation, the City is left riding on a never-ending roller coaster, forced to guess whether the certified amount will be $10.00 in one year and $10,000,000 the next. [20]

(emphasis added)

The Court would simply note two things about the above-quoted argument of the City. First, Defendants cannot have it both ways. Plaintiffs have not claimed to the Court that the City urges that PRS's assets should" be depleted before the City will ever pay anything (indeed, Plaintiffs freely acknowledge that the City has paid them over $4.1 million for the fiscal year in question). Rather, Plaintiffs simply have made an argument about what the System would be like if the City's position were fully carried out in practice to its logical end conclusion. [21] In that sense, the Court does not believe the Plaintiffs' argument has "misrepresented' or "exaggerated" the true state of affairs at all. The plain truth is that Defendants *have* argued to this Court that the PRS assets *must* be depleted to zero before the City can be legally *REQUIRED* to make any contribution to PRS, at all, for benefits.

Second, such an argument--whether meritorious or not--is entirely appropriate, because this case ultimately is not about what "should" be done, but rather is about what is (or isn't) required to be done under the terms of the statute. Thus, the Court's second difficulty with the above-quoted argument by the City, is that it is *so* heavily policy-based. It amounts, in sum and substance, to an argument that this Court should reject the Plaintiffs' interpretation of the statute and adopt the City's position instead simply because Plaintiffs' interpretation would (the City claims) amount to bad public policy.

But this Court is not a legislative body. It is not the job of the Court to weigh public policy. The Court has to interpret the law as it is written, not as the City or someone else might like it to read if they could word it differently. As written, it appears to the Court that the statute plainly says the City must appropriate and transfer the PRS-certified amount, and indeed that the very legislative purpose and intent of § 86.344 is to limit the City's authority to impose its own will over the certification process. [22]

The Plaintiffs offer a far more plausible interpretation of the statutory language that Defendants rely on, in the second clause of § 86.337. Plaintiffs' interpretation, which the Court finds to be the correct interpretation, is that the City must always make a contribution for benefits that is at least as large as the "normal contribution rate." If, however, in circumstances where the normal contribution when combined with the Police Retirement System's total assets are not sufficient to cover the pension, disability and other benefits that are payable during the current year (such might be the case in the early historical beginnings of the PRS pension plan, for example), then the City is obligated to make an additional contribution sufficient in amount to allow the Police Retirement System to pay all of the benefits owing to its beneficiaries in the current year. When the related provisions of the Act are considered in *pari materia* as they must be, (see *Geary v. Missouri State* Employees Retirement System, 878 S.W.2d 918, 922 (Mo.App. W.D.1994)), that is the most plausible construction.

Finally as to construing the legislative meaning, Defendants also make a fleeting argument that their position is supported by another part of the statute, § 86.292 RSMo. That section provides that if the PRS Board of Trustees is unable to pay member benefits within five years after the benefits are owed, the member's accumulated contributions remain assets of the Retirement System, subject to payment at a later date if "proper application" for the benefits is eventually made. In its entirety, the section reads as follows:

> If the board of trustees is unable to refund the accumulated contributions of a member or to commence payment of benefits within five years after such refund or benefits are otherwise first due and payable, the accumulated contributions shall remain assets of the retirement system. If proper application is thereafter made for refund or benefits, the board shall make payment, but no credit shall be allowed for any interest after the date the refund or benefits were first due and payable.

Defendants argue that this statutory section "suggests that the legislature contemplated a situation in which the City would not be in a position of funding [the full PRS-certified annual contribution amount) in a given year. [23]

This Court disagrees. Rather, it finds Plaintiffs' view of this particular part of the statute to be more persuasive. As Plaintiffs urge, a fair reading of § 86.292 strongly suggests it has no connection at all with the City's annual contribution; rather, when it is read in- conjunction with its immediately preceding section (§ 86.290 RSMo) and the other parts of the PRS statute, it is intended to provide for a situation where the Police Retirement System is required to refund a member's contribution or make a distribution but is temporarily unable to do so because the member and/or his estate cannot be located. The section thus has no connection to the issues in controversy in this lawsuit.

For all of the foregoing reasons, the Court concludes that when properly construed, the relevant and governing provisions of Chapter 86. RSMo. require the City Defendants to appropriate and pay the PRS-certified amount as set forth in § 86.344. subject to their right to timely challenge the propriety of the certified amount pursuant to the remedies available under § 86.227.

II. THE CITY'S CLAIMS OF CONSTITUTIONAL INVALIDITY

A. Improper Delegation of Legislative Authority

Turning now to the City's various asserted defense claims that the PRS statutory scheme would be unconstitutional if the City is mandated to appropriate and pay the certified amount, the Court first examines Defendants' claim that such a requirement would be an unconstitutional delegation of the City's legislative appropriations authority.

The Court finds this claim lacks legal merit. See *FRS* Companion Case Order, at pages 73-82. which is incorporated herein by reference. Virtually the exact same reasons that make the argument unmeritorious in *FRS,* apply to make it just as specious here as well. It simply is not true that the PRS Board of Trustees and their actuary have "unlimited" or "unfetterd" discretion to seek whatever amount of money they might want from the City. Indeed, the legislative standards defining the "normal contribution rate" (i.e. the amount that PRS may properly certify as due from the City for benefits in any given year) is, if anything, even *more* clearly and precisely delineated in the PRS scheme than the comparable provisions in the FRS scheme; see § 87.330 RSMo.

Nor, as the Court explained in the *FRS Companion Case Order,* is it true that these discretion-limiting legislative standards are somehow not real or meaningful merely because they are not "tied to the City budget," or because PRS rather than the City is the one charged with implementing them. It likewise is a canard to argue that these discretion-limiting standards are somehow false or illusory merely because they are based on actuarial computation; see *Mosers v. Jackson County,* 738 S.W.2d at 120. The fact that these standards are real and are built into the statute and must be followed by PRS, coupled with the fact that Defendants have a readily available remedy if they wish to challenge the actuarial soundness or appropriateness of the amount certified, belies any contention that the PRS scheme is an unconstitutional delegation of legislative authority. These features of the statute make the situation in the case at bar clearly distinguishable from the situation in *State ex rel. Field* v. Smith, 329 Mo. 1019, 49 S.W.2d 74 (Mo. banc 1932), and accordingly the Court finds no such constitutional invalidity. [24]

B. Article VI, § 26(a) of the Missouri Constitution

Defendants next argue that if the statutes require the City to pay the certified amount, this would be a violation of Article VI, § 26(a) of the Missouri Constitution, which generally prohibits a city from becoming indebted beyond its income. In support of this argument they cite to the trial court's decision in the *ERS* case, *supra,* (summarily affirmed per Rule 84.16(b) by the Court of Appeals at 49 S.W.3d 887 (Mo. App. E.D. 2001)), and also allude to *Tomlinson v. Kansas City,* 391 S.W.2d 850 (Ho. 1965).

Although as will be discussed later herein *Tomlinson* does help Defendants with respect to Plaintiffs' impairment-of-contract claim, it is largely inapposite (and thus does not help Defendants) with respect to Plaintiffs' claims for relief for statutory violations under Count I. See the discussion contained in *FRS Companion Case Order,* at 82-88, which is generally applicable to the instant case as well. Additionally, in the instant case the PRS scheme is based solely on state statute, whereas in Tomlinson---apparently; it is not quite 100% clear but the reported decision appears to so indicate---the pension plan there was based solely on a city ordinance, which Kansas City was free to amend or repeal at any time. Here, of course, the City of St. Louis cannot amend or repeal the governing statutory provisions. The facts of the instant case are thus much more closely akin to *State ex rel. Twenty-Second Judicial Circuit v. Jones,* 823 S.W.2d 471 (Mo. banc 1992), where the circuit court certified its budget to the City and held that under the relevant statutes the City was required to pay the certified amount. [25] Nothing in *Jones* even remotely suggests that such a requirement would violate Article VI. § 26(a).

With respect to *ERS, supra,* that case is distinguishable from the case at bar. *ERS* involved a retirement system that was created purely by ordinance. As Judge Dierker's insightful and well-reasoned opinion in that case expressly recognized, avoiding an obligation created by the City for itself is a fundamentally different legal proposition than avoiding an obligation created by the command of a state statute. As noted in the *FRS Companion* Case Order, the *ERS* ruling is distinguishable from the case at hand for other reasons as well. Additionally, the memorandum opinion issued by the Court of Appeals in *ERS* was strictly for the use of the parties in that case only and, both by its own express terms as well as the express mandatory language of Rule 84.16(b), is without precedential effect and may not be cited or used in any other case before any court. For all of these reasons, *ERS* is not viable authority for Defendants' argument as to Article VI. § 26(a).

Article VI, § 26(a) states:

> 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 given year the income and revenue provided for such year plus any unencumbered balances from the previous years, except as otherwise provided in this constitution.

In essence § 26(a) is a type of spending and borrowing limit imposed on local governments. See *Mercantile Bank of Illinois v. School District of Osceola,* 834 S.W.2d 737, 739-41 (Mo. banc 1992). It says to local governments that (1) they may not borrow to increase what they have to spend in a year beyond their total revenue for that year plus any unencumbered assets they have left over from previous years, and (2) that they cannot spend more than they have. *Id.* at 741. Seen in this light, this constitutional provision is simply a requirement that whatever budgeting and spending choices are made may not entail impermissible borrowing or spending in excess of income.

Accordingly, the Court cannot agree with the City's apparent contention that compliance with § 86.344 RSMo---i.e., requiring the City to pay the PRS-certified amount---would necessarily require it to violate Article VI, § 26(a). As the Plaintiffs correctly point out, the City's argument seems to implicitly assume that the Police Retirement System is attempting. to force the City to borrow money, or that compliance with the statute by paying the normal contribution rate would somehow force the City to do so; yet that plainly is not true. Nothing in the statutes requires the City to borrow money for this contribution. Indeed, the statute is worded in a way so that the contribution does not become due and payable until the "next following year" (emphasis added), so that the System has to give the City a great deal of advance notice of the pending obligation in order that the City may plan its budget.

Further, the City has repeatedly stated, both in the oral argument before this Court as well as in its written briefs, that it is not contending that it cannot afford to pay the certified amounts [26]; rather, it is contending that it cannot pay those amounts and still be able to make the budget and spending priority choices that it wants to make and believes it is legally entitled to make as a constitutional charter city.

Thus, the record simply does not support any suggestion that the City cannot prepare and enact a balanced budget without disobeying the mandatory funding provisions of the PRS statute, or conversely that the City cannot obey those mandatory funding provisions without violating the Article VI, § 26(a) ban against excess indebtedness.

In its reply memorandum, the City, in response to some of these same points as raised by the Plaintiffs in their 9-30-04 memorandum, then argues that the PRS "misses the point" of the City's Article VI, § 26(a) argument. The real point of their argument concerning that constitutional provision, the City says, is that requiring the City to appropriate the certified contributions to the PRS would violate Article VI, § 26(a) "because the revenue for 2003-2004 has already been appropriated and transferred to various recipients." (Defendants' Reply Memorandum, at 13.) Thus, they say: "If this Court requires the City to pay the certified amount for fiscal year 2003-2004, the City would then be obligated in excess of its revenues in violation of section 26(a)." (*Id.* at 13-14).

The Court disagrees. This amounts to an argument that if the City previously had acted in accordance with its funding obligations under the PRS statute the City could have complied with the statute during the relevant fiscal time period without violating Article VI, § 26(a), but that it cannot do so now because the clock has run out. Defendants may not evade their express legal duties simply by running out the clock. If the City's interpretation of section 26(a) were correct, then the City could avoid virtually all monetary obligations that it preferred not to pay (whether the obligations were pursuant to contract, tort judgment not barred by sovereign immunity, or--as here--the requirement of a statutory command), no matter how legally binding and

mandatory those obligations otherwise might be, simply by the evasive expedient of deliberately choosing not to budget for them, whether in the year for which the obligation first arose or later years. The Court does not believe Article VI, § 26(a) was intended to allow, or does allow, such evasion. Here, the City was aware of its statutory obligation to the Police Retirement System and simply chose to ignore it. Article VI, § 26(a) does not shield the City from liability for such a violation.

C. The Hancock Amendment

As in the FRS Companion Case, so here too, Defendants also contend that if the statutory funding provisions (in this case §§ 86.330, 86.337 and 86.344) require the City to pay the certified amounts, then to that extent the statutes are unconstitutional as a violation of that part of Missouri's Constitution popularly known as "the Hancock Amendment." Specifically, the City argues, it would be a violation of one particular provision thereof, Article X, § 21. That constitutional provision states:

> 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 political subdivisions, unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs.

The above constitutional provision generally prohibits the State from requiring local governments to begin a new mandated activity or service, or to increase the level of a previously mandated activity or service beyond its pre-Hancock level, without appropriating sufficient funds to pay for the new or increased government activity. Thus, the City contends, the relief that Plaintiffs seek would amount to an unconstitutional unfunded mandate in direct violation of this part of the Hancock Amendment, to the extent that the certified amount for the fiscal year in question was greater than the amount that. the City contributed to the PRS during the 1980-81 time period when the Hancock Amendment took effect. In support of this argument the City relies upon *Boone County v. State,* 631 S.W.2d 321 (Mo. banc 1982), and *State ex rel. Sayad v. Zych,* 642 S.W.2d 907 (Mo. banc 1982). [27]

Plaintiffs counter by arguing that the City lacks standing to raise the Hancock issue; that PRS is not a "state agency" for purposes of Article X, § 21; and that in any event the PRS's level of activity has not "increased" within the meaning of Article X, § 21 since the time Hancock was enacted.

Both sides raise serious arguments as to the merits of the Hancock issue. However, the Court is deeply skeptical of Defendants' contention that a mere increase in raw dollar figure costs, as in this case, always and necessarily amounts to an increase in the "level of activity" required by pre-Hancock law, within the meaning of the constitutional prohibition contained in Article X, § 21. See Edward D. ("Chip") Robertson, Jr. and Duncan E. Kincheloe III, *Missouri's Tax Limitation Amendment: Ad Astra Per Aspera,* UMKC L. Rev. 1, 14-17 (Fall 1983). Nevertheless, the Court need not address the merits of the Hancock issue, because the Court has determined that it lacks jurisdiction to do so.

The Court has no jurisdiction to determine the Hancock issue because the Defendants lack standing to raise it, even as an affirmative defense. The City is not a "taxpayer;" and the Defendant officials are parties to this action solely in their official capacities. See *Fort Zumwalt School District v. State,* 896 S.W.2d 918. 921 (Mo. banc 1995); and *State ex rel. Board of* Health Care Center Trustees of Clay County v. County Commission of Clay County. 896 S.W.2d 627, 631 (Mo. banc 1991). See also generally the analysis of the Hancock standing" issue contained in the *FRS Companion Case Order,* at pages 108-116 thereof, which applies with equal force in the case at bar.

In its very brief comments addressing the Hancock standing issue, the City argues, inter alia, that the PRS "fails to acknowledge that the grant of standing to taxpayers in section 23 does not prevent a municipality from asserting violations of the Hancock Amendment. See, e.g., *City of Jefferson v. Missouri* Dep*t. of Natural Resources,* 916 S.W.2d 794 (Mo. banc 1996)."[28] But what Defendants fail to realize is that while that seemingly sensible view was at one time the law in Missouri, it no longer is the law after the Supreme Court's turnabout in *Fort Zumwalt.* Clearly, there was a time when Missouri appellate courts and the Missouri Supreme Court took exactly the view that Defendants espouse, regarding section 23 as not being a limit on the right of municipalities to assert violations of Hancock. Prior to *Fort* Zumwalt, Missouri courts, including the Supreme Court, had expressly assumed and stated that political subdivisions did have standing to seek enforcement of Hancock. See *Buchannan v. Kirkpatrick,* 615 S.W.2d 6, 13 (Mo. banc 1981); *State ex rel. City* of St. Louis v. Litz, 653 S.W.2d 703, 706-707 (Mo.App. E.D.1983). That all changed, 'however, with the Supreme Court's 1995 decision in *Fort Zumwalt,* 896 S.W.2d at 921.

Thus, *City of Jefferson, supra,* does not stand for the proposition that Defendants cite it for, because it was first decided before the Supreme Court's ruling in *Fort Zumwalt,* which fundamentally changed the law on this question. [29]

Accordingly. Defendants do not have standing to raise their attempted defense that enforcement of the statutory provisions to require the City to pay the certified amount would violate the Hancock Amendment. *Fort Zumwalt,* 896 S.W.2d at 921; *Clay County,* 896 S.W.2d 631. The Court therefore does not have jurisdiction to decide the merits of the Hancock issue which Defendants have sought to raise as an affirmative defense in this cause. *Western* Casualty & Surety Co. v. Kansas City Bank & Trust, 743 S.W.2d 578. 580 (Mo. App. 1988).

III. OTHER PLEADED DEFENSES TO COUNT I

Defendants have pleaded seven other affirmative defenses in their Answer to Plaintiffs' Second Amended Petition. For whatever reason, Defendants have chosen not to mention these (or at most only gloss over them) in their written and oral arguments regarding the parties' motions for summary judgment. Plaintiffs are nonetheless not entitled to full summary judgment unless the record shows the "non-viability" of each properly-pleaded affirmative defense; but a claimant may establish .such non-viability merely by showing the absence of "any one" fact necessary to support the affirmative defense. *ITT Commercial* Finance Corp. v. Mid-America Marine Supply *Corp.,* 854 S.W.2d 371. 381 (Mo. banc 1993); see also *Leiser v. City of Wildwood,* 59 S.W.3d 597. 605 (Mo. App. E.D. 2001). The Court finds that five of these seven affirmative defenses lack legal merit.

In paragraph 28 of their Answer to Plaintiffs' Second Amended Petition, Defendants assert that pursuant to the City Charter and our state Constitution, the City's Board of E & A and Board of Aldermen have "exclusive" power to determine the City's budget and appropriate funds, and that "any provision of law purporting to impair, limit or abridge that legislative power is illegal, void and unconstitutional." The Court finds this defense to be without legal merit. See *State ex rel. Twenty-Second* Judicial Circuit v. Jones, 823 S.W.2d 471, 476-478 (Mo. banc 1992).

In paragraph 29 of the Answer, Defendants assert that "Plaintiffs' petition fails to state a claim as to which relief may be granted against [Defendants] as a matter of law." The Court finds this claim to be of no force; it is too vague to plead any cognizable "affirmative defense" and as such the Plaintiffs do not have the burden to respond to it. See *Leiser* v. City of Wildwood, 59 S.W.3d at 606.

In paragraph 30 of their Answer, Defendants assert that the issues pleaded by Plaintiffs are "moot," and that no justiciable case or controversy exists, "because the budget of the City of St. Louis has already been adopted and is now final and all available city revenue and funds have been fully allocated and appropriated." The Court rejects this defense as without merit. The Defendants may not evade their express legal duties simply by (so to speak) "running out the clock." See *State ex rel. Twenty-Second* Judicial Circuit v. Jones, supra.

In paragraph 31 of the Answer, Defendants allege that this Court "lacks jurisdiction" to "exercise the legislative function" of the City's Board of E & A and Board of Aldermen "by compelling the appropriation of funds in a manner contrary to the legislative discretion vested in those bodies," and that "any such exercise of jurisdiction would be a violation of the separation of powers and therefore would violate the constitution of Missouri and the constitution of the United States." The Court rejects this argument. Courts do have a duty not to impermissibly encroach on the rights and functions of the two other branches of government. *State v. Banks,* 454 S.W.2d 498, 500 (Mo. banc 1970). At the same time, however, one of the proper responsibilities of the judiciary is to assure that actions of the executive and legislative branches do not deprive parties of rights conferred by statute or the constitution. If Defendants have violated their mandatory legal obligations by failing to follow the commands of a valid state statute regarding the manner case; and that indeed, that is one reason why the parties agreed that this case could and should be resolved by means of cross motions for summary judgment. [31]

Certainly, the Defendants have not only not attempted in any way to raise such a "incorrect amount" defense in their written papers in these summary judgment proceedings, but they in fact have told the Court exactly the opposite. See, e.g., the 10-18-04 "Reply Memorandum in Support of Defendants' Motion for Summary Judgment," at 3: "Contrary to the PRS's assertion, the City is not arguing that the PRS miscalculated the normal contribution rate." [32] (emphasis added) Thus, it came as somewhat of a surprise to the Court to find just such a argument pleaded as a defense, in paragraph 32 of the City Defendants' Answer to the Second Amended Petition.

Given the foregoing, the Court can only assume that it is merely due to an inadvertent oversight, in not striking that part of paragraph 32 by interlineation, that it remains in the Answer. Defendants have not in any way sought to raise such a defense in the summary judgment motions, and as discussed in the foregoing and in footnote 31, below, have in fact represented to the Court that such a defense is not being raised. Accordingly, the Court finds that this part of the affirmative defense pleaded in paragraph 32 of Defendants' answer to Plaintiffs' second amended petition has effectively been waived and/or abandoned by the Defendants.

IV. PLAINTIFFS' IMPAIRMENT-OF-CONTRACT CLAIM

In Count II of their petition, the five individual plaintiffs assert a claim that the City's decision (as formalized by its budget ordinance) to appropriate substantially less than the certified amount impairs the obligation of their employment contracts, by reducing the amount of funds necessary to fund their share of the PRS assets set aside for their vested benefits. The Court will examine this claim closely because, although the Court does not believe it ultimately is consistent with Missouri law, both sides present substantial arguments on the question and it is possible that Missouri's higher courts may want to re-examine this area of the law.

Specifically, Plaintiffs argue, the City's action in failing to appropriate the certified amount violates Article I, § 13 of the Missouri Constitution, which provides: "That no ex post facto law, nor law impairing the obligation of contracts ... can be enacted."

Plaintiffs contend that § 86.207.1 RSMo requires all City police officers to be members of the PRS, and that pursuant to that section all new police officers signed an enrollment form with the PRS when they joined the St. Louis Metropolitan Police Department which entitles them to benefits when vested. They further contend that § 86.320 RSMo provides that, as consideration for the retirement benefits, 7% of each police officer's paycheck must be deducted from the officer's salary, unless they retire or go into the deferred compensation (DROP) program under § 86.251, at which time a DROP member's benefits are actually paid into an account in his or her name. (All of the five individual plaintiffs are either in DROP or receiving retirement benefits as a retiree.) Plaintiffs further allege that the $9,575,892 certified by the PRS as due and payable from the City for the fiscal year in question includes a benefit amount "that the System's actuary has certified is necessary for each and every member of the Retirement System from the most recent, new officer through the oldest, past retiring officer, including the Individual Plaintiffs." Thus, Plaintiffs say in their Petition, the City's action in appropriating only $4,115,600 for that year:

> ... impairs the obligation of the Individual Plaintiffs' contracts by reducing the amount of funds required by state law necessary to fully fund their share of the Retirement System's assets set aside for their vested benefits to which they are currently entitled or receiving. Each of the Individual Plaintiffs have had their seven percent deductions taken from their compensation over their respective terms of employment, yet they will not receive the commensurate benefit by reason of (the City's action].

(Second Amended Petition, at paragraph 25).

Thus, in Count II the five Individual Plaintiffs seek a declaratory judgment saying that for those reasons the City's budget ordinance appropriating substantially less than the PRS-certified amount is "unconstitutional and in violation of Article I. § 13 of the Missouri Constitution as impairing the obligation" of their contracts. In short, Plaintiffs allege, the relevant statutes create an implied in fact contract between the City and the PRS members, because the members give their loyal service and are required to contribute 7% of their paychecks, with the promise that in return the City will contribute its statutorily defined amount; and vested members therefore "have a contract that should ensure that the fund will remain actuarially sound." [33]

In support of their argument, Plaintiffs cite to the case of *People ex rel. Sklodowski v. State,* 284 Ill.App. 809, 674 N.E.2d 81 (Ill. App. 1st Dist. 1996), a case whose ruling and reasoning does, indeed, tend to go along with their view.

Sklodowski, however, if one wished to point to a case from another jurisdiction as allegedly persuasive authority in support of this view, is probably not the best case in the world to cite for that purpose, since it was completely overruled by the Illinois Supreme Court. (See *People ex rel. Sklodowski v. State of Illinois,* 182 Ill.2d 220, 230 Ill.Dec. 884, 695 N.E.2d 374 (Ill. 1998). More important than the actual reversal itself, however, is the fact that the Illinois Supreme Court's opinion in that case seemed (at least somewhat) more persuasive than the appellate court's. It illustrates some of the problems with Plaintiffs' argument, even in states where the contractual nature of a public employee's pension rights is more clear than in Missouri.

In *Sklodowski,* the Court noted the Illinois Constitution itself contained a clause which expressly creates an enforceable "contractual" relationship, giving some contractual protection to public employees' right to pension benefits. *Sklodowski,* 230 Ill.Dec. 884, 695 N.E.2d at 378. Nevertheless the Court held, the constitutional provision, when coupled with the relevant statutes, created a contractual relationship that protected only the vested right to receive promised benefits, not a right to enforce a particular level or manner of funding the pension system. *Id.,* at 378-379. Further, the Court stated, the normal presumption is that absent an express legislative declaration, "laws do not create private contractual or vested rights but merely declare a policy to be pursued until the legislature ordains otherwise." *Id.,* at 379. See also *Retired Public Employees' Council of Washington v. Charles,* 148 Wash.2d 602, 62 P.3d 470, 482-484 (Wash. 2003) (holding that pension rights are contractual in nature to significant degree, but that a reduced level of funding for the pension plan nonetheless does nor necessarily rise to the level of being an "impairment of contract").

At the same time, however, there are some cases from other states that could be seen as supporting Plaintiffs' view. See, e.g., the Arizona Supreme Court's decision in *Yeazell v. Copins.* 98 Ariz. 109, 402 P.2d 541 (Ariz. 1965); see also *Bd. of Administration v. Wilson,* 52 Cal.App.4th 1109, 1131-1137, 61 Cal.Rptr.2d 207 (1997) (holding that state employees under PERS had a contractual right to an actuarially sound retirement system, and that such rights were actually impaired by Legislature's change to in arrears contributions); and *Claypool v. Wilson,* 6 Cal. Rptr. 77, 85 (Cal. App. 3d Dist. 1992).

Still further, it is clear that "the modern trend" is for states to reject the old concept of public pensions as merely a gratuity; that only a very" few states still fully adhere to the gratuity concept; that many states "have fully rejected" the gratuity theory as outdated; and that most of those states now embrace "some form of contract theory to enforce the rights of public employees to

their pensions," although there is a wide variety of underlying rationales and approaches for the contractual view. Andrew C. Mackenzie, *Determining the Nature of* Public Employees' *Rights to Their Pensisons,* 46 Maine L. Rev. 355.359-360 (1994). [34]

See also generally, 52 A.L.R.2d 437 (1957 and 2004 update); as well as 5-78 *Antieau on Local Government Law,* Second Edition § 78.01 (3) and (4) (discussing public pensions; noting the older view that pensions were only gratuities has now "generally been repudiated,. and that "modern decisions" instead hold that public pension plans are in effect "provisions for deferred compensation and are contractual in nature.")

Notably, however, Plaintiffs cite virtually no Missouri case law to support their impairment-of-contract argument. That is not surprising, because present case law in Missouri appears to be directly contrary to their position. As Defendants point out, Missouri courts still, at least to a very significant degree, cleave to the old view that (as a general rule) 'a pension granted by public authorities is not a contractual obligation but is a gratuitous allowance, in the continuation of which the pensioner has no vested right.... *State ex rel. Phillip v. Public School Retirement System of City of St. Louis,* 364 Mo. 395, 262 S.W.2d 569, 576 (Mo. banc 1953); *Fraternal Order of Police Lodge #2 v. City of St. Joseph,* 8 S.W.3d 257, 264 (Mo.App. W.D.1999). As Defendants also point out, it is at least a somewhat remote, indirect and strained argument for Individual Plaintiffs to maintain that their contracts are being "impaired" when, in fact, their retirement benefits are being paid.

Still further, and although as noted previously the Court does not believe the *Tomlinson* case (391 S.W.2d 850) is on point or controlling with respect to the PRS's statutory violation claim under Count I, the Court believes Defendants are correct in arguing that it is on point--and thus controlling-- with respect to the plaintiffs' Count II impairment-of-contract claim.

In *Tomlinson,* as in the case at bar with respect to Count II. certain individual pensions system beneficiaries sued the city to recover amounts allegedly owed to the pension fund under the System's legislative provisions establishing the level of funding contributions to be made by the city to the System. Id. at 851-852. The Supreme Court recognized that under certain circumstances and for certain purposes, a member of a pension system may attain a vested and contractual status. [35] Nevertheless the *Tomlinson* court noted that this particular retirement system had no specific legislative provision saying that no subsequent legislative provisions could in any way diminish or impair the interest originally created; the Court also emphasized that the beneficiaries of the system were receiving their pensions under the ordinance. The court thus held that although the contribution provision was mandatory in its language, the . ordinance nonetheless did not create a *contractual* obligation on the part of the city, such as would give rise to a cause of action by individual members against the city for failure to make funding contributions to the System in accordance with the terms of the governing ordinance. *Id.* at 853-854. As in *Tomlinson,* so here too, there is no contention that the vested individual plaintiffs are not receiving their benefits. *Tomlinson* appears to the Court to be directly on point [36] , and stands for the proposition that the Individual Plaintiffs do not have "such a vested interest in the manner of the City's financing the system as will support the action." *Id.* at 854.

Thus, while it is possible that at some point in the future the Missouri Supreme Court might like to re-visit the question of to what extent members of a public pension system may have a contractual interest in the proper funding of their pension systems, it is clear that, as a matter of presently existing Missouri law, Plaintiffs cannot prevail on such an impairment-of-contract claim. Therefore, Defendants are entitled to summary judgment on that claim.

V. SCOPE OF RELIEF TO WHICH PLAINTIFFS ARE ENTITLED

From what has been said thus far, it follows that Plaintiffs, although not entitled to any relief under their Count II impairment-of-contract claim, are entitled to summary judgment on Count I. As to that count, Plaintiffs have demonstrated the factual and legal soundness of their claims for relief, and have also demonstrated the "non-viability, of the affirmative defenses which Defendants have sought to raise. With respect to Count I, therefore, the record shows that Plaintiffs have established a right to judgment as a matter of law based on facts as to which there is no genuine dispute.

There remains a question of the scope of relief to which Plaintiffs are entitled. Although Plaintiffs have established a right to judgment as a matter of law, this does not necessarily mean Plaintiffs are entitled to everything they have requested in the way of relief. As to Count I, Plaintiffs have requested general declaratory relief, a money judgment for the amount owed (plus pre judgment interest) for the fiscal year in question, and also "an injunction prohibiting Defendants from utilizing a funding methodology for Plaintiffs' annual certification based on anything other than the actuarial principles required by §§ 86.200 to 86.366, rather than the City's budget constraints."

The Court believes that Plaintiffs have met the criteria for showing entitlement to general declaratory relief regarding the mandatory nature of the requirement imposed on the City by § 86.344 RSMo and the other pertinent provisions of Chapter 86 RSMo, and the City's legal obligation to comply therewith in its funding of the Police Retirement System. See Rule 87.02; *Grewell* v. State Farm Mut. Auto. Ins. Co.. Inc., 102 S.W.3d 33, 36 n. 8-10 (Mo. banc 2003). This is so despite the fact that Plaintiffs are also entitled to a money judgment, since money alone would not be an adequate remedy in the present situation. Given the special facts and circumstances of this case, where the respective rights and duties of the parties in their relationship with each other under the statute plainly need to be established, it is clear that 'proper relief involves more than just the money damages sought.' See *Polk County Bank v. Spitz,* 690 S.W.2d 192, 194 (Mo. App. E.D. 1985). By the same token, though, it is clear that in addition to declaratory relief Plaintiffs are entitled to a money judgment as well, for the amount of money that the City still owes. See *Satterfield v. Layton,* 669 S.M.2d 287, 289 (Mo. App. E.D. 1984).

With respect to the request for injunctive relief, however, and without specifically addressing whether Plaintiffs have met the required showing of irreparable injury, the Court is not persuaded that injunctive relief is necessary. The Court has broad discretion in administration of the Declaratory Judgment Act. *Preferred Physicians Mutual Management Group v. Preferred* Physicians Mutual Risk Retention Group, 916 S.W.2d 821. 824 (Mo. App. W.D. 1995). Hopefully, whatever the higher courts of Missouri eventually decide regarding the trial court's ruling in this case (affirm, reverse or somewhere in between), that decision will provide the parties with a general precedent that will help clarify their rights and duties under the law and thus guide their future conduct. But in the meantime, the Court is not going to presume in advance that the City will fail to comply with the declaratory and other relief which the Court grants in this cause.

That is to say, once the Court has declared what. the legal rights and duties of the parties are in this controversy, and has also held that the City is legally obligated to pay PRS the remaining balance of the certified amount still due and owing for Fiscal Year 2004, the Court is not going to then presume that the City will refuse to comply, in a reasonable and timely manner, with such declaratory and monetary relief. There is no good reason to indulge such a presumption. On the contrary, although of course the Court understands that like every other litigant the City has a right to appeal (and very likely will appeal the Court's ruling in this matter), the Court nonetheless presumes that the City will abide by what the courts have adjudged and declared its legal obligations to be. If, on the other hand, a future course of events would show that the City has not complied with the declaratory relief granted in this cause in a proper manner, then the law is well-established that Plaintiffs may rely on the declaratory judgment and use it as a basis for seeking any supplemental relief as may be necessary. Rule 87.10; § 527.080 RSMo. In either case, it does not appear to the Court that there is presently any need for injunctive relief.

Accordingly, the Court finds that Plaintiffs' request for injunctive relief should be denied.

CONCLUSION, ORDER AND JUDGMENT

WHEREFORE, it is hereby ordered that as to Count II of the Second Amended Petition, the Defendants' motion for summary judgment is granted, and likewise Plaintiffs' motion for summary judgment as to that count is denied. It is clear as a matter of law that under presently existing Missouri case law precedent the Defendants' complained-of failure to appropriate the full PRS-certified amount, even such action may be in violation of the statute, does not rise to the level of being an impairment of the five Individual Plaintiffs' contractual rights.

It is further ordered that, consistent with the Court's foregoing memorandum opinion, as to Count I of the Second Amended Petition, the Defendants' motion for summary judgment is denied, and the Plaintiffs' motion for summary judgment is granted, to the following extent only:

(1) The Court adopts the findings of fact that are not genuinely in dispute as are set forth in the foregoing memorandum opinion.

(2) The key legislative language at issue in this case is contained in the statutory provisions of §§ 86.330, 86.337 and 86.344 RSMo.

(3) The Court hereby finds, adjudges, decrees and declares that under those statutory provisions, when those provisions are properly construed both with reference to their own plain meaning as well as with reference to the related statutory provisions of §§ 86.200 to 86.366 RSMo as a whole, the City is *required* to annually budget, appropriate and transfer to the PRS an amount that is "not less than" the amount that has been certified by the PRS and its actuary as being the "normal contribution rate" as defined by § 86.330, which amount is also referred to in § 86.344 as "the cost of benefits as determined pursuant to section 86.337."[37] Further, as provided by § 86.344, the City normally has an obligation to timely transfer said certified amount to the PRS "in equal payments in the first six months of the ensuing year." However, the City's annual obligation to appropriate and pay this amount is subject to the rights of administrative and/or judicial review that the City has under § 86.227 RSMo, in the event the City chooses in a timely manner, to challenge the soundness or reasonableness of the actuary's calculation of the amount so certified.

(4) The Court further finds, adjudges, decrees and declares that it is evident from the overall structure and context of §§ 86.200 through 86.366 RSMo, that "shall" as used in § 86.344 is not used in an advisory or "directory" sense, but rather is used in the ordinary mandatory sense that the word "shall" usually connotes. This is not changed by the fact that the statute does not specify a built-in penalty or sanction for the City's failure to do that which the statute says "shall" be done; see *Bauer v. Transitional School District of City of St. Louis,* 111 S.W.3d 405. 408 (Mo. banc 2003). The Court further finds that the suggested construction of the statute which has been offered by the City in this case and which centers around the language found in the second clause of § 86.337 RSMo (the part which begins with the words "provided, however,"), is an incorrect interpretation of the statute. The language cited therein by the City does not mean what the City claims it means.

(5) The Court further finds, adjudges, decrees and declares that it is undisputed that the City budget ordinance for the fiscal year at issue is expressly contrary to the relevant §§ 86.330, 86.337 and 86.344' RSMo, because said budget ordinance provided for an annual contribution to the PRS of 6% of covered payroll rather than what is required by those statutes.

(6) The Court further finds, adjudges, decrees and declares that the governing statutory provisions of Chapter 86 RSMo which, as previously declared, require the City to appropriate and transfer to the PRS the certified amount for "the cost of benefits as determined pursuant to section 86.337," do not violate Article VI. § 26(a) of the Missouri Constitution. By the same token, for the reasons previously cited in the memorandum opinion herein, the Court finds that the case of *Tomlinson v. Kansas City.* 391 S.W.2d 850 (Mo.1965). is inapplicable as to Count I of the case at bar.

(7) The Court further finds, adjudges, decrees and declares that these same statutory provisions, which require the City to budget, appropriate and pay the PRS-certified annual contribution amount for benefits, do not operate as an unconstitutional delegation of legislative authority. For the same reasons, the Court finds that the case of *State ex rel. Field v. Smith,* 329 Mo. 1019, 49 S.W.2d 74 (Mo. banc 1932), is inapposite.

(8) As to the Defendants' contention regarding the Hancock Amendment and their attempts to rely upon it as a defense, the Court finds, adjudges, decrees and declares that Defendants lack standing to raise the Hancock issue and, therefore, this Court lacks jurisdiction to decide the issue. Accordingly, the Court makes no finding as to the merits of the Hancock issue, but does find, on the basis of Defendants' lack of standing to raise it, that the Hancock Amendment is not a "viable" affirmative defense that Defendants can use in this case to defeat the Plaintiffs' entitlement to summary judgment on Count I. See *Leiser v. City*

of Wildwood, 59 S.W.3d 597, 606 (Mo.App. E.D.2001); *Board of* Health Trustees of Clay County v. County Commission of Clay County, 896 S.W.2d 627, 631 (Mo. banc 1995).

(9) The Court further finds, adjudges, decrees and declares, for the reasons previously set forth in the section of the foregoing memorandum opinion entitled "III. Other Pleaded Defenses to Count I," that the affirmative legal defenses pled in paragraphs 28 through 32 of the City Defendants' Joint Answer to Plaintiffs' Second Amended Petition do not have legal merit.

(10) In view of the foregoing, the Court finds, adjudges, decrees and declares that, inasmuch as the City did not exercise its right under § 86.227 RSMo to appeal the correctness of the PRS-certified benefits amount for Fiscal Year 2004 ($9,575,892), and inasmuch as the Defendants did not appropriate and transfer to PRS said certified amount but instead contributed for FY '04 the lesser sum of $4,115,600, the City thereby breached its legal obligations and violated the Police Retirement System's legal rights. The City thus owes the PRS arrearages for Fiscal Year 2004 of the difference between the two amounts, that being the sum (apparently) of $5,460,292. [38]

(11) Accordingly, judgment is hereby entered, in favor of the Plaintiffs and against the City of St. Louis, in the amount of $5,460,292, payable to the Police Retirement System. The City is ordered to promptly pay said sum or be faced with execution, garnishment or other lawful collection remedies. [39]

(12) The Court denies Plaintiffs' request for an injunction, as the Court will not presume in advance that the City will not in good faith comply with the Court's declaration of the parties' respective rights and duties and the other relief granted in this judgment.

(13) Costs taxed to Defendants.

SO ORDERED:

<<signature>>

David L. Dowd, Circuit Judge

Dated: June 17th, 2005

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Footnotes

1 Ms. Green is also, by virtue of her position. a member of the PRS Board of Trustees and so once again--as in the *ERS* case before Judge Dierker--finds herself in the somewhat anomalous position of suing herself.

2 Specifically. Plaintiffs claim that the amount timely certified to the City by PRS was $9.575,892 (but see footnote 38. *infra.* while the amount actually appropriated and paid by the City for that period was only $4.115,600, leaving a claimed shortfall due and owing to PRS for FY '04 of

3 The City has not disputed that it is required to pay its share of the PRS's expenses as provided by § 86.344. and hence that part of the statutory scheme :s not at issue in this lawsuit. The City does dispute, however, that it is required to pay the full amount certified by PRS for "the cost of benefits as determined pursuant to section 86.337."

4 The record reflects that the Missouri Attorney General was notified of the allegations of statutory unconstitutionality in this action, as contemplated by Rule 87.04. After being so notified, the Attorney General chose not to have any further participation in the action.

5 Plaintiffs' proposed Second Amended Petition was filed on June 30.2004. along with a motion for leave to amend. As in the *FRS* companion case, the record does not clearly indicate that formal leave to amend was ever granted. However. as in the companion case so here too. the parties have created the Second Amended Petition has having been duly filed. Accordingly, leave to file the Second Amended Petition is hereby granted.

6 For example. but not by way of limitation, unlike the FRS. which is based in part on city ordinance, the PRS is based solely on state statute. Likewise, the Plaintiffs in *PRS* have asserted an impairment-of-contract claim that the Plaintiffs in *FRS* chose not to raise.

7 Members are required to make contributions to the PRS in the amount of 7% of their compensation, with deductions taken from each paycheck. 5 86.320 RSMo.

8 At this point. it is perhaps appropriate to interject that at the present time. unlike in the Firemen's Retirement System, there is no longer any "accrued liability contribution race" in the Police Retirement System. The accrued liability contribution was discontinued in the PRS by law a number of years ago. by operation of § 86.340 RSMo.

9 The Court has not included the title of $ 86.350 herein because a comparison of the title to the body of the section shows that the title is somewhat misleadingly worded. The title creates the false impression that the City is obligated to pay only "one-half" of the cost of providing benefits, when that is not at all what the statute states.

10 The Court may--indeed, it has a duty to--take judicial notice of state statutes. *State v, Dollens.* 878 S.W.2d 875. 878 (Mo. App. E.D. 1994). In this case the Court believes it may do so without improperly expanding the summary judgment record even though neither side has specifically cited § 86.227. because both sides seek a declaration of their rights and liabilities under Chapter 86. because the related parts of the statute must be read as a whole rather than viewing sections in isolation, and because by judicially [text illegible] a pertinent part of the statute the Court is not really adding new "evidence" so much as examining the relevant law.

11 See Order of the Court dated December 9. 2004,

12 This makes it different from the Court's merely caking notice of a pertinent statute, which is essentially nothing more than noticing relevant law in a case, something that. as previously noted, Missouri appellate courts have said trial courts have a duty co do even when not requested by the parties. See footnote 10 supra.

13 With only one or two possible exceptions which will be noted. all of the facts alleged in Defendants' SUMF are deemed admitted. since Plaintiffs never filed any response with correspondingly numbered paragraphs (or otherwise) admitting or denying those averments, as required by Rule 74.04(c)(2).

14 Reference is made thereto, however. See generally *FRS Companion Case Order.* at pp. 28-41.

15 In their reply memorandum to Plaintiffs' memorandum in opposition to their motion for summary judgment. Defendants' complain that Plaintiffs have somehow "misrepresented" Defendants' position merely by pointing out that this would, indeed, be the eventual result if Defendants' construction of the statute were carried to its logical conclusion. Defendants reply that they have never argued the City "should" pay nothing or "should" take its position to such an extreme in actual practice. However, as will be discussed later herein, this Court is not a policy-maker or a legislative body. This case is thus not about what "should" be done, but rather is about what the law does or does not require--i.e.. what the parties' respective rights and liabilities are under the statute as it actually is written.

16 Defendants twice make the erroneous assertion that 5 86.350 RSMo, similar to how § 87.340 RSMo and § 4.18.325 are worded in the FRS scheme, expressly makes it an obligation of the City to "maintain" fund "reserves" in the PRS. (See Defendants' 10-4-04 Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. at 3; and Reply Memorandum in Support of Defendants' Motion for Summary Judgment. also at 3.) Not so. That mistaken statement likely came from looking at the former version of § 86.350 found in the main body of 6 V.A.M.S. (which did contain such language), rather than the current version found in the pocket part.

17 See *FRS Companion Case Order,* at pages 50-52. the subsection entitled "3. Defendants' Construction Contravenes Actuarial Soundness."

18 Although the Court's research suggests there may be no universally accepted precise technical definition of "actuarial soundness" as that term may apply in the context of public pension systems, nevertheless, the Court believes the term has a well understood general meaning. See BLACK'S LAW DICTIONARY (8th ed.). page 39. which defines "actuarially sound retirement system" as "a retirement plan that contains sufficient funds to pay future obligations, as by receiving contributions from employees and the employer to be invested in accounts to pay future benefits."

19 Reply Memorandum in Support of Defendants' Motion for Summary Judgment." at 5.

20 But, the Court would note, the City presumably did not complain about any bumpy "roller coaster" ride when, for ten years in a row prior to the year in question. the PRS's duly determined normal contribution rate due and owing from the City was $0.00.

21 This is a legitimate form of argument, one that is no different in principle from the City's argument--whether meritorious or not--that the Plaintiffs' position would. if carried to its logical conclusion, allow the PRS to appropriate the City's "entire budget."

22 Of course, as noted earlier, the City's obligation to pay the annual contribution is limited by its right to administratively appeal and/or judicially challenge the actuarial reasonableness of the certified amount, a right provided for under § 86.227 RSMo. Thus, the "courts are open to a claim that the actuarial computation is unsound." *Missouri State Employees'* Retirement System v. Jackson County, 738 S.W.2d 118. 120 (Mo. banc 1987). Obviously, to the extent that the City prevails in such a challenge, it is not obligated to pay. Here, the City has chosen not to invoke § 86.227 and challenge the correctness of the amount certified.

23 Defendants never bother to explain to the Court just how or why it is that they believe § 86.292 "suggests" such a conclusion---although the Court suspects Defendants perhaps mean to imply that any inability of the System to promptly pay benefits to beneficiaries suggests that the legislature may have contemplated a situation where the PRS was strapped for cash due to the fact that the City was. for some period of time. "not in a position" of being able to fully pay its normal annual contribution. If so. that is a somewhat odd and perhaps even self-contradictory argument for the City to make, since the Court understands the City to have argued (at least up until this point) that it *is* obligated---in any event. under any circumstances--to pay a sufficient amount to cover all PRS *benefits* that are due and payable in any given year. even if it has failed in previous years to make all or some part of its actuarially certified regular annual contribution. Is the City now saying it not only has discretion not to contribute to PRS as long as there is enough money in the PRS reserves to cover current obligations, but that it also can renege on its obligation to pay the actual benefits once those reserves become depleted?

24 See too *Shelby Township Police and Fire Retirement Board v. Charter Township* of Shelby. 438 Mich. 247, 475 N.W.2d 249. 255 (Mich. 1991). which of course is not binding in Missouri, but which the Court finds to be persuasive authority on the issue of alleged improper delegation of legislative power. See also 73 C.J.S. *Public Administrative Law and Procedure,* §§ 57-61 (2004).

25 Defendants strive mightily to distinguish Jones from the case at bar (see discussion at pages 6-8 of "Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment"). But, though it is true *Jones* is not quite precisely on point. Defendants' arguments that the case is significantly distinguishable are nonetheless not persuasive. According to Defendants, it makes a difference that the analogous statutes in *Jones* provided that the local government budgeting authorities "shall not change" the circuit court's certified amount. and must instead include said amount in the county budget "without change." whereas in the case at bar the statute requires only that the local government authorities "shall" appropriate and transfer the certified amount. (*Id.* at 7.) But to make such an argument--to parse language and split verbal hairs in such a manner --is to exalt the form of language over its substance and plain meaning. Obviously, the substance of the statutory provision in each case is essentially the same, even though the legislature chose to use affirmative wording ("shall") in one statute and negative wording ("shall not") in the other.

26 See. e.g., Reply Memorandum in Support of Defendants' Motion for Summary Judgment, at 1 ("... the City has never argued that it is unable to pay-"); id. at 6 ("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.")

27 In this case. unlike the FRS companion case. Defendants have pleaded the Hancock Amendment as an affirmative defense. Additionally, the parties' written argument concerning Hancock is somewhat more specific and delves more deeply into the merits in this case compared to that one. Thus. the Court concludes that unlike the situation in the FRS case. Defendants in the case at bar have not waived the Hancock defense by failing to properly plead and raise it.

28 See Reply Memorandum in Support of Defendants' Motion for Summary Judgment. at 8.

29 *City of Jefferson* was first decided in 1993. before *Fort Zumwalt;* see 863 S.W.2d 844 (Mo. bane 1993). It is true that when the case then came up before the Supreme Court a second time after *Fort Zumwalt* (see 916 S.W.2d 794), the Court again briefly addressed the Hancock issue; but that no doubt was simply due to the "law of the case" doctrine.

31 Obviously. the case could not properly be resolved in such a procedural posture. but would instead require a trial. if the parties dispute whether the amount certified was a proper and correct calculation and intend to put on expert testimony or other actuarial evidence.

32 See also the City's several assertions contained in its 12-28-04 "Memorandum in Opposition to Plaintiffs' Motion to Take Judicial Notice." There, inter alia. Defendants stated: "[N]either the actuary's certification nor the appropriateness of her methodology is at issue in the present case" (page 2). And the following: "The issue decided in the earlier case was whether the City had a basis for challenging the calculation of the amount certified in 1987 ... That is not an issue raised by the Petition in this case and is not a matter before this Court on either side's motion for summary judgment. Nor is the appropriateness of the present actuarial calculation challenged." (page 3) (emphasis added)

33 The Court is sympathetic to this claim and, if the Court had the power to do so (as. for example. if this judge were sitting as a member of the Missouri Supreme Court hearing an argument that Missouri common law in this area ought to be re-examined and perhaps changed), the Court would be inclined to agree that such argument is logically and legally sound. See, e.g., *Yeazell v. Copins,* 98 Ariz. 109, 402 P.2d 541. 546 (Ariz. 1965). However. as will be discussed further herein, the claim is simply not consistent with existing Missouri law. This Court is of course constrained by that law, and has no authority to contravene or ignore well-established Missouri case law precedent.

34 The Court's independent research suggests that this law review article is by far the best. most in-depth and comprehensive analysis to be found anywhere, examining the courts' treatment of public pensioners' rights in the various state jurisdictions and comparing the various different approaches taken.

35 See also *Atchinson v. Retirement Board,* 343 S.W.2d 25. 34 (Mo. 1951) (holding that the controlling statutes in effect at the time officer's rights to pension vested determine the extent of the contractual rights of retiring officers). See also *Police Retirement System of Kansas City v. Kansas City.* 529 S.W.2d 388. 391-393 (assuming. without deciding. that pensions amount to deferred compensation rather than a gratuity).

36 The Plaintiffs attempt to distinguish *Tomlinson, as well as Fraternal Order* of Police Lodge #2. by arguing that those cases dealt solely with an ordinance-based system, whereas the PRS is a system based on statute. On this issue, however,

that distinction is not crucial; the principle is still the same. Plaintiffs also respond to the Defendants' briefing on this issue with several overwrought arguments, such as that the City is saying that "it can impair pension rights even if those rights have vested.' This of course is only Plaintiffs' characterization of Defendants" argument; but no matter how they might choose to characterize the argument. Plaintiffs never convincingly counter the contention that the facts and holding in *Tomlinson* are directly on point--and thus dispositive--with respect to the impairment-of-contract claim in this case.

37 This annually required contribution amount is in addition to any separate certified amount that may be due from the City to PRS (as stated in § 86.344) for expenses pursuant to subsection 2 of section 86.343." However, the Court makes no determination herein as to what (if any) legal obligation for funding of such PRS expenses the City may have under § 86.343, because that part of the statute has not been put in issue in this lawsuit.

38 The Court believes that is the correct amount. However there may be a slight degree of uncertainty or confusion about it because, inexplicably, Plaintiffs' Second Amended Petition at times cites the figure of $9.575,892 as the certified amount but then, at other times. switches gears and cites the figure of $9.574.892 as the certified amount. For whatever reason, the petition uses the latter figure as the one from which it subtracts the amount the City actually paid ($4,115.600). and thus arrives at an alleged shortfall amount still due and owing to PRS of "$5.459.292." From its review of the summary judgment record, however. the Court believes that $9,575.892 is the actual certified amount, and thus that the actual shortfall amount is $5.460.292.

39 Pre-judgment interest on tort claims (assuming this could be considered a tort case) is. as a general rule, not recoverable. *Vowel v. A.G. Edwards & Sons. Inc.*. 801 S.W.2d 746. 757 (Mo. App. E.D. 1990). Plaintiffs have not alleged any basis under which they would be entitled to pre-judgment interest. either through § 408.040 RSMo or otherwise. Accordingly. Plaintiffs' prayer for pre-judgment interest is denied.

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