

MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

THE FIREMEN'S RETIREMENT SYSTEM,)	
etc., et al.,)	
)	
Plaintiffs,)	
)	
and)	
)	
INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS, LOCAL 73, et al.,)	No. 1222-CC02916
)	consolidated with
Intervenor Plaintiffs,)	No. 1322-CC00006
)	Div. 18
v.)	
)	
THE CITY OF ST. LOUIS,)	
)	
Defendant.)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND JUDGMENT

Plaintiffs, the trustees of the Firemen's Retirement System of St. Louis, joined by intervenor plaintiffs Local 73 of the International Association of Fire Fighters, three active firefighter members of FRS, and one retired beneficiary, seek declaratory and injunctive relief regarding ordinances adopted by the defendant City of St. Louis, attempting to terminate the existing retirement system applicable to St. Louis firefighter employees and replace it with a different system. The proceedings herein have been complicated by the shifting legislative landscape; in that the original suit (No. 1222-CC02916) attacked three ordinances adopted by the City. During the pendency of the litigation, however, and before the Court could enter a final judgment in No. 1222-CC02916, the City enacted a fourth ordinance that amended two of the earlier

ordinances. The latest ordinance relied in part on this Court's opinion in granting a preliminary injunction as to the earlier ordinances. Consequently, the Court permitted the parties to supplement their pleadings and the record.

The Court now considers the claims of the parties on a complete record. It is the intention of the Court to enter a judgment finally and completely disposing of all claims pleaded in the consolidated cases; and, having considered the pleadings, testimony, exhibits and arguments of counsel, and being fully advised in the premises, the Court now enters its findings of fact conclusions of law, order and judgment. Issues on which no findings are explicitly made shall be deemed found in accordance with the result reached. All evidentiary objections reserved at trial are overruled, with the Court giving the evidence only the weight it is entitled to under the law. Unless otherwise noted, the Court finds all testifying witnesses to be credible.

In its prior order on the motion for a preliminary injunction, the Court explicated at some length its views on the proper application of Missouri constitutional and statutory provisions to the parties' controversy. The Court will endeavor to be less discursive in its conclusions of law *post*, but the Court adheres to the opinions expressed previously. References will be to the trial transcripts (Trial Tr.), depositions (Depo. Tr.), and trial exhibits.

The operation and effects of the City's past and present pension ordinances involve, to some extent, mixed questions of

law and fact. In general, the Court will treat the text of the ordinances themselves and matters of the administration or operation of the pension plans as matters of fact; questions of legal effect of the ordinances and of authority to administer or operate the pension plans at issue are treated as questions of law, but the line of demarcation is not always easy to discern and this may account for some redundancy in findings and conclusions.

The Court expresses its thanks to counsel for all parties for their highly professional conduct in a difficult case.

Findings of Fact

1. Plaintiff trustees of the Firemen's Retirement System of the City of St. Louis (FRS) operate a firemen's retirement system covering firefighter employees of the City of St. Louis. Although several City officers sit on the FRS board of trustees, the FRS and the City have a long history of disagreements over the operation of the FRS, and several prior lawsuits have erupted, resulting in appellate opinions defining the authority of the trustees and the obligations of the City.

2. The FRS in its current form has been in operation since 1960. At that time, statutory revisions prompted the City to revise its firefighter pension ordinances. Significantly, the 1960 revisions had the effect of replacing the prior retirement system with a new system, and beneficiaries under the former system were continued as beneficiaries of the new system.

3. Intervenor International Association of Fire Fighters, Local 73, is a labor organization representing members of the St. Louis Fire Department. Intervenors Doane, Washington and Hill are active duty firefighter members of the FRS; intervenor Zoeller is a retired firefighter, currently receiving benefits from the FRS.

4. The City of St. Louis is a constitutional charter city enjoying "home rule" as provided in the Missouri Constitution.

5. City firefighters have been required to belong to FRS as a condition of their employment. However, details regarding the FRS are not provided as part of the hiring process. Hiring by the City for the job of firefighter is governed by the City charter, art. XVIII, and by rules and regulations of the Civil Service Commission and the Department of Personnel. Although pay and benefits of firefighters are fixed by ordinance, there is nothing in the record to indicate that the City offers or that a prospective firefighter employee accepts a particular scale of wages and benefits when hired. Rather, as part of firefighters' orientation, which occurs after they are hired, FRS staff or trustees have conducted information sessions with newly-hired firefighters concerning the Firemen's Retirement System and the benefits provided to firefighters under it. Firefighters are also given informational brochures and a copy of the enabling legislation and the implementing ordinances. Firefighters must also sign the registry at FRS confirming the firefighters' membership and participation in FRS as a condition to their

employment. Trial Tr. 111-13, 120, 8/24/12; Trial Tr. 17-18, 99, 105, *passim.*, 8/22/12; Pl. Trial Ex. 5.

6. City firefighters are not subject to the Social Security program, and instead contribute a percentage of their salaries to the FRS, after taxes, as prescribed by ordinance. Under the FRS, the firefighters' contributions are refunded upon retirement or termination of employment. R.C. § 4.18.210.

7. Some firefighters testified at trial concerning their understandings of and reliance on benefits under the FRS. Although the Court does not wish to impugn the veracity of any serving firefighter, the Court is unable to find that any firefighter relied on the existence or continuation of the FRS in accepting employment with the City. The Court does find that some firefighters have elected to remain in the City service, instead of seeking other employment, in part due to the pension benefits under the FRS.

8. As of May 8, 2012, the City of St. Louis enacted Ordinance No. 69143, generally referred to in the record as Board Bill 270, purporting to repeal, conditionally, the provisions of all ordinances governing the FRS and to freeze benefit levels under the FRS at the level in force at the time of the adoption of a new pension plan for St. Louis firefighter employees. The ordinances conditionally repealed were and are codified in Revised Code of the City of St. Louis (R.C.) Ch. 4.18.

9. As of July 2, 2012, the City enacted Ordinance No. 69183, generally referred to in the record as Board Bill 11,

amending R.C. § 4.18.060, regarding the powers and duties of the trustees of the FRS, so as to limit the ability of the trustees to initiate litigation attacking the validity of City ordinances governing firefighters' pensions.

10. As of July 29, 2012, the City enacted Ordinance No. 69245, generally referred to in the record as Board Bill 12, adopting a comprehensive substitute pension plan for City firefighter employees and providing for the merger of plan assets and administration under the same trustees as the FRS. The terms of Ordinance No. 69245 are codified at R.C. Ch. 4.19.

11. On July 6, 2012, the Court granted a preliminary injunction enjoining enforcement of Ordinance No. 69183 in part. Subsequently, the Court entered a temporary restraining order by consent enjoining full implementation of Ordinance No. 69245. Still later, following hearing, the Court granted a preliminary injunction enjoining implementation of Ordinances Nos. 69149 and 69245 pending trial on the merits. That trial was completed by October 22, 2012.

12. Relying in part on the Court's opinion filed in connection with the grant of a preliminary injunction on September 28, 2012, the City enacted Ordinance No. 69353, referred to in the record as Board Bill 109. That ordinance amended Ordinance No. 69245, R.C. Ch. 4.19, in several significant respects. In particular, Ordinance No. 69353 repealed the conditional repeal of the FRS ordinances enacted in Ordinance No. 69149 and repealed the provisions of Ordinance No.

69245 which provided for the merger of the FRS plan assets into the new plan, referred to in the record as the Firemen's Retirement Plan (FRP).

13. Between 2001 and 2011, due to the cumulative effect of benefit increases and actuarial losses, the City's required annual payment to the FRS increased by 586%, from \$3,365,007 to \$23,072,000. Trial Tr. Vol. VI, 267-73 August 24, 2012; Def. Trial Ex. H. This fiscal reality is reflected in the findings of the Board of Aldermen in adopting the ordinances at issue. By 2011, the cost of funding the FRS represented approximately 56% of the total firefighter payroll, compared to 10.3% in 2001. Def. Trial Ex. H. Although certain administrative adjustments (such as revising the actuarial standard from "frozen initial liability" to "entry age normal") and, of course, investment returns, could reduce the cost of the FRS to the City in the future, there can be little doubt that, without substantial adjustments to the benefits scheme, the cost of continuation of the FRS in its current form will lead to severe financial stress for the City in the foreseeable future.

14. The Court finds that, if the benefits scheme of the FRS and FRP is implemented as provided, the City's taxpayers can expect a net reduction in cost in excess of \$4 million annually. Trial Tr. Vol. II, 86-87, March 19, 2013; Defs. Trial Ex. L.

15. The ordinances at issue in this case effectively establish a "dual plan" system. This dual plan system will discontinue the accrual of pension benefits under the FRS for

service performed and compensation paid after February 1, 2013, and establish a new pension plan, the FRP, to provide retirement income, disability, and survivor death benefits for service rendered after February 1, 2013.

16. Before it passed ordinances establishing the FRP and freezing the FRS, the Board of Aldermen was presented with an actuarial cost statement projecting the economic impact of the dual-plan system. Pl. Trial Ex. 62. The Court finds as a matter of fact that this cost statement complied with the requirements of the applicable Missouri statutes. Trial Tr. Vol. II, 3-19, March 19, 2013. The parties do not dispute the adequacy of the cost statement presented in connection with Ordinance No. 69245.

17. The operation and effect of the dual plan system with regard to benefits as prescribed by the ordinances at issue can be summarized as follows:

a. The FRS will pay retirement income benefits only for service rendered and compensation paid up to February 1, 2013. Service after February 1, 2013 will be recognized by the FRS only for purposes of determining eligibility to receive a retirement income benefit, such as vesting and the pension commencement date. Years of service rendered and compensation paid after February 1, 2013 will not increase the amount of benefits to be paid by the FRS. No employee contributions will be made to the FRS with respect to payroll periods beginning on or after February 1, 2013.

b. The FRS will continue to pay: retirement income

benefits to members who retired before February 1, 2013; disability benefits to members who became disabled before February 1, 2013; and survivor benefits to surviving spouses and beneficiaries of members who died before February 1, 2013.

c. The FRP will provide retirement income benefits for service rendered after February 1, 2013. Employee contributions for payroll periods on or after February 1, 2013 will be made to the FRP. Disability benefits for a participant who becomes disabled after February 1, 2013 will be paid from the FRP. Survivor benefits for a beneficiary of a participant who dies after February 1, 2013 will be paid from the FRP.

d. A firefighter who retires after completing at least 20 years of service prior to February 1, 2013, can receive an immediate unreduced retirement income benefit from the FRS, plus a cash refund of his contributions in full. A firefighter who terminates employment before completing 20 years of service receives a refund of his contributions plus interest only, from the FRS. Trial Tr. Vol. II, 38-39, August 21, 2012. The same will be true under the FRP.

e. No firefighter will receive a pension benefit because of the same years of service from both the FRP and the FRS.

f. Retirement income benefits under the FRP are calculated in substantially the same way as under the FRS, except that after February 1, 2013 the FRP will calculate

the benefit based on years of service credited under both plans, and then offset the benefit that is payable from the FRS. Trial Tr. Vol. II, 27, March 19, 2013. In effect, the retirement income benefit paid by the FRP will be based solely on years of service rendered after February 1, 2013, but the rate of accrual for each such year will be based on total years of service as a firefighter. Trial Tr. Vol. II, 27, March 19, 2013. Retirement income benefits attributable to compensation paid after February 1, 2013 accrue only under the FRP.

g. The benefits the FRS will pay to a participant who retires on or after February 1, 2013 will never be less than the amount of the benefit accrued under the FRS as of February 1, 2013. Thus, for participants with at least 20 years of service as of February 1, 2013, the retirement income benefit formula under the FRP is the same as the benefit formula under the FRS. The retirement income benefit payable under the FRP, when combined with the benefit payable from the FRS, is the same as the total retirement income benefit that would have been payable to such a participant under the FRS if it had not been frozen.

h. For participants with fewer than 20 years of service as of February 1, 2013, the retirement income benefit formula under the FRP is the same as the retirement income benefit formula under the FRS, with two exceptions. First, the retirement income benefit for service performed after

February 1, 2013 will be actuarially reduced if such a participant elects to receive such benefit before attaining age 55. In other words, the FRP will not pay a full benefit to anyone who retires prior to the age of 55, regardless of years of service. Second, employee contributions from such firefighters are increased from 8% to 9% and are not refundable upon retirement. The increase in contribution rate for participants with fewer than 20 years of service relates solely to retirement income benefits attributable to service rendered after February 1, 2013.

i. The FRP provides a slightly lower rate of accrual of benefits for participants hired on or after February 1, 2013. Such participants will contribute 9% of their annual compensation, which is nonrefundable. Retirement income benefits that commence before age 55 will be actuarially reduced. Such participants who leave after completing at least 10 years of service will have the option of receiving a deferred vested retirement income.

j. The dual plan system modifies the role of sick leave in computing pension benefits. The sick leave modification issue arose from the enactment of an earlier ordinance by the City and is the subject of another pending action, 22nd Cir. No. 1022-CC11326.

18. The changes in employee contribution rates, right to refunds of contributions, and retirement benefits payable on

retirement before age 55 are critical components of the City's effort to reduce its future firefighter pension costs. See Trial Tr. Vol. II, 95, March 19, 2013.

19. Another important aspect of the dual plan system relates to the deferred retirement option plan ("DROP"). The FRS included a DROP, which allowed a participant who was eligible for retirement to begin receiving his pension while continuing to work and at the same time receive a full salary. See R.C. § 4.18.131. The retirement income benefits for a participant in DROP are credited to an account that earns interest, and are paid in cash to the participant in a lump sum upon retirement. Years of service completed while in DROP do not count as credited service for accrual of retirement income benefits. A firefighter who continues to work after the end of the DROP period accrues additional retirement income benefits based on service rendered and compensation paid after the end of the DROP period and his retirement income benefit upon retirement includes those increases. Trial Tr. Vol. II, 26-30, 69-73 (March 19, 2013).

20. The FRP continues the FRS DROP program in all material respects. Trial Tr. Vol. II, 28-29, 69, March 19, 2013. The only change is that under the FRP, any DROP participant with less than 20 years of service as of February 1, 2013 and who enters DROP before age 55 will have an actuarial reduction applied to his retirement income benefit attributable to service worked after February 1, 2013. Trial Tr. Vol. II, 117, March 19, 2013. A member of FRS who is participating in DROP on February 1, 2013

will continue to have retirement income payments credited to his DROP account under the FRS so long as the participant continues in DROP. Trial Tr. Vol. II, 28, March 19, 2013. Such a participant will earn no additional benefits while in DROP, because his service while in DROP is disregarded. Trial Tr. Vol. II, 28, March 19, 2013. The benefit credited to his DROP account in FRS is paid upon termination of employment. If such a participant continues in employment after the DROP period, all retirement income benefits attributable to service rendered after the DROP period will accrue under the FRP. Trial Tr. Vol. II, 28-29, March 19, 2013.

21. Under the dual plan system, sick pay accrued before February 1, 2013 can be converted by a DROP participant into a combination of cash, additional years of service, and final average compensation for retirement income benefit purposes in the same manner as permitted by the existing FRS ordinances.

22. No firefighter will earn retirement income benefits under both the FRS and FRP simultaneously. Trial Tr. Vol. II, 79-80, 93, March 19, 2013. The benefit earned or accrued on account of service performed before February 1, 2013 will be paid entirely from the FRS, and the benefit earned or accrued on account of service performed after February 1, 2013 will be paid entirely from the FRP. Trial Tr. Vol. I, 100, March 18, 2013.

23. Under the ordinances establishing the dual plan system, the City intends that all pension benefits due to a firefighter by the FRS and by the FRP will be paid. The annual

contribution required by the FRS and by the FRP is paid by the City in an amount as determined by each system's actuary. Notwithstanding ambiguity in Ordinance 69353 on this point, the City has represented that its obligation to fund the FRP at an actuarially sound level may not be diminished by subsequent amendments to the Plan.

24. Actuarial calculations under the FRP to govern City contributions to the plan will utilize a method known to the arcane world of actuaries as "entry age normal," an alteration which will operate to reduce the amount of City contributions to the FRP in the first few years of its operation, but will increase such contributions over time. The FRS utilizes a different actuarial method known as "frozen initial liability," which operates to increase contribution rates in earlier years of an amortization of unfunded liabilities, but reduces them over time. Both methods are considered valid by professional actuaries, but the parties sharply disagree as to whether Ch. 4.18 requires the use of the frozen initial liability method or leaves it to the discretion of the trustees to utilize either method. Both parties' experts appear to agree that the contribution rate calculations prescribed by R.C. Ch. 4.18 (in conformity to the enabling statutes) do not precisely track either method. In any event, under the dual plan system, the FRS may continue to utilize "frozen initial liability" to the extent necessary to determine any future sums required to fund benefits payable under the FRS as of February 1, 2013.

25. As of February 1, 2013, the value of accrued benefits under the FRP will be \$0. Trial Tr. Vol. II, 20, March 19, 2013. As of February 1, 2013, the FRP will have an unfunded actuarial accrued liability of approximately \$65 million, based on benefits that are projected to accrue in the future due to future compensation and projected service. Trial Tr. Vol. II, 20-21, March 19, 2013. This amount is a projected liability over the life of the FRP based on current membership but does not have to be paid to the Plan by the City immediately in order to fund the Plan at an actuarially sound level. Trial Tr. Vol. II, 21, March 19, 2013; see also Trial Tr. Vol. I, 188-89, March 18, 2013. The City presented opinion evidence from its actuary that the FRP is actuarially sound. Trial Tr. Vol. II, 19, March 19, 2013.

26. Although the concept of "actuarially sound" as used in pension statutes and ordinances strikes the Court as rather fanciful in the real world, the Court accepts the opinion of the City's actuary, Ms. Nicholl, that the FRP can be considered actuarially sound. During the first year after February 1, 2013, the FRP may be required to pay pension benefits between \$200,000 and \$300,000. Trial Tr. Vol. II, 23, March 19, 2013. During the first year after February 1, 2013, if the FRP is implemented, the FRP will accumulate over \$13 million in assets, consisting of member payroll contributions of approximately \$250,000 per month (totaling \$3 million the first year), and the City's annual required contribution of approximately \$10 million. Trial Tr. Vol. II, 23, March 19, 2013. The City will be prepared to make

necessary contributions to fund the FRP. Trial Tr. Vol. II, 103-04, March 19, 2013.

27. The Court finds from the record that, if implemented, the dual plan system realistically will not cause liquidity issues for the FRS relative to its ability to fund benefits. Trial Tr. Vol. II, 21-23, March 19, 2013. Likewise, there should be no liquidity issue with respect to the FRP because sufficient assets will be available to pay benefits when due after February 1, 2013. Trial Tr. Vol. II, 18, 21-23, March 19, 2013. Although plaintiffs suggested that the FRP may be unable to fund disability benefits immediately after February 1, 2013, the Executive Director of the FRS testified that disability claims typically take between two to four months before benefit payments would need to be made. Trial Tr. Vol. I, 72-73, March 18, 2013.

28. Due to the preliminary injunction, the FRS has continued to operate its plan, collecting City and firefighters' contributions and paying benefits consistently with Ch. 4.18. Although the record was completed before February 1, 2013, the Court infers from the evidence of record that some firefighters or their survivors will have become eligible for benefits from and after February 1, 2013. The parties will be required to transfer funds as needed in order to put the FRP into operation consistently with this Court's final judgment. In addition, the Court finds that additional contributions to the FRS will be required to maintain actuarial soundness, but there will be no need for an immediate, massive infusion of cash from the City to

enable the FRS to pay all benefits as required.

29. The Court finds that the dual plan system will entail increased administrative costs in the short term. Computer programs at the FRS will have to be adjusted to compute benefits in light of the dual plan system. The FRP will require staff and support, but it does not appear that the City has taken any particular steps toward identifying staff and support, other than requiring the director of personnel to take steps to recruit needed staff. Nevertheless, the Court finds that any additional administrative expense will be modest and can be borne by the parties without undue stress.

Conclusions of Law

1. The Court has jurisdiction of the parties and subject matter. The parties' claims present ripe, justiciable controversies. § 527.020, RSMo 2000 & Supp. Plaintiff FRS and its trustees have standing to seek declaratory and injunctive relief regarding the enforceability of ordinances affecting the operation of the FRS, including whether ordinances impair the obligation of contract, given the fiduciary and administrative duties of the FRS trustees owed both to the City of St. Louis and the members of the FRS. *Firemen's Retirement System v. City of St. Louis*, 789 S.W.2d 484 (Mo.banc 1990); *Firemen's Retirement System v. City of St. Louis*, 754 S.W.2d 21 (Mo.App.E.D. 1988). (The Court notes that the standing of FRS on the issue of impairment of contract is academic, as some of the FRS trustees themselves and the individual intervenor plaintiffs are subject

to the dual plan system and so unquestionably have standing to claim impairment of contract.)

2. For the reasons explicated at greater length in the Court's Memorandum and Order of September 28, 2012, the Court concludes that the City of St. Louis as a constitutional charter city has the authority to adopt a pension system for its firefighter employees with or without enabling legislation.

3. To the extent that the City, by R.C. Ch. 4.18, has elected to adopt a pension system under the authority of §§ 87.120 et seq.--enabling legislation pre-dating the adoption of Mo.Const. art. VI, § 19(a)--it is bound to conform to that enabling legislation in establishing the terms and conditions of the pension system for its firefighter employees.

4. Because the enabling legislation is silent on the matter of terminating the FRS, and because the City has consistently reserved the right to amend or repeal the provisions of Ch. 4.18, the Court adheres to its view that the City has the authority to terminate the FRS and to replace it with the FRP.

5. As set forth in the previous Memorandum and Order, the City does not have absolute discretion in choosing the manner of terminating the FRS. Section 87.125, RSMo, mandates that the pension fund established in conformity to the enabling legislation must remain under the management and control of the FRS trustees. Thus, the City lacked authority to terminate the FRS by merging it into the FRP, even though the FRP provided that

the FRS trustees would be the FRP trustees and that vested rights under the FRS would be honored.

6. By adopting Ordinance 69353, the City revised its termination of the FRS by providing for the dual plan system described in the Court's findings of fact. The dual plan system injected a new issue that has caused the Court to reexamine its conclusions in the prior Memorandum and Order, as the Court did not intend by that Memorandum to render an advisory opinion on how the City should proceed to terminate the FRS. After such reexamination, the Court concludes, on the basis of the City's constitutional authority and on the basis of the Court's construction of the enabling legislation, that the City has the requisite constitutional and charter authority to establish the dual plan system. (Flattering as it is for the Court's opinion to inspire such deference from the City, the Court emphasizes that it feels no compulsion to vindicate the City's new course.)

7. The plangent, beguilingly simple argument of the plaintiffs is that the FRS, once established under the enabling legislation, cannot be terminated by the City without amendment of the enabling legislation. In other words, once the City lies down on the Procrustean bed of the enabling legislation, it can never get up again without leave from the General Assembly. The Court rejects this argument as inconsistent with the overriding authority of Mo.Const. art. VI, § 19(a) and the proper construction of the enabling legislation.

8. Given the conclusion that the City has the authority to terminate the FRS, the critical question is the propriety of the manner in which it is terminated. Plaintiffs would have it that the enabling legislation creates a species of "catch-22," in which the City has the authority to terminate the FRS, but there is no legal way in which to do so consistent with the enabling legislation. In the Court's view, the linchpin of plaintiffs' argument is found in § 87.130.1, RSMo, which provides:

All persons who are firemen shall be members [of FRS] as a condition of their employment and shall receive no pension or retirement allowance from any other pension or retirement system supported wholly or in part by the city or the state of Missouri *because of years of service for which they are entitled to benefits under this system* nor shall they be required to make contributions under any other pension or retirement system of the city or the state of Missouri, anything to the contrary notwithstanding. [Emphasis added.]

9. The Court concludes that the dual plan system adopted by the City is consistent with § 87.130.1. Under the dual plan, City firefighters hired before February 1, 2013, receive one pension benefit by reason of years of service for which they are entitled to benefits under the FRS, and another pension benefit for years of service under the FRP. Before February 1, 2013, firefighters made contributions only to the FRS. After February 1, 2013, firefighters make contributions only to the FRP.

10. The Supreme Court has summarized the principles leading to this Court's conclusions as follows:

. . . under Missouri law, municipal ordinances must be harmonized with the statutes of the state, and if the ordinances cannot be harmonized, they are void. . . . However, a court should construe ordinances to uphold their validity unless the ordinances are expressly inconsistent

or in irreconcilable conflict with the general law of the state. . . . Ordinances may supplement state laws, but when the expressed or implied provisions of each are inconsistent or in irreconcilable conflict, then the statutes annul the ordinances. . . . To determine if a conflict exists between an ordinance and a state statute, the test is whether the ordinance permits that which the statute prohibits or prohibits that which the statute permits. [*State ex rel. Teefey v. Bd. of Zoning Adjustment*, 24 S.W.3d 681, at 685 (Mo.banc 2000) [citations omitted].]

11. Plainly, the dual plan system does not prohibit what the enabling legislation permits nor does it permit what the legislation prohibits. Rather, the dual plan system supplements the legislation by providing the means whereby the FRS is terminated and the FRP provides pension benefits in the future.

12. Although the General Assembly can prescribe certain terms and conditions of employment for employees of charter cities, Mo.Const. art. VI, § 22 quite plainly forbids the General Assembly to fix the compensation of such employees. See *City of St. Louis v. State*, 382 S.W.3d 905 (Mo.banc 2012). The term "compensation" as used in article VI of the constitution has been construed to include pensions. See *Mo. Prosecuting Attys. & Circuit Attys. Ret. System v. Barton County*, 311 S.W.3d 737 (Mo.banc 2010). Moreover, the Supreme Court clearly declared that it is the permissive character of §§ 87.120 *et seq.* that avoids the stricture of art. VI, § 22. *Firemen's Retirement System v. City of St. Louis*, *supra*, 789 S.W.2d at 486; cf. *Grimes v. City of St. Louis*, 630 S.W.2d 82 (Mo.banc 1982) (recognizing the City's "right" to be free of legislative interference in

"internal affairs"). In sum, the City can lie down on the Procrustean bed, but it can also get up.

13. The dual plan system enacted by Ordinances 69245 and 69353 successfully reconciles the City's right to terminate the FRS with its constitutional duty to preserve vested rights and with its constitutional right to adopt a new, independent pension plan for its firefighters. The plaintiffs' position that the City is stuck with the FRS unless and until the General Assembly permits otherwise--and perhaps not even then, if plaintiffs' view of the obligation of contract is correct--cannot be reconciled with the permissive character of the FRS statutes and the City's right to terminate the FRS. The City reserved the right to terminate the FRS from the time of its first adoption. The FRS statutes are silent on the right to terminate. However, silence is not tantamount to prohibition. See *City of Kansas City v. Carlson*, 292 S.W.3d 368 (Mo.App.W.D. 2009); *Miller v. City of Town & Country*, 62 S.W.3d 431 (Mo.App.E.D. 2001).

14. The City's efforts to meld the continued operations of the FRS and the FRP do not constitute impermissible amendment of R.C. Ch. 4.18; rather, they harmonize Ch. 4.19 with Ch. 4.18, and preserve pension benefits of firefighters whose benefits have not otherwise vested. To be sure, the dual plan system does affect how the FRS will operate in the future. But the ordinance provisions that affect the FRS are necessary and proper to secure the orderly termination of the FRS, a termination that is lawful and not forbidden by the constitution, statutes or charter.

15. The ordinances adopting the dual plan system are not inconsistent with the City charter. Charter, art. XVIII, §§ 3(r), 4(b), 6(b).

16. The principles governing the federal and state constitutional prohibitions on impairment of contract have been severely eroded by judicial decisions since the 1930s, but they continue to retain some vitality. See *Hoyne v. Prudential Savings & Loan Ass'n*, 711 S.W.2d 899 (Mo.App.E.D. 1986). The Missouri Supreme Court has held that abrogation or modification of contract rights as a result of the proper exercise of the police power does not contravene the prohibition. However, the Court also held that the police power is not so powerful that it permits impairment of the obligation of contract where the impairment is not necessary to the achievement of the objective for which the power is exercised. See *State ex rel. Kansas City v. Public Service Comm.*, 524 S.W.2d 855 (Mo.banc 1975); see also *General Motors Corp. v. Romein*, 503 U.S. 181 (1992). In sum, a party claiming violation of the contracts clause must show a contractual relationship, a substantial impairment of rights under the contract, and an absence of sufficient justification for the impairment under the police power.

17. The Court previously concluded that those active or firefighters or their survivors whose rights had vested under the FRS have a contractual right subject to protection under the contracts clauses, and the Court now adheres to that conclusion. See *State ex rel. Breshears v. Mo. State Employees Ret. System*,

362 S.W.2d 571 (Mo.banc 1962); *Atchison v. Retirement Board*, 343 S.W.2d 25, at 34 (Mo. 1960); *State ex rel. Phillip v. Pub. School Ret. System*, 262 S.W.2d 569 (Mo.banc 1953). The contract is, in substance, a contract between the firefighter employees on the one hand and the FRS and City on the other.

18. The Court concludes that the ordinances establishing the dual plan system do not impair vested rights or the obligation of contract of current retirees or vested FRS members. On the contrary, the ordinances generously preserve benefits which were not vested as of February 1, 2013, and ensure that benefits vested as of that date are protected and will be paid by the FRS. The purported scrivener's error in R.C. § 4.19.170(B) as amended by Ordinance 69353 is immaterial to the Court's analysis. Whether the City has effectively obligated itself to fund the FRP in the future is not a ripe, justiciable question before the Court. The contracts clauses operate in the past, not the future. Only the FRS benefits in existence as of February 1, 2013, are subject to constitutional protection, to the extent they were vested at that time.

19. Although the Court agrees with plaintiffs' basic contention that pension benefits can be contractual in nature and subject to protection under the federal and state constitutional prohibitions on impairment, the Court emphatically rejects plaintiffs' contentions that the City is obligated to provide benefits under the FRS as it now exists to all employees who were hired prior to February 1, 2013, regardless of their vested

status under the FRS. Whether pension benefits are compensation or gratuities, the right to such benefits is subject to the terms and conditions of the laws creating and bestowing those benefits. In the Court's view, there is no authority in Missouri for the proposition that a public employee, once hired, is permanently entitled to pension benefits under plans in force at the time of hire, when the plans themselves do not so specify. The City at all times reserved the right to amend or repeal the FRS ordinances. R.C. § 4.18.345. This was sufficient to preclude creating a contract with employees who were or are not vested. See *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 106 S.Ct. 2390 (1986); see also *Fraternal Order of Police Lodge #2 v. City of St. Joseph*, 8 S.W.3d 257 (Mo.App.W.D. 1999); *Savannah R-III Sch. Dist. v. Public School Ret. System*, 950 S.W.2d 854 (Mo.banc 1997).

20. The Court also concludes that there is no impairment of any contractual rights of any active firefighter by reason of the dual plan system's alteration of death or disability retirement benefits. Again, the City reserved the right to amend or repeal the FRS ordinances, and death or disability retirement benefits are at best a contingent expectancy on the part of firefighter employees of the City. Such expectancies are not sufficient to limit the City's legislative authority to adopt a separate plan with different conditions for receiving death or disability retirement benefits in the future. See *General Motors*

Corp. v. Romein, supra; Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987).

21. The City invites the Court to correct what it terms a "scrivener's error" in connection with firefighters with 20 or more years of service who emerge from the DROP program and are required to thereafter pay contributions of 9% of salary to the FRP. The Court declines to rewrite legislation. If the error rendered the legislation meaningless or invalid on its face, the Court enjoin its enforcement, cf. *State ex rel. Ashcroft v. Blunt*, 699 S.W.2d 329 (Mo.banc 1985), but the record contains no evidence that the Board Bill 109 signed by the Mayor of the City was not the Board Bill passed by the Board of Aldermen.

22. The Court is perplexed by the parties' issues in regard to any facet of the FRP applying to firefighters remaining in service after February 1, 2013. The Court perceives no impairment of contract insofar as the dual plan system treats contributions to and benefits of the FRP after February 1, 2013 differently than contributions to and benefits of the FRS before February 1, 2013. Thus, the Court perceives no impediment to imposing a 9% contribution rate on all active firefighters for services from and after February 1, 2013. If the Court's prior opinion led the parties to conclude otherwise, the Court was more opaque in its analysis than usual.

23. Firefighters with less than 20 years' service have no contract rights in the FRS, with one exception: in the Court's view, such firefighters have a right to the refund of

contributions to the FRS made prior to February 1, 2013. This may not be a contractual right, but R.C. § 4.18.265 quite clearly makes the FRS contribution a part of the firefighter's lawful salary, and § 4.18.210 makes the contribution refundable. Cases may quibble about whether this amounts to a contract right or a property right, but the Court concludes that it is an enforceable right.

24. The Court's construction of the ordinances at issue leads it to the conclusion that the dual plan system preserves all vested rights as of February 1, 2013, including the right of all firefighters subject to the FRS to a refund of contributions to the FRS on termination of employment or retirement. If the Court is in error, plaintiffs would be entitled to a declaration of rights that precluded the City from denying such vested rights, if for no other reason than that the City may not retrospectively strip away such rights. Mo.Const. art. I, § 13.

25. The Court concludes that the cost statement provided to the Board of Aldermen in connection with the adoption of Ordinance No. 69353 complies with the requirements of § 105.665, RSMo. The Court concludes that § 105.684 does not apply in the context of the ordinances here at issue. The intent of § 105.684 was to require some assurance of the ability of a local government to fund planned increases in pension benefits prior to the time such increases take effect. Here, the dual plan system freezes existing benefits under the FRS and creates a new plan which, beyond peradventure, does not constitute a benefit

increase or enhancement and virtually eliminates lump sum payments to retirees in the future.

26. Ordinance No. 69183 is invalid as revising the authority and duties of the FRS trustees in a manner that is irreconcilable with the terms of §§ 87.140 & 87.145. *FRS v. City*, supra. The ordinance also conflicts with the Declaratory Judgment Act, §§ 527.010 et seq., and with Mo.Const. art. I § 14. Cf. *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771 (Mo.banc 2003). This is particularly true when the issue involves the trustees' duties with regard to the administration of the public funds within their management and control.

27. The Missouri Uniform Trust Act, §§ 456.010 et seq., has no application to the case at bar. The trustees under the FRS do not administer an ordinary private trust and the City is not just a settlor of a trust. The trustees are part of an administrative agency with specified responsibilities for administering a pension system and the public funds allocated for that purpose. They have exclusive jurisdiction to pass upon applications for benefits. Cf. *State ex rel. Lambert v. Padberg*, 145 S.W.2d 123 (Mo.banc 1949). They act in a fiduciary capacity for the benefit of firefighters and their families, *Firemen's Retirement System v. City of St. Louis*, supra, 789 S.W.2d at 486, but, in this Court's opinion, they also have fiduciary duties to the City. The terms of the "trusts" in this case are defined by

statute or ordinance, not by a trust indenture. The provisions of the Trust Act are applicable only by analogy, if at all.

28. The Court concludes that the FRS trustees retain the authority to manage the FRS so as to accomplish an orderly termination and winding up. The City's obligation remains undiminished to provide adequate funding to ensure payment of FRS benefits until there are no longer any beneficiaries entitled to receive them. This is so notwithstanding the provision of R.C. § 4.19.170(B) disclaiming direct liability of the City to participants or beneficiaries under the FRP. The duty of the City to provide adequate funding of the FRS is not affected by § 4.19.170(B). Cf. *Neske v. City of St. Louis*, supra. The precise scope of the City's obligations in the future to the FRP is not before the Court. It is presumed that the City, the FRS trustees, and the FRP trustees will cooperate in the performance of their respective duties under the law.

29. Count IX of the amended petition in No. 1222-CC02916 and the petition in No. 1322-CC00006 assert an alternative claim to an order compelling the City to make additional, massive contributions to the FRS if the dual plan system is held valid. The evidence of record suggests that such a claim is at best premature. The City may be required to make additional contributions to the FRS to ensure the actuarial soundness of the "closed-end" plan, but, so long as benefits can continue to be paid with existing assets, the Court considers that the issue of additional contributions is not ripe at this time. Cf. *Tomlinson*

v. *Kansas City*, 391 S.W.2d 850 (Mo. 1965). (The Court neglected to discuss *Tomlinson* in its prior Memorandum and Order, as the case turned on the standing of individual pension system members to compel additional funding of a pension system when all benefits were being paid. The authority of *Tomlinson* has been compromised by *Neske v. City of St. Louis*, supra, but it does counsel caution in proceeding with actions to compel funding of pension systems. The Court also notes that *Tomlinson*, in discussing a Michigan case, implies that firefighters who have made purportedly refundable contributions to a pension system may have enforceable contractual rights to a return of those contributions.)

ORDER AND JUDGMENT

In light of the foregoing, it is

ORDERED that the preliminary injunction heretofore granted as to City of St. Louis Ordinances Nos. 69245 and 69353 be and the same is hereby dissolved; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff trustees of the Firemen's Retirement System of the City of St. Louis have judgment against defendant City on plaintiffs' claims regarding St. Louis City Ordinance 69183, and it is declared that said ordinance is invalid and of no force or effect insofar as the plaintiff trustees act to manage the Firemen's Retirement System of the City of St. Louis; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendant City, its officers, agents, employees and all persons acting in concert

with them having notice of this judgment be and they are hereby restrained and enjoined from implementing or enforcing St. Louis City Ordinance No. 69183 as to the trustees of the Firemen's Retirement System of the City of St. Louis; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that defendant City of St. Louis have judgment against plaintiffs and plaintiff-intervenors on all claims alleged in the petitions and counterclaims pleaded in these consolidated causes regarding St. Louis City Ordinance No. 69245 as amended by Ordinance No. 69353, and the rights, status and legal relations of the parties under St. Louis City Ordinances Nos. 69353 and 69245 are declared as follows: said ordinances are validly enacted pursuant to Mo. Const. art. VI, § 19(a) and the Charter of the City of St. Louis; as construed herein, said ordinances do not impair the vested or contract rights of members of the Firemen's Retirement System as the same existed on February 1, 2013; said ordinances do not conflict with any statute of the State of Missouri and may be implemented by the City of St. Louis and the duly constituted board of the Firemen's Retirement Plan and the trustees of the Firemen's Retirement System of the City of St. Louis in accordance with the terms of said ordinances; the trustees of the Firemen's Retirement System of the City of St. Louis shall continue in office and shall pay benefits as required by Ch. 4.18 of the Revised Code of the City of St. Louis and the ordinances embodied therein, with regard to members of the Firemen's Retirement System as of February 1, 2013, until such time as

there are no longer any members or survivors of members entitled to benefits thereunder, at which time the Firemen's Retirement System of the City of St. Louis shall be dissolved and any unexpended funds shall revert to the City of St. Louis; the City of St. Louis has the right to recover firefighter employee contributions paid to the Firemen's Retirement System of the City of St. Louis on or after February 1, 2013 for payment into the Firemen's Retirement Plan of the City of St. Louis; the FRS trustees have the right to recover from the City the cost of benefits paid by FRS since February 1, 2013, which benefits were payable under the Firemen's Retirement Plan; the City of St. Louis continues to be obligated to provide sufficient funds to maintain the actuarial soundness of the Firemen's Retirement System of the City of St. Louis to discharge all liabilities for present and future benefits, computed as of February 1, 2013; and it is

FURTHER ORDERED, ADJUDGED AND DECREED on the Court's own motion that the claims alleged by plaintiffs in count IX of the amended petition in No. 1222-CC02916 and count VII of the petition in No. 1322-CC00006 be and the same are hereby dismissed without prejudice as unripe; each party shall bear its own costs herein (including attorney's fees).

SO ORDERED:

Robert H. Dierker
Circuit Judge

Dated: _____, 20__
cc: Counsel/parties pro se