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

THE FIREMEN'S RETIREMENT SYSTEM, etc., et al.,	)	
Plaintiffs,	)	
v.	)	No. 1222-CC02916
	)	Div. 18
THE CITY OF ST. LOUIS,	)	
Defendant.	)	

MEMORANDUM AND ORDER

> MR. NACY: Senator, as I remember, one of the purposes for which the proceedings in this Convention are being reported was to aid judges in the future, ignorant judges in the future, to determine what this Convention had in its mind. If you were a judge and read this argument that has just taken place, what side would you be on?
>
> PRESIDENT: Is there further discussion of Section 12 or any amendments?
>
> *From the Debates of the Constitutional Convention of Missouri, 1944, regarding proposed Section 12, authority of local governments to provide for pensions, p. 3934.*

Mr. Nacy never got an answer to his question, and now the Court, "the ignorant judge in the future," must divine what the people meant in 1945 when they adopted Mo.Const. art. VI, §25, and, as if that task were not enough, the Court must also divine what the people meant when they adopted Mo.Const. art. VI, §19(a), regarding powers of constitutional charter cities, and what the General Assembly meant when it adopted §§ 87.120, et seq., RSMo 2000 & Supp., authorizing a firemen's retirement system for the City of St. Louis. Of course, if

there were no tasks like this, there would be no need for judges in the first place, so the Court must not seem resentful.

"Pension Crisis Looms Despite Cuts" warns a front page headline in the *The Wall Street Journal*, September 22-23, 2012, p. 1. Playing out their parts in this national drama, the trustees of the Firemen's Retirement System of St. Louis (FRS for short), Local 73 of the International Association of Fire Fighters, three active firefighter members of FRS, one retired beneficiary, and the City of St. Louis are before the Court as a result of the City's efforts to curb its pension costs, which now consume an annual sum exceeding 50% of the actual payroll of active duty firefighters. The original plaintiffs, the FRS and its trustees, and the intervenor plaintiffs, Local 73 and the four individuals, seek declaratory and injunctive relief to annul ordinances 69149, 69183, and 69245 enacted by the City in 2012. Ordinance 69183, referred to in the record as Board Bill 11, imposed restrictions on the authority of the FRS trustees to litigate changes in the City's pension plan for firefighters. Ordinances 69149 and 69245 (the latter referred to in the record as Board Bill 12) purported to repeal the existing pension plan and substitute a new plan with significant reductions in benefits for firefighters not yet retired.

Board Bill 11 was the subject of a separate trial. The claims as alleged in the original petition and carried forward in the FRS trustees' amended petition[1] assert that the ordinance is invalid as in

[1]The FRS trustees filed two amended petitions, both labeled "first amended petition." The Court is treating the amended petition as the one filed on July 23, 2012.

conflict with the enabling statutes, with the City Charter, with the open courts guaranty of the Missouri Bill of Rights, with the Missouri Uniform Trust Act, and with the Declaratory Judgment Act. After advancing the trial on the merits of the claims regarding Board Bill 11 and consolidating it with the preliminary injunction hearing, the Court granted a preliminary injunction and would be in a position to address the merits of the FRS trustees' claims (the intervenors have no role as to Board Bill 11), but for the issue of mootness, discussed below.

Board Bill 12 and its precursor, ordinance 69149, are the subject of similar contentions by the FRS trustees and the intervenors: the ordinances conflict with the enabling statutes, exceed the City's constitutional home rule powers, conflict with the City Charter, contravene the open courts guaranty, and unconstitutionally impair the obligation of contract in a variety of ways, chiefly by reducing benefits and altering the City's funding obligations. The claims regarding Board Bill 12 have been the subject of a preliminary injunction hearing. The bill was to take effect on or about August 28, 2012, but the parties consented to an order delaying implementation until October 1, which is the beginning of the FRS fiscal year and the date on which the City's annual contribution to the pension fund is usually made.

The parties have amassed a considerable record before this Court. In the Court's view, however, there are virtually no facts in dispute. The City has a pension system for firefighters, enacted pursuant to §§ 87.120, et seq. The FRS is governed by ordinances codified at Ch.

4.18 of the Revised Code of the City of St. Louis. Until the enactment of Board Bill 11, Ch. 4.18 reproduced almost verbatim the language of the enabling legislation. Board Bill 11 amends § 4.18.060 of the Revised Code to redefine the powers and duties of the FRS trustees.

The provisions of Board Bill 11 are incorporated in Board Bill 12, which repeals Ch. 4.18 regarding the firemen's pension system and replaces it with Ch. 4.19 of the Revised Code. Board Bill 12 in terms creates a "firefighters' retirement plan" to replace the "firemen's retirement system." Board Bill 12 thus fulfills the conditional repeal of Ch. 4.18 enacted by ordinance 69149.

It is at once apparent that the enactment of Board Bill 12 supersedes Board Bill 11. The claims regarding Board Bill 11 are therefore moot–unless Board Bill 12 is itself invalid. Given the procedural posture of the case, the Court cannot reach the validity of Board Bill 11 until it determines the validity of Board Bill 12. If Board Bill 12 is valid, § 4.18.060, as amended, is superseded. If Board Bill 12 is invalid in whole or in part, the Court will be required to declare the rights and obligations of the parties under Board Bill 11, at least to the extent that the FRS survives as an operating entity. Because the Court cannot render advisory opinions or address moot questions, see, e.g., *Akin v. Director of Revenue,* 934 S.W.2d 295 (Mo.banc 1996), it must either dismiss the claims regarding Board Bill 11 or stay them until resolution of the claims regarding Board Bill 12.

Because parties may plead claims alternatively or hypothetically, Rule 55.10, Mo.R.Civ.P., the Court concludes that it can stay the claims regarding Board Bill 11 until it determines if the disposition of the other claims infuse it with the life of a real controversy. In the latter event, the Court can proceed to enter a judgment as to Board Bill 11; otherwise, the claims will be dismissed.

Board Bill 12 contains several provisions not found in Ch. 4.18 or in the enabling legislation. The material facts as to the claims regarding Board Bill 12 appear to the Court to be as follows. (The following does not fully detail all of the changes to pension benefits wrought by Board Bill 12, due to the time constraints on the Court in resolving the motion for preliminary injunction. The Court has attempted to focus on issues most material to preliminary relief. Naturally, the Court's findings are interlocutory and may be revisited when the Court enters final judgment.)

As noted, Board Bill 12 repeals Ch. 4.18 and replaces the FRS with a new plan. The new plan provides for the transfer of all assets of the FRS to the new plan. The FRS trustees become the trustees of the new plan. Current beneficiaries of the FRS are "grandfathered" into the new plan. Benefits accrued under the FRS as of the effective date of Board Bill 12, with some limitations, are carried forward into the new plan and the trustees are directed to continue to provide such benefits. Actuarial calculations under the new plan to govern City contributions to the plan are to be performed by 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 new

plan 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. Although both methods are considered valid by professional actuaries, 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 Ch. 4.18 (in conformity to the enabling statutes) do not precisely track either method.

Board Bill 12 also significantly alters the costs and benefits of the pension plan to firefighters. Under Ch. 4.18, firefighters contribute 8% of their annual salary to the pension fund. That contribution is refunded in its entirety upon retirement or departure from the City's service. Under Ch. 4.19, the contribution rate is increased to 9% and is non-refundable (except if employment is terminated prior to ten years of service). In addition, the pension benefits under the new plan are reduced. In particular, under Ch. 4.18, a firefighter was eligible to retire with full pension benefits after 20 years of service, without regard to age. Under Ch. 4.19, firefighters cannot retire with full benefits unless they reach the age of 55 and have 20 years' service. The retirement benefit under Ch. 4.18 is computed by reference to the firefighter's salary during his last two years of service; under Ch. 4.19, the benefit is computed

by reference to an average of the firefighter's salary during his last five years of service.

There are other alterations in the benefits scheme under the new plan which need not detain us long. Pension credit for accumulated sick leave is limited, cost of living increases are limited, and disability benefits are curtailed by Ch. 4.19, without regard to the provisions of the enabling statutes on these subjects.

Although the cost to the City of the FRS is quite large, and growing, there is no evidence that the City is or will be unable to meet its obligations under Ch. 4.18 now or in the foreseeable future. Likewise, there is no evidence that the financial burden of the FRS is preventing the City from servicing its bonded indebtedness, meeting its statutory obligations to fund the police force, or creating any manifest risk to the public health, safety or welfare. The Court finds credible, however, the testimony of the City's Budget Director that the current trajectory of FRS cost is likely to lead to severe fiscal stress in the foreseeable future.

The Court finds that the enactment of Board Bill 12 has created significant morale problems within the St. Louis Fire Department, that the pendency of the litigation is causing confusion and uncertainty in the administration of the FRS and in the ranks of firefighters who are at or near retirement under the FRS, and that the trustees have been subjected to the threat of liability whether they act or fail to act in conformity to Board Bill 12. The Court credits the testimony of intervenors that they have relied on the continued existence of the FRS in remaining as employees of the St. Louis Fire Department. The

Court also finds it likely that implementation of Board Bill 12 will result in an increase in retirements of experienced firefighters who are eligible to receive the full pension benefit under the FRS and whose departure from employment could create operational difficulties for the fire department in the short term. (The Court does not find that a large number of retirements will necessarily jeopardize the safety of the citizens of the City. There is no evidence that the department cannot adequately protect the public even if there is a significant loss of more senior personnel.)

Plaintiffs have presented evidence of administrative difficulties in merging the FRS with the new plan, including expenses connected with revising actuarial and benefit computations, and uncertainty regarding the employment of staff to assist the trustees in the future. The extra expenses to create computer software to incorporate new benefits calculations could be substantial, but are by no means extraordinary. The evidence shows that the principal aides to the FRS would be continued in employment under the new plan, although supervision of staff would be entrusted to the City's director of personnel rather than to the trustees themselves. The administrative adjustments hardly amount to irreparable harm to the FRS as a matter of fact.

Standing

The City’s answer alleges that the FRS trustees lack standing to bring this action. The Court rejects this argument. The Supreme Court has recognized the FRS as an entity with the capacity to bring an action through its trustees to enforce the City’s obligations under

the pension ordinances and to secure declaratory relief concerning the relations between the FRS and the City. There can be no doubt that the FRS and its trustees have standing to bring this action. See *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). Of course, even without the FRS and its trustees, this action could be prosecuted by the individual intervenor plaintiffs.

Home Rule and the Enabling Statutes

This case is at the center of a tangled skein of cases, statutes and constitutional provisions. At one time, public employee pensions were viewed as gratuities, mere grants of public money to private individuals. At least since 1875, the Missouri Constitution has prohibited grants of public money to private persons by the State or by municipalities. Mo.Const. art. IV, §§ 46 & 47 (1875). Early efforts to provide pensions for policemen and firemen foundered on these provisions. *State ex rel. Heaven v. Ziegenhein,* 144 Mo. 283, 45 S.W. 1099 (banc 1898). So it came about that the constitution was amended to permit the General Assembly to authorize municipalities to provide for the pensioning of members of organized fire and police departments. It appears that the first grant of authority to permit pensions of firemen was by amendment of article IV, § 47 of the 1875 constitution.

During the constitutional convention of 1944, the issue of public employee pensions was discussed at some length. What is now Mo.Const. art. VI, § 25 was adopted so as to permit the General Assembly to

authorize municipalities having a population in excess of 100,000 to provide pensions for policemen, firemen and other employees. At one point, there was discussion about whether the constitutional provision would require a charter city to seek enabling legislation, and some of the delegates to the convention apparently believed that a charter city could act on its own authority. However, the question was never resolved explicitly. 1944 Constitutional Convention Tr. 3930. The revision of article VI, § 25 was duly enacted in 1945, amended in 1948 to further enlarge the range of municipalities which could be authorized to grant pensions, and § 25 assumed its present form in 1966, providing as follows:

> No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the surviving spouses and children of of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and the surviving spouses and minor children of such deceased employees; and except also, any county, city or political corporation or subdivision may provide for the payment of periodic cost of living increases in pension and retirement benefits paid under this section to its retired officers and employees and spouses of deceased officers and employees, provided such pension and retirement systems will remain actuarially sound.

The enabling legislation for the FRS was originally adopted in 1943. In 1959, the enabling statutes were repealed and reenacted. Since 1959, § 87.125 has provided that the City of St. Louis "is

hereby authorized, subject to the provisions of section 87.120 to 87.370, to provide by ordinance for the pensioning of members of any . . . organized fire department . . .” Ch. 4.18 was adopted in response to the 1959 version of the enabling legislation.

While the Missouri constitution was being revised to address state and local authority to provide for public employee pensions, its provisions regarding other aspects of municipal authority were also evolving. In particular, the authority of “home rule” charter cities was the subject of several constitutional changes. The City of St. Louis has been a constitutional charter city since 1875, with the adoption of Mo.Const. art. IX, § 20. The 1945 constitution carried forward the City’s status and recognized its charter as then existing. Mo.Const. art. VI, §§ 30-33. The 1945 constitution also authorized other cities to adopt charters. Mo.Const. art. VI, § 19. The authority of charter cities was limited, however, by a proviso that the charter and ordinances adopted thereunder must be “consistent with and subject to the constitution and laws.” In 1971, however, the citizenry adopted Mo.Const. art. VI, § 19(a). That section provided that a city adopting a charter “shall have all powers which the general assembly . . . has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.”

The language of § 19(a) was held to mean what it says in *Cape Motor Lodge, Inc. v. City of Cape Girardeau,* 706 S.W.2d 208 (Mo.banc

1986), and *State ex inf. Hannah ex rel. Christ v. City of St. Charles,* 676 S.W.2d 508 (Mo.banc 1984). As the *Cape Motor Lodge* opinion puts it, 706 S.W.2d at 211 [citations omitted]:

> Under section 19(a), the emphasis no longer is whether a home rule city has the authority to exercise the power involved; the emphasis is whether the exercise of that power conflicts with the Missouri Constitution, state statutes or the charter itself. Conflicts between local enactments and state law provisions are matters of statutory construction. Once a determination of conflict between a constitutional or statutory provision and a charter or ordinance provision is made, the state law provision controls. * * *
> The test for determining if a conflict exists is whether the ordinance "permits what the statute prohibits" or "prohibits what the statute permits."

Because § 19(a) has been recognized as a direct grant of power to constitutional charter cities by the constitution itself, a charter city may legislate on subjects even if its charter does not expressly refer to those subjects or authorize the legislation in question. Accordingly, charter cities have been held to have the authority to condemn land outside their boundaries, *City of Cape Girardeau v. Jett,* 851 S.W.2d 114 (Mo.App.E.D. 1993), to issue "special obligation" bonds, *Wunderlich v. City of St. Louis,* 511 S.W.2d 753 (Mo.banc 1974), and to annex land, *State ex. inf. Hannah ex rel. Christ v. City of St. Charles,* supra, without enabling legislation or specific charter authority, because each of these powers could have been granted to the city by the General Assembly.

On the other hand, the courts have not entirely forsaken the influence of the old “Dillon’s rule” of strict construction of municipal authority, when there is a perceived inconsistency between state and municipal policy on a subject. As the Supreme Court

observed in *Yellow Freight Systems, Inc. v. Mayor's Comm. on Human Rights,* 791 S.W.2d 382, at 385 (Mo.banc 1990), the scope of power that the General Assembly itself can confer on a charter city "must be subject to some limitation," such that a charter city cannot invade the province of general legislation involving the public policy of the state as a whole. Thus, the courts have found constitutional charter city authority may be "preempted" by comprehensive state legislation on the matter. When the City of St. Louis sought to impose a use tax in a form not authorized by statute, it was held that the City's ordinance conflicted with comprehensive state legislation on the subject of sales and use taxes and was "preempted." See *Alumax Foils, Inc. v. City of St. Louis,* 959 S.W.2d 836 (Mo.App.E.D. 1997).

In general, however, absent conflict with the constitution, the line of demarcation between a charter city's authority to legislate and preemptive state policy is usually discerned by comparing state and municipal legislation on the subject to determine if the City ordinance permits what the statutes prohibit or prohibits what the statutes permit. In making this comparison, the courts do not infer either prohibition or permission from mere statutory silence. See *City of Kansas City v. Carlson,* 292 S.W.3d 368 (Mo.App.W.D. 2009) (charter city could forbid smoking in bars even though state statute excluded bars from its coverage by definition); cf. *Brotherhood of Stationary Engineers v. City of St. Louis,* 212 S.W.2d 454 (Mo.App.St.L. 1948)(city could impose additional licensing requirements beyond statutory requirements where statute did not limit requirements "to its own prescriptions").

The simplest form of limitation on a constitutional charter city's authority is that created by express statutory language. If the General Assembly enacts a statute authorizing municipal legislation on a subject and expressly mandates that any municipal legislation must conform to the enabling statute, an ordinance in conflict with the enabling legislation is invalid. For example, in *State ex inf. Hannah ex rel. Christ v. City of St. Charles,* supra, even though the charter city needed no enabling legislation or charter authority to annex land, the city was bound by the Sawyer Act, which provided: "Should any city . . . seek to annex an area to which objection is made, the following *shall be satisfied* . . ." This language was held to preempt the city charter. 676 S.W.2d at 513. Similarly, in *State ex rel. Hazelwood Yellow Ribbon Committee v. Klos,* 35 S.W.3d 457 (Mo.App.E.D. 2000)(Teitelman, J.), a proposed charter amendment to restrict tax increment financing was precluded by an express prohibition on referenda in the enabling statute, § 99.835.3. Finally, in *ACI Plastics, Inc. v. City of St. Louis,* 724 S.W.2d 513 (Mo.banc 1987), the City Sales Tax Act was held to mandate submission of sales tax propositions in conformity to the statute, so that an ordinance submitting a sales tax increase in a manner inconsistent with the statute was invalid.

Applying these principles to the case at bar, it is apparent, first, that Mo.Const. art. VI, § 25 does not operate as a limitation on the authority of a constitutional charter city to enact pension legislation for its employees. On the contrary, § 25 is a grant of authority to the General Assembly to in turn authorize cities to

create pension systems. Since the General Assembly has this authority to grant cities that power, the plain terms of § 19(a) authorize constitutional charter cities to enact pension legislation with or without enabling statutes. Far from violating § 25, Board Bill 12 is a valid exercise of the City's direct constitutional authority, unless a statute limits or denies that authority.

The authority of a charter city to enact pension legislation relating to its own employees was recognized by the Supreme Court even before the adoption of § 19(a). In *Kansas City v. Brouse,* 468 S.W.2d 15 (Mo.banc 1971), the Supreme Court was confronted with a charter city ordinance establishing a pension system for municipal judges. The Kansas City charter authorized pensions as permitted by state law. After a revision to article VI, § 25 in 1966, Kansas City adopted the pension plan for municipal judges, but its officers declined to fund the plan without state enabling legislation. The Supreme Court held, 468 S.W.2d at 17-18:

> Although the Kansas City charter had for many years included the power to establish retirement for its officers, it necessarily had to await the grant of such power under the state constitution, which came about by the above-mentioned constitutional amendment to Art. VI, Sec. 25, adopted January 14, 1966. The amendment provides ". . . the general assembly may authorize any . . . city . . . to provide for the retirement . . . of its officers . . .", but this does not mean an act of the legislature was required for Kansas City to proceed with the adoption of a retirement plan for its municipal judges, because the home rule charter provisions of the state constitution have delegated the legislative power over municipal affairs to a city which accepts the same by adopting a home rule charter, as Kansas City has done, so that subsequent changes in the constitution which permit the general assembly to provide for retirement plans for cities, by construction permit a home rule charter city to make the same provisions for its officers and employees. This because the powers which the city has under its home rule charter are a direct grant from the organic law of the

> state . . .
> The charter of Kansas City must be "consistent with and subject to the constitution and laws of the state", Art. VI, Sec. 19, 1945 Constitution, but in our opinion what Kansas City has done here is not an invasion of the province of general legislation, is not out of harmony with the policy of the state as declared by laws for the people at large, and is consistent with the constitution.

Brouse shows that charter cities had power to adopt pension plans even before § 19(a). There is no reason whatever to believe that § 19(a) restricted that home rule authority. On the contrary, §§ 19(a) and 25 construed together give the City plenary legislative authority over municipal pensions unless the General Assembly expressly limits or restricts that authority. So, the question in this case becomes, does § 87.125 limit or deny the authority of the City to adopt Board Bill 12?

Section 87.125 provides in pertinent part that the City of St. Louis

> is hereby authorized, subject to the provisions of sections 87.120 to 87.370, to provide by ordinance for the pensioning of members of any . . . organized fire department and of the dependents of deceased members thereof and to take form its municipal revenue a fund for such purpose. The fund shall be under the management of a board of trustees herein described and shall be known as "The Firemen's Retirements System of [the City of St. Louis] and by such name all of its business shall be transacted, all of its funds invested and all of its cash and securities and other property held.

The FRS enabling legislation has repeatedly been held to be permissive, i.e., the City is under no obligation to adopt ordinances establishing a firemen's pension system as authorized by the statute, nor is the City obligated to adopt ordinances to conform to amendments of the enabling legislation. *Firemen's Retirement System v. City of*

St. Louis, 754 S.W.2d 21 (Mo.App.E.D. 1988); *Trantina v. Bd. of Trustees of FRS,* 503 S.W.2d 148 (Mo.App.St.L. 1973)(enabling legislation not "preemptory"). It has likewise been held that if the City acts *pursuant to* the enabling legislation, it is obliged to conform to the statutory standards. *Trantina,* 503 S.W.2d at 152. The permissive character of the enabling legislation leads ineluctably to the conclusion that § 87.125 does not mandate that the City may adopt only one form of a firefighters' pension system, i.e., that authorized by §§ 87.120 et seq.

In the Court's view, this case is the obverse of the Sawyer Act case, *State ex inf. Hannah ex rel. Christ v. City of St. Charles*. As discussed above, the Sawyer Act was mandatory in that it provided that any charter city seeking to annex land "shall" satisfy the statutory desiderata. By contrast, nowhere in the FRS enabling legislation is there a legislative command that if the City chooses to adopt a firefighters' pension system, it "shall" conform to the enabling legislation. The language "subject to" in § 87.125 does not amount to a mandate that the City can adopt one form of a firefighters' pension system and no other. Rather, that language means only that if the City chooses to adopt the system contemplated by the enabling legislation then it must do so "subject to" the statutory standards. It does not preclude action under the City's constitutional charter authority. This conclusion is consistent with the permissive character of the FRS enabling statutes; it is also required by another consideration: Mo.Const. art. VI, § 22.

Not only does the Missouri constitution endow constitutional charter cities with "home rule" powers but also it limits the ability of the General Assembly to control certain aspects of municipal government by article VI, § 22, which antedates both § 19(a) and § 25 of the same article. Section 22 provides:

> No law shall be enacted creating or fixing the powers, duties or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution . . .

The prohibition of § 22 clearly applies to pensions of employees of constitutional charter cities. There is considerable uncertainty in Missouri law about whether the term "compensation" includes pensions, see *Police Ret. System v. Kansas City,* 529 S.W.2d 388 (Mo. 1975); but see *Mo. Prosecuting Attys. & Circuit Attys. Ret. System v. Barton County,* 311 S.W.3d 737 (Mo.banc 2010)(term "compensation" in amended article VI, § 11 included pensions); but there can be no doubt that the plain terms of § 22 preclude legislation mandating that the City adopt a pension ordinance or only one form of such an ordinance, as such legislation would plainly intrude on the powers and duties of the Board of Aldermen of the City with respect to a matter of purely municipal concern. As the Supreme Court held in *Firemen's Retirement System v. City of St.* Louis, supra, 789 S.W.2d at 486, the pension enabling legislation did not contravene article VI, § 22, because of its permissive character. See also *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"). It would hardly be consistent with the "permissive" rationale to hold that the

legislature can limit the City's authority to adopt employee pension plans to a single form prescribed by the legislature. Indeed, the holding of *Kansas City v. Brouse* is directly contrary to such a notion.

Plaintiffs' contention that the FRS enabling legislation permits the City to adopt only one firefighters' pension, the one authorized by the enabling legislation, flies in the face of article VI, § 22. To adopt plaintiffs' construction would render the enabling legislation unconstitutional. To avoid that result, § 87.125 must be construed as requiring the City to conform to the enabling legislation only if it chooses to act pursuant to that legislation. If it elects an independent course, the enabling legislation is irrelevant.[2]

In sum, §§ 87.120 et seq. are not mandatory unless the City chooses to enact an ordinance adopting the pension plan therein authorized. If the City chooses to do so, its ordinances must conform to the enabling legislation as it stands as of the time of enactment of the ordinances. If the City chooses to adopt its own pension system under authority of article VI, § 19(a), it may do so without reference to §§ 87.120 et seq.

Given that Board Bill 12 is a valid exercise of the City's home rule authority to control the terms and conditions of employment of its employees, the next question is whether and to what extent the

[2] Plaintiffs allude to § 71.010, RSMo 2000 & Supp., as limiting the City's authority to adopt any pension plan but the one contemplated by § 87.125. Section 71.010 provides that if there is a general law of the state on a subject, charter cities must conform their ordinances to the state law "upon the same subject," unless the city's charter prescribes otherwise. That statute does not and cannot make a permissive enabling statute mandatory. Furthermore, as discussed *post*, the City Charter gives the City express authority to adopt its own pension schemes.

City is free to abolish the FRS and merge its existing members and assets into the new plan. In other words, must the operation of Board Bill 12 be limited to firefighters employed after its effective date?

The City's ordinances establishing the FRS, at least since 1959, have expressly provided that the City reserves the right to amend or repeal them. § 4.18.345. Both parties acknowledge that the enabling legislation is silent on the issue of repeal or termination. The parties draw diametrically opposed conclusions from this silence. Plaintiffs assert that the statutory silence amounts to prohibition, and so the City ordinance permits what the statute prohibits and is in conflict with it. The City argues that silence leaves the manner of termination to the legislative discretion of the City. The City further argues that the soundest manner of terminating the FRS and providing for the vested rights of its members is to merge the assets and members of the FRS into the new plan, with due provision for the vested rights of those members.

At this time, the Court is persuaded that the City may repeal Ch. 4.18, but the Court is not persuaded that the City has the authority to merge the FRS into the new plan. In the Court's view, so long as there are vested members of the FRS, the City is not free simply to transfer those members and the assets of the FRS to another plan. Section 87.125 is explicit that the assets of the FRS are to be managed and controlled by the trustees of the FRS, not some other entity. Furthermore, as will be discussed *post*, the City is not at liberty to impair the vested rights of the FRS members. That

limitation derives from the constitution and is a very definite check on the home rule authority of the City to enact pension legislation.

Applying the reasoning of *City of Kansas City v. Carlson,* supra, to this case, it is clear that the silence of the enabling legislation on the subject of termination does not preclude termination. Nevertheless, when the City acts within the context of the FRS, it must conform to the enabling legislation insofar as that legislation prescribes the manner of action. *Trantina,* supra. The Court therefore concludes that the City is not entitled to divest the FRS trustees of their exclusive management and control of the assets of the FRS, except to the extent that those assets exceed the sums necessary to provide accrued benefits to the vested members of the FRS on an "actuarially sound" basis. To permit such a transfer of assets would, in the Court's view, directly contravene § 87.125. In short, the Court accepts the City's right to terminate the FRS, but it cannot accept the City's right to merge the FRS into the new plan. Merger does not follow inexorably from termination.

To be sure, the merger language of § 4.19.010.E is virtually identical to the language used in § 4.18.335 to transfer the assets of the FRS existing under earlier enabling legislation to the FRS as created by ordinance in 1959, pursuant to the 1959 enabling legislation. However, the merger of the pre-1959 FRS and the current FRS occurred pursuant to the enabling legislation. In adopting Ch. 4.19, the City is very definitely *not* acting pursuant to enabling legislation. Consequently, the City cannot rely on the 1959 merger as precedent for undertaking the merger contemplated by Board Bill 12.

Board Bill 12 is careful to condition the new plan's obligations to pay benefits accrued under the FRS on the transfer of the FRS assets to the new plan. §§ 4.19.010.E, 4.19.170.D. That implies that the drafters of Board Bill 12 recognized the possibility that the merger of the plans could not take place in the manner prescribed; but because Board Bill 12 does not condition its enforceability on the merger of assets, it seems to the Court that the drafters contemplated the eventuality that the FRS would have to continue as a parallel system as to some or all of the FRS members as of the effective date of repeal of Ch. 4.18.

The Court recognizes that the City's preferred mode of terminating the FRS may be entirely reasonable. The problem, in the Court's view, is that the City's charter authority simply does not endow it with the unfettered right to merge the FRS into the new plan. The fact that the enabling legislation makes no provision for terminating the FRS permits the City to repeal its ordinances; but repeal implies an orderly winding up of the affairs of the FRS. This winding up means making provision for the continued payment of accrued benefits to vested members from the assets of the FRS, and continued management of the FRS by the trustees for the benefit of those vested members.

The testimony of the actuaries in the record to date reflects puzzlement at the concept of terminating a public employee pension plan, but their supplemental affidavits suggest to the Court that it is feasible to operate a "closed end" pension fund. Whether such a course would be unduly expensive for the City is a matter for decision

by the City. Nevertheless, the Court is bound ultimately to declare the rights and duties of the parties under the relevant constitutional provisions, the statutes, the charter and ordinances. At this preliminary injunction stage, the Court's conclusion that the law forbids the merger of the FRS into the new plan militates in favor of granting a preliminary injunction to preserve the status quo.

The City Charter

Plaintiffs and intervenors contend that Board Bill 12 contravenes the City Charter. The Court disagrees.

The charter is the City's organic law of which the Court takes judicial notice, see Mo.Const. art. VI, § 33. Article XVIII of the charter provides in part:

> The mayor and aldermen shall provide, by ordinance:
> * * *
> **(b) Retirement system.** For a contributory retirement system on a sound actuarial basis, if an when permissible under the Constitution and Laws of the State of Missouri, to provide for the retirement of employees in the classified service who have become unable to render satisfactory service by reason of physical or mental incapacity . . .
> * * *
> The [civil service] commission shall have power, and it shall be its duty:
> * * *
> **(b) Ordinances.** To recommend to the mayor and aldermen in accordance with this article, ordinances to provide for:
> * * *
> (2) a plan for a system of retirement of superannuated and otherwise incapacitated employees, if and when permissible under the Constitution and Laws of the State of Missouri . . .
> [Charter, art. XVIII, §4(b) and §6(b).]

This language plainly authorizes the establishment of a City pension plan by ordinance. See also Charter, art. XVIII, §3(r), regarding civil service rules pertaining to a retirement system. To the extent the charter appears to contemplate retirement by reason of

incapacity, the Court considers that the reference to "superannuated" and "incapacitated" includes age-based retirements, and the Board of Aldermen is free to determine who is "superannuated" or "incapacitated." Even if the charter authority for pensions is more limited, the direct grant of authority to constitutional charter cities in § 19(a) permits the City to adopt pension plans unless forbidden by the charter. See *State ex inf. Hannah ex rel. Christ v. City of St. Charles,* supra; *City of Cape Girardeau v. Jett,* supra.

Impairment of Contract

Both the federal and state constitutions contain express prohibitions on legislation impairing the obligation of contract. U.S. Const. art. I, § 10; Mo.Const. art. I, § 13.

The modern mode of determining whether legislation impairs the obligation of contract is not faithful to the plain meaning of the constitutional provision, but it does require as a first step an inquiry as to whether there is indeed a contract, followed by a determination if there is a "substantial" impairment. See, e.g., *Am. Fed. of State, County & Muni. Employees v. City of Benton,* 513 F.3d 874 (8th Cir. 2008). If there is a "substantial" impairment, modern federal constitutional law next inquires if there is a good enough reason for the impairment. In effect, the federal law has relegated the contracts clause to a category of deprivation of property without due process. See K. Sullivan & G. Guenther, *Constitutional Law* 534 (2004). If the State's interest in enacting the impairment is weighty enough, it will usually survive scrutiny, although the State's authority to impair its own contracts is subjected to more searching

review. See *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977). The Court's research does not disclose any significant difference between the application of the federal contracts clause and the Missouri constitutional counterpart.

In the context of public employment, it is well established that even "tenured" public employees do not have a contract of employment that is enforceable by an action in law or equity. E.g., *Holmes v. Kansas City,* 364 S.W.3d 615 (Mo.App.W.D. 2012). However, pension rights present a knottier question.

The contractual rights of public employees who are participants in a government pension system in Missouri appear to depend on three things: first, whether their participation is the result of a voluntary election by them; second, whether the applicable pension legislation contains language to the effect that the pension benefits provided are deemed obligations of the governmental entity and no later amendment or repeal shall affect the existing or accrued rights of the participants; and, third, whether the plan is a contributory plan. 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).

There are three groups of persons affected by the incipient termination of the FRS: retirees (including surviving spouses and disabled) who are currently receiving benefits; firefighters who have accumulated 20 or more years of creditable service; and firefighters who have less than 20 years of service.

Breshears and *Atchison* recognize that beneficiaries of a public employee pension plan may acquire vested, contractual rights to benefits under the plan, but *Atchison* refers to the existence of the pension fund and repeal of the pension statute, implying that termination of the fund and repeal of the pension statute could terminate even the rights of retirees. On the other hand, *Breshears* and *Phillip* recognize and enforce contractual rights of active employees, precluding enforcement of pension plan amendments.

In *Fraternal Order of Police Lodge #2 v. City of St. Joseph,* 8 S.W.3d 257 (Mo.App.W.D. 1999), the city of St. Joseph, a constitutional charter city, amended its police pension plan to eliminate the use of accumulated sick leave and vacation payments in the calculation of the employee's last annual salary for purposes of computing the pension benefit, with the effect of reducing the pension. In rejecting an action brought by serving police officers to invalidate the change in the pension plan, the Court of Appeals held, 8 S.W.3d at 264:

> The general rule is that a pension granted by public authorities is not a contractual obligation but is a gratuitous allowance, in the continuance of which the pensioner has no vested right, and that a pension is accordingly terminable at the will of the grantor, either in whole or in part. *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). And since there is no contract on the part of the state to continue the payment of a benefit or annuity, a change in the law affecting such benefit or annuity does not impair the obligation of a contract or deprive a pensioner of property within the constitutional meaning. *Id.* Governmental employees can have no property rights in a pension fund, nor can those claiming under them have any such rights except their claims be based upon and come within the laws governing the fund. *Id.* The extent of the rights which vested in employees is governed by the controlling statute in effect at the time their rights to a pension vested, which became a part of the

> contract of employment as much as if its provisions were written therein. *Atchison v. Retirement Bd. of Police Retirement System of Kansas City*, 343 S.W.2d 25, 34 (Mo. 1960).

Section 4.18.325 of the governing FRS ordinance provides that "all benefits granted under the provisions of this chapter are hereby made obligations of the City," but it does not expressly provide that future amendments or repeal will not affect rights existing at the time of amendment or repeal. It is a contributory plan, and, even though membership in FRS is made a condition of employment, the plan must be construed as "voluntary," since no firefighter is compelled to accept employment with the City and correlative membership in the FRS.

In light of the language of Ch. 4.18 and the cases regarding public employee pension rights, the Court concludes, and none of the parties disputes, that retirees under the FRS have a continued right to receive benefits under the FRS plan as in force prior to the effective date of Board Bill 12. Further, in the Court's view, there is little to distinguish between firefighters who have 20 years' service and who are eligible to retire as of the effective date of Board Bill 12 and firefighters who retired the day before. It seems to the Court that the *St. Joseph* case overlooks the class of pension plan participants who, "after contributing to the fund through the years as required under the [ordinance], and after attaining the retirement age and meeting the requirements of creditable service," *Atchison,* supra, 343 S.W.2d at 34, could apply for and be granted pensions as of the effective date of the repeal of the FRS ordinances. To exclude that class of FRS beneficiaries from the status of persons

with rights fully accrued and finally vested is arbitrary. The Court concludes that such vested firefighters have "private rights" in pension benefits under the FRS, rights which cannot be impaired, or denied without due process. Cf. *State ex rel. Police Ret. System v. Murphy,* 224 S.W.2d 68 (Mo.banc 1949). Whether these vested rights are seen as property rights or contract rights, the result is the same: the City is without power to deny them.

The situation is otherwise with respect to firefighters who have not attained 20 years' service as of the effective date of Board Bill 12. These firefighters are in the same position as the police officers in *Fraternal Order of Police v. City of St. Joseph,* supra; see also *Savannah R-III Sch. Dist. v. Public School Ret. System,* 950 S.W.2d 854 (Mo.banc 1997). The City expressly reserved the right to amend or repeal Ch. 4.18. § 4.18.345. In repealing Ch. 4.18, Board Bill 12 recognizes most of the benefits attributable to a firefighter's service under the FRS. Even if it did not, however, it would not impair any contractual rights of firefighters with less than 20 years' service.

The Court also concludes that there is no impairment of any contractual rights of any active firefighter by reason of Board Bill 12's alteration of disability retirement benefits as to firefighters who have not yet been granted such disability retirement. Again, the City reserved the right to amend or repeal the FRS ordinances, and 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 disability retirement benefits.

Given that some contract rights are impaired by Board Bill 12 on its face, the next question is whether that impairment is substantial. On the record to date, the Court finds that Board Bill 12 does threaten a substantial impairment of those rights. The new plan contains several provisions for "grandfathering" FRS beneficiaries. Superficially, at least, these provisions seem to preserve intact the accrued rights of the vested firefighters and retirees. See Pl.Ex. 36. However, it appears to the Court on this record that Board Bill 12 entails impairment of contract in two respects: the merger or transfer of assets from the FRS to the new plan, without a corresponding unqualified obligation of the City to fund accrued and vested benefits; and the alteration in the "deferred retirement option plan" ("DROP") to the disadvantage of firefighters with 20 years' service who have not attained the age of 55.

It simply cannot be denied that the obligations to current retirees and vested firefighters depend on the actuarial soundness of the FRS plan as it existed as of the date of repeal. To combine the assets of the FRS plan with those of the new plan is to imperil the ability of the retirees and vested members to obtain their full benefits, given that Board Bill 12 expressly limits the City's obligations under the new plan (including the obligations to pay accrued benefits under the "grandfathering" provisions) to the assets of the plan. § 4.19.170.B. This appears to the Court to amount to a substantial impairment of those persons' vested contractual rights.

Cf. *State ex rel. Breshears v. Mo. State Employees Ret. System,* supra. Accordingly, this is a substantial issue warranting preliminary relief at this stage of the proceedings.

Open Courts

Section 4.19.140.B of Board Bill 12 incorporates the language enacted in Board Bill 11 with regard to the powers and duties of the trustees of the new plan (who are the FRS trustees by another name). This aspect of Board Bill 12 is attacked by the FRS trustees on the same bases as they attacked Board Bill 11.

Due to the necessity of entering an order on the motion for preliminary injunction prior to the beginning of the FRS plan year, October 1, the Court will defer extensive discussion of the attack on § 4.19.140.B until its disposition of all claims on the merits. The foregoing discussion necessarily implies that the Court will be obliged to consider the validity of Board Bill 11, since the Court has tentatively concluded that the FRS will continue to exist for some period of time. The Court will content itself at this time with two observations.

First, the trustees of the FRS and of the new plan occupy the same status: they are in essence part of an administrative agency of the City, charged with administration of public funds. See *Weber v. Firemen's Retirement System,* 872 S.W.2d 477 (Mo.banc 1994). As such, their powers and duties ordinarily can be prescribed by the City in its sole discretion. Mo.Const. art. VI, § 22; *State ex rel. Burke v. Cervantes,* 423 S.W.2d 791 (Mo. 1968).

Second, even if the trustees of the FRS or the new plan can be disabled from taking certain actions in their official capacities to obstruct or contest City policy, it does not follow that the City, by ordinance, can close the courthouse door to them when a ripe, justiciable controversy arises concerning their powers or duties. 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.

Trust Law

Upon further consideration, the Court has concluded that 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. As noted above, 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.

Remedies

At this stage, the Court is able to rule only on the motion for preliminary injunction directed at Board Bill 12. As discussed above, the claims regarding Board Bill 11 depend on the ultimate validity of Board Bill 12. Because it is likely that Board Bill 12 is invalid at least in part, the Court will necessarily address the validity of Board Bill 11 in its final judgment on all claims. The record to date persuades the Court that little, if any, additional evidence is required in order for the Court to dispose of all claims on the merits.

Plaintiffs at this time have established a probability of success on the merits, if that is defined as presenting serious questions going to the merits and making a fair ground for further litigation. The intervenor plaintiffs have, in the Court's view, established the requisite probability of irreparable harm, arising chiefly from the unquantifiable harm to heretofore settled expectations and career choices. While a preliminary injunction will not necessarily assuage the potential harm to the intervenor plaintiffs, it seems to the Court that preservation of the status quo for a limited period will aid all parties in preparing for the eventuality that the existing FRS will be terminated in whole or in part.

The Court is likewise persuaded that the balance of hardships and the public interest counsel preservation of the status quo pending final judgment. The City has already budgeted

for the contribution to the FRS as required under the existing system. There is no evidence that actual payment of the contribution so budgeted will cause significant fiscal harm to the City. Both the City and the FRS trustees need additional time to develop administrative mechanisms for dealing with the termination of the FRS and the establishment of the new plan. Finally, the administrative expense and inconvenience that would be entailed by allowing the new plan to go forward, merging assets, and then having to unravel the FRS from the new plan if merger of assets is not permitted, impel the Court to delay that merger--the more so as the Court predicts that the parties will be required to maintain dual systems for an extended period of time.

The grant or denial of a preliminary injunction is always discretionary. Such relief is ideally suited to the preservation of the status quo. Given that the City's pension system for firefighters has been in the making for the better part of a century, the re-making of the system can stand a little more time and judicial attention.

ORDER

In light of the foregoing, it is

ORDERED that the preliminary injunction heretofore granted be and the same is hereby continued in effect pending further order; and it is

FURTHER ORDERED that defendant City of St. Louis, its officers, agents, employees and all persons acting in concert

therewith having notice of this Order be and they are hereby preliminarily restrained and enjoined from implementing or enforcing Ordinance 69245 of the City of St. Louis, known as Board Bill 12, pending further order; provided, that nothing herein shall prevent the parties from taking such administrative steps as shall seem to them to be prudent to prepare for the termination of the Firemen's Retirement System of the City of St. Louis and the activation of the pension plan provided by Board Bill 12; cash bond previously posted shall be treated as applicable to this order; and it is

FURTHER ORDERED that all claims alleged in the plaintiffs' amended petition with regard to the validity or construction of Ordinance 69183 of the City of St. Louis, identified in the pleadings and record as Board Bill 11, be and they are hereby stayed pending disposition of claims regarding Board Bill 12 and ordinance 69149; and it is

FURTHER ORDERED that trial on the merits remains set for Monday, October 22, 2012, commencing at 9:00 a.m. in Division 18; a case management conference pursuant to Rule 62.01, Mo.R.Civ.P., is set for Thursday, October 18, 2012, at 11:00 a.m. in Division 18.

SO ORDERED:

_____
Robert H. Dierker
Circuit Judge

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