APPENDIX

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APPENDIX A

State of Rhode Island
Supreme Court

No. 2017-36-Appeal.
(KC 13-1059)
(formerly PC 13-3212)

[Filed June, 3 2019]

Cranston Police Retirees Action Committee	)
	)
v.	)
	)
The City of Cranston, by and through its Finance Director Robert Strom and its City Treasurer David Capuano, et al.	)

Present: Suttell, C.J., Goldberg, Flaherty, Robinson, and Indeglia, JJ.

O P I N I O N

Chief Justice Suttell, for the Court. This appeal concerns two 2013 Cranston city ordinances that promulgated a ten-year suspension of the cost-of-living-adjustment (COLA) benefit for retirees of the Cranston Police Department and Cranston Fire Department who were enrolled in the City of

Cranston's pension plan. The plaintiff, Cranston Police Retirees Action Committee (CPRAC or plaintiff), initiated this litigation against the City of Cranston (the City), Mayor Allan Fung, and the members of the Cranston City Council (collectively, defendants), alleging a litany of claims ranging from constitutional violations to statutory infringements. A Superior Court justice, sitting without a jury in a trial held over six days in November 2015, found in favor of the defendants on all counts. The plaintiff now raises several issues for our consideration related to the trial justice's rulings on an assortment of motions and her findings of fact and conclusions of law. For the reasons set forth in this opinion, we affirm the judgment of the Superior Court.

I

Facts

In 1937, the City established a pension fund for members of its police and fire departments. By the mid-1980s, the pension fund had become a significant financial concern. In the early1990s, Mayor Michael Traficante met with police and firefighter union leaders in an attempt to address the problem. Ultimately, in 1996, the City passed two ordinances based on an agreement reached with the unions, creating a two-tiered pension system (the 1996 ordinances). The 1996 ordinances, No. 96-54 for firefighters and No. 96-56 for police officers, provided that all members of the police and fire departments hired after July 1, 1995, would be enrolled in the state's pension system. Additionally, those members with five or fewer years of service could elect to stay in the City's pension plan or

enroll in the state's pension system. For the members remaining in the City's pension plan, the 1996 ordinances provided for a minimum 3 percent compounded COLA, or, alternatively, a percentage equal to that of a contractual increase for active members. The unions bargained for this COLA to match the benefits that were being offered under the state's pension plan.

The fiscal issues related to the City's pension plan did not subside with the passage of the 1996 ordinances. By July 1, 1999, the unfunded accrued liability of the City's pension plan exceeded more than $169 million. The City's pension liability remained an issue throughout the early 2000s. Mayor John O'Leary, who succeeded Mayor Traficante, borrowed against the pension fund in his final year in office to pay the then-retirees' health care costs and base pensions.[1]

When Mayor Fung took office in 2009, the City was in "dire" fiscal condition. At that time, Cranston faced a severe economic recession that was affecting all parts of the country. As such, the City experienced high unemployment rates and over $1 billion in decreased property values. Moreover, state aid decreased substantially between 2007 and 2011, and two devastating floods in the spring of 2010 also inflicted a financial toll on the City. In order to improve its financial situation, the City made cuts to personnel, eliminated city vehicles, and increased health care co-shares for its employees.

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[1] Those amounts were repaid to the pension fund the following year.

In 2011, the General Assembly passed the Rhode Island Retirement Security Act (RIRSA), G.L. 1956 chapter 65 of title 45, legislation focused on promoting the sustainability of municipal pension systems. *See* § 45-65-2. Pursuant to § 45-65-4, a municipality's pension plan would be in "critical status" if "as determined by its actuary, as of the beginning of the plan year, a plan's funded percentage for such plan year is less than sixty percent (60%)." A municipality administering a plan in "critical status" is required, under RIRSA, (1) to give notice of such status to plan participants and other listed individuals and entities and (2) to submit a funding improvement plan detailing the municipality's strategy for emerging from that status. Section 45-65-6. A commission within the Department of Revenue that had been set up under the statute established guidelines for the funding improvement plans, suggesting that, "[g]enerally, the funding improvement period should not exceed 20 years with the plan emerging from critical status within that timeframe." Municipalities not in compliance with the statute faced a reduction in state aid. Section 45-65-7.

Mayor Fung's administration analyzed the health of the City's pension system during his first term. By June 30, 2011, the unfunded accrued liability of the pension plans had risen to $256 million.[2] In 2012, the

[2] One of the biggest factors contributing to this unfunded liability of the plan was historic underfunding of the plan due to the City's failure to pay 100 percent of its annual required contribution (ARC). Mayor Fung testified that the ARC is the amount that the City is supposed to contribute to the pension plan as determined

pension system was funded at only 16.9 percent, meeting the definition for "critical status" pursuant to § 45-65-4. In accordance with § 45-65-6, Mayor Fung sent a letter to all pensioners enrolled in the City's pension system informing them of the "critical status." The City next put together an "alternative funding improvement plan consistent with the [requirements of § 45-65-6]." In doing so, the City considered a number of options, including raising taxes, cutting more personnel, and eliminating city services. Additionally, in September 2012, Mayor Fung met with City pensioners to keep them apprised of the pension situation and also to propose a ten-year COLA suspension as the preferred method of raising the plan from critical status. Thereafter, Mayor Fung presented the COLA suspension plan to the City Council in two proposed ordinances in October 2012.

Shortly after, Mayor Fung withdrew the proposed ordinances in favor of negotiations with the plan participants, and, in the months that followed, he met with the police and firefighter unions and persons who represented the City's police and firefighter retirees. After meeting with the unions and retirees, the City's actuaries ran twenty to thirty additional scenarios for plans to lift the pension system from critical status. Ultimately, however, the City enacted two ordinances on April 23, 2013 (the 2013 ordinances)—No. 2013-5, governing police retirees, and No. 2013-6, governing fire retirees—suspending the minimum 3 percent COLA for ten years, beginning July 1, 2013.

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by City actuaries "after reviewing the plan, all the plan participants, the funding of the plan, [and] the investments[.]"

Following the passage of the 2013 ordinances, The Cranston Police Department Retirees Association, Inc., and Local 1363 Retirees Association filed suit against the City on behalf of retirees enrolled in the City's pension plan, alleging that the 2013 ordinances violated the United States and Rhode Island Constitutions. The parties reached a settlement agreement, and a final consent judgment was entered in December 2013. The agreement provided for a COLA suspension in alternating years for ten years, and a 1.5 percent COLA payment in years eleven and twelve. Each retiree was given the opportunity to opt out of the settlement agreement and to retain the right to pursue civil claims against the City. The members of CPRAC are retirees enrolled in the City's pension system who opted out of the settlement agreement.

II

Procedural History

A

Pretrial Motions

On June 28, 2013, plaintiff filed an eight-count complaint in Superior Court against the City, Mayor Fung, and the members of the Cranston City Council.[3] The complaint included allegations of violations of the

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[3] The complaint named John Lanni, Jr., Donald Botts, Jr., Mario Aceto, Michael J. Farina, Michael W. Favicchio, Paul H. Archetto, Richard D. Santamaria, Jr., Sarah Kales Lee, and Steven A. Stycos, in their capacity as members of the Cranston City Council. The named members of the city council, along with Mayor Fung, will be referred to hereafter as the "Non-City" defendants.

United States and Rhode Island Constitutions, a state statute, and breach of contract.[4] The defendants filed a motion to dismiss six of the eight counts, as well as an answer to the complaint. The trial justice granted defendants' motion to dismiss in part, dismissing counts VI and VIII of the complaint. During the course of discovery, defendants filed a motion for a protective order to prevent plaintiff from deposing city councilmember John Lanni, Jr. On September 15, 2015, the trial justice granted defendants' motion on the basis that Lanni enjoyed the privilege of legislative immunity, and that the topics about which plaintiff sought to question Lanni were related to his position as a legislator.

In the month prior to trial, the parties filed several motions for summary judgment. On October 9, 2015, the Non-City defendants filed a motion for summary judgment on all remaining counts. One week later, the

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[4] In count I, plaintiff sought a declaration that the 2013 ordinances violated the Contract Clauses of the United States and Rhode Island Constitutions. The plaintiff alleged a breach of contract claim and constitutional violation of the Takings Clauses of the United States and Rhode Island Constitutions in count II. In count III, plaintiff alleged that the enactment of the 2013 ordinances by the mayor and city council members was facially unconstitutional, and sought a declaratory judgment to that effect. Count IV of the complaint alleged that the enactment of the 2013 ordinances was barred by the doctrine of *res judicata* and that the ordinances were thus void *ab initio*. Count V of the complaint asked for equitable or injunctive relief. In counts VI and VII, plaintiff alleged a violation of civil rights pursuant to 42 U.S.C. §§ 1983 and 1988, and the Open Meetings Act, G.L. 1956 chapter 46 of title 42, respectively. Finally, in count VIII, plaintiff alleged that defendants violated the fiduciary duty owed to retirees.

City filed a motion for summary judgment as to plaintiff's Takings Clause claim. The plaintiff filed its own motion for summary judgment on October 19, 2015, seeking summary judgment on its claims based on *res judicata* and on the violation of the Rhode Island Open Meetings Act, G.L. 1956 chapter 46 of title 42 (the OMA). The City also filed a cross-motion for summary judgment as to the *res judicata* and OMA counts.

The trial justice heard arguments on all four summary judgment motions at a hearing held on November 2, 2015. On that same day, the trial justice issued a decision from the bench, granting summary judgment in favor of the Non-City defendants on all counts, and in favor of the City as to *res judicata* and the Takings Clause claim. The trial justice reserved judgment on the OMA claim until November 6, 2015, when she rendered a bench decision granting summary judgment in favor of the City.

The City had also filed a motion *in limine* to determine the appropriate burden of proof for the Contract Clause claim. The trial justice heard arguments on this motion at the November 2, 2015 hearing, and rendered a bench decision on November 6, 2015. The trial justice relayed that she would employ a burden-shifting analysis on part of the Contract Clause analysis, with specific burdens of production on each party at each stage of the analysis.

Three days before trial, the City sought leave to amend its answer to the complaint to specifically deny some of plaintiff's allegations and to formally add an affirmative defense. The City contended that these

amendments would simply ensure that its pleading conformed to the positions that it had taken throughout the litigation and to evidence the City intended to introduce during the upcoming trial. The trial justice granted the City's motion to amend on the morning the trial began, over plaintiff's objection.

B

Trial

On November 9, 2015, the first day of trial, three counts of plaintiff's complaint remained: violation of the Contract Clause, breach of contract, and injunctive relief. Sixteen witnesses testified over the course of five days. Their testimony is summarized below.

The plaintiff presented testimony from nine members of CPRAC, two former Cranston mayors, and an actuary, who provided expert testimony. The City presented testimony from the current mayor, the City's finance director, an actuary, and a current Cranston firefighter.

Glenn Gilkenson, president of CPRAC, testified first. Gilkenson retired from the Cranston Police Department in 2008 after twenty-five years of service. Gilkenson testified that, according to the collective bargaining agreement under which he retired, he received a pension and COLA adjustments. According to Gilkenson, after the 2013 ordinances passed, he spoke to a few retired police officers and firefighters who werein the same situation, and they decided to form a nonprofit organization, CPRAC, to fight the suspension of their COLA benefits. Gilkenson testified that CPRAC started with seventy-five members, and,

at the time of trial, had seventy-one members. Gilkenson testified that it was CPRAC's policy and strategy to not negotiate with the City with respect to a reduction of the COLA, and he also stated that the COLA freeze had impacted his personal finances.

Following Gilkenson's testimony, plaintiff presented eight other members of CPRAC as witnesses over the course of the first two days of trial: retired firefighter Vincent Matrumalo and retired police officers Edward Walsh, William Lynch, David Greene, Robert Davies, Charles Galligan, Edward Evans, and Vincent Maccarone. Similar to Gilkenson's testimony, these CPRAC members consistently testified that they had believed they would receive COLA benefits for life, and that the suspension of the COLA benefit had a significant financial impact on their lives. Each of the CPRAC members' collective bargaining agreements (CBAs) were admitted as trial exhibits. Each CBA, beginning in 1997, provided for COLAs to the pension benefits at a rate of at least 3 percent, compounded on July 1 of each year.

The plaintiff then called Michael Traficante, mayor of Cranston from 1985-1999, to the stand. Mayor Traficante testified that he became aware of the City's pension crisis as early as 1984, when he served as city council president. He further testified about negotiations with the police and firefighter unions in the mid-1990s to address the pension crisis. According to Mayor Traficante, the City explored many alternatives to address the pension liability aside from moving the pensioners into the state system, including a pension bond or supplemental tax, but ultimately

decided that moving the pensioners into the state system was the best course of action. The plaintiff also called Mayor Traficante's successor, John O'Leary, to testify. Mayor O'Leary served as mayor from 1999 until 2003. Mayor O'Leary testified that, in his final year as mayor, he borrowed money from the fire and police pension fund as a one-time allocation to pay for retirees' health care costs, and that the debt was repaid the following year.

The City's current mayor, Allan Fung, took the stand next, having been called by defendants. Mayor Fung testified that, just after he took office in 2009, he examined the City's fiscal condition and discovered that it was "very dire." According to Mayor Fung, the economic recession of the late 2000s had taken a toll on the City, as it had on other cities across the country, and made it difficult for the City to raise revenue. Additionally, Mayor Fung testified, the City experienced two devastating floods in 2010, and state aid decreased dramatically in the first few years of his administration—by $18 million between 2007 and 2011. Mayor Fung testified that he felt that if the City did not address the financial crisis, Chapter 9 bankruptcy "could be a very real possibility[.]"

Mayor Fung further testified about the critical status of the City's pension system as of 2011, stating that, at its lowest point, the system was funded at only16.9 percent, with $256 million of unfunded accrued liability. He testified that a combination of factors led to this situation, including the compounded COLAs for municipal retirees and historic underfunding of the entire municipal pension system.

Mayor Fung testified that his administration considered many alternatives to determine the best solution for emerging from "critical status" within the twenty-year guideline. In addition to a ten-year suspension of the COLA, Mayor Fung testified, the City implemented wage freezes, layoffs of City employees, tax increases, health care co-share increases, and expense reduction, in order to raise revenue during its financial crisis.

Robert Strom, finance director for the City, testified next for defendants. Strom reiterated Mayor Fung's statements that the City had suffered a financial crisis during the first few years of the Fung administration. Strom further testified that he believed that the City would face serious consequences if the twenty-year guideline for emerging from "critical status" was not met, including reduced or eliminated state funds, which were instrumental to the City's budget. Strom also testified that raising taxes on the City's residents would not resolve the pension system's problems because the City would need to raise taxes so substantially that it would have been unfair and unsustainable, considering the fact that the City already had one of the highest tax rates in the state.

The plaintiffs called their retained expert, William Fornia, to the stand on the penultimate day of trial.[5] Fornia testified that he is an actuary by profession and had been a pension consultant for several large

[5] The day before Fornia testified, the City moved to prevent him from testifying as to certain subjects, a motion that the trial justice denied.

consulting firms for many years prior to starting his own company. Fornia testified that, based on his expert analysis of the actuarial reports commissioned by the City, the COLA suspension caused an average loss of $210,000 per retiree. Fornia further testified that the City's pension problems were foreseeable and predictable, and that the City had not chosen the least drastic remedy available when it chose to suspend the COLAs.

After the plaintiff rested, the City called two more witnesses to conclude the testimony at trial: expert witness Daniel Sherman, an actuary, and Paul Valletta, Jr., a current Cranston firefighter and president of the firefighters' union. Sherman rebutted some of plaintiff's expert's conclusions, particularly with respect to the pension system's shortfall calculation and the COLA change alternatives. Valletta testified about the negotiations between Mayor Fung and the unions and retirees prior to the passage of the ordinances. The trial ended on November 17, 2015.

On July 22, 2016, the trial justice issued a written decision resolving, in favor of the City, the claims for violation of the Contract Clauses of the United States and Rhode Island Constitutions, breach of contract, and injunctive relief. The details of her decision that are salient to the issues plaintiff raises on appeal will be discussed *infra*. Final judgment in favor of all defendants was entered on August 4, 2016.

C

Posttrial Motions

Following entry of final judgment, the City filed a motion for costs. The plaintiff objected and filed a motion to stay consideration of the bill of costs until plaintiff's appeal was decided by this Court. The trial justice heard argument on the motions on October 13, 2016, when she summarily denied plaintiff's motion to stay and awarded costs to the City in the amount of $9,717.85.

III

Issues on Appeal

Before this Court, plaintiff challenges several pretrial decisions, some of the trial justice's findings and conclusions after trial, and the posttrial award of costs in favor of the City.[6] Specifically, plaintiff argues that the trial justice erred by: (1) finding that the 2013 ordinances did not violate the Contract Clauses of the United States and Rhode Island Constitutions; (2) misapplying the burden of proof in the Contract Clause analysis; (3) misconceiving and misapplying expert testimony; (4) granting summary judgment in favor of the City as to the Takings Clause, *res judicata*, and OMA claims; (5) granting defendants' motion for a protective order as to Councilmember Lanni; (6) granting summary judgment in favor of the Non-City defendants on all counts; (7) granting the

[6] The plaintiff does not challenge the trial justice's decision following trial with respect to the claims for breach of contract or injunctive relief.

City's motion to amend its answer shortly before trial; and (8) summarily dismissing plaintiff's motion to stay and granting, in part, the City's motion for costs. We will take each issue in turn.

A

Contract Clause

The trial justice concluded that the 2013 ordinances suspending plaintiff's members' COLAs did not violate the Contract Clauses of the United States or Rhode Island Constitutions. Before this Court, plaintiff claims two errors as to the trial justice's Contract Clause analysis. First, plaintiff argues that the trial justice erred in the determination and application of the burden of proof at trial. Second, plaintiff argues that the trial justice erred in ultimately finding in favor of the City on this issue.

This Court has held that we "will apply a *de novo* standard of review to questions of law that may implicate a constitutional right." *Goetz v. LUVRAJ, LLC*, 986 A.2d 1012, 1016 (R.I. 2010). However, we will not disturb the factual findings made by a trial justice sitting without a jury "unless such findings are clearly erroneous or unless the trial justice misconceived or overlooked material evidence." *Gregoire v. Baird Properties, LLC*, 138 A.3d 182, 191 (R.I. 2016) (deletion omitted) (quoting *South County Post & Beam, Inc. v. McMahon*, 116 A.3d 204, 210 (R.I. 2015)). "When the record indicates that competent evidence supports the trial justice's findings, we shall not substitute our view of the evidence for his or hers even though a contrary conclusion could have been reached." *Id.* (brackets

omitted) (quoting *South County Post & Beam, Inc.*, 116 A.3d at 210).

The Contract Clauses of the United States and the Rhode Island Constitutions prevent the state from enacting laws "impairing the obligation of contracts[.]" U.S. Const. Art. I, § 10, cl. 1; R.I. Const. art. 1, § 12. "Although the Contract Clause appears literally to proscribe 'any' impairment, * * * 'the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula.'" *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 21 (1977) (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934)). Moreover, "[t]hough the Framers apparently had in mind only purely private contracts (particularly debt obligations) the Clause routinely has been applied to contracts between states and private parties." *Nonnenmacher v. City of Warwick*, 722 A.2d 1199, 1202 (R.I. 1999) (deletion omitted) (quoting *McGrath v. Rhode Island Retirement Board, Etc.*, 88 F.3d 12, 16 (1st Cir. 1996)). The Contract Clause "has been interpreted to apply to municipalities as well." *Id.*

We have previously adopted the United States Supreme Court's three-part analysis for Contract Clause issues. *Nonnenmacher*, 722 A.2d at 1202 (citing *General Motors Corporation v. Romein*, 503 U.S. 181, 186 (1992)). "A court first must determine whether a contract exists." *Id.* (citing *McGrath*, 88 F.3d at 16). Second, "[i]f a contract exists, the court then must determine whether the modification results in an impairment of that contract and, if so, whether this impairment can be characterized as substantial." *Id.*

(citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)). "Finally, if it is determined that the impairment is substantial, the court then must inquire whether the impairment, nonetheless, is reasonable and necessary to fulfill an important public purpose." *Id.* (citing *Energy Reserves Group, Inc.*, 459 U.S. at 412).

1

Burden of Production

Before addressing the merits of plaintiff's Contract Clause argument, we turn to whether the trial justice erred in her conclusions about the burden of production at each stage of the analysis. When the trial justice ruled on the City's motion *in limine* regarding the burden of proof for plaintiff's Contract Clause claim, she set out the following rubric: (1) "[p]laintiff bears the burden of production in establishing [whether the state law has substantially impaired a contract] beyond a reasonable doubt"; (2) if plaintiff meets that burden, "the burden of production shifts to the defendant to prove" that the 2013 ordinances were reasonable and necessary to fulfill a significant and legitimate public purpose; and (3) "[t]hereafter, a plaintiff may, of course, rebut with evidence that the legislation was not reasonable and necessary * * * beyond a reasonable doubt." The trial justice further stated that the City's burden with respect to demonstrating a reasonable and necessary legitimate public purpose would be satisfied by credible evidence. The trial justice also stated that she would use a "less deference" standard in evaluating the City's argument whether the legislation was reasonable or necessary.

On appeal, plaintiff asserts that, despite her articulated rubric, the trial justice gave "nearly complete deference" to the City regarding the degree and necessity of the contractual impairment. The plaintiff argues that the City should have been required to demonstrate, at the very least, a preponderance of the evidence, rather than "credible evidence," regarding its justification for the impairment; and plaintiff contends that the correct standard in this case should actually be clear and convincing evidence. For its part, the City argues that the trial justice should not have shifted the burden of production at all, but that she ultimately reached the correct conclusion. We review the trial justice's determination and application of the burden-shifting analysis *de novo*. *See Panarello v. State Department of Corrections*, 88 A.3d 350, 366 (R.I. 2014). We note that "it would be reversible error for a trial justice to apply the wrong burden of proof." *Id.*

"[T]he term 'burden of proof' embraces two different concepts"—the burden of production and the burden of persuasion. *Murphy v. O'Neill*, 454 A.2d 248, 250 (R.I. 1983). "The 'burden of persuasion' refers to the litigants' burden of establishing the truth of a given proposition in a case by such quantum of evidence as the law may require[,]" and it "never shifts." *Id.* (punctuation omitted). The burden of production, also referred to as the "burden of going forward with the evidence," *DeBlois v. Clark*, 764 A.2d 727, 732 n.3 (R.I. 2001), "shifts from party to party as the case progresses." *Murphy*, 454 A.2d at 250.

We must first resolve whether the trial justice properly determined that a burden-shifting analysis applies in this case. Courts have not been uniform in shifting the burden of production to the state in the Contract Clause context following a finding of substantial impairment. For example, in *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307 (6th Cir. 1998), the Sixth Circuit required that a "*state* must proffer a 'significant and legitimate' public purpose for the regulation warranting the extent of the impairment caused by the measure." *Pizza*, 154 F.3d at 323 (quoting *Energy Reserves Group Inc.*, 459 U.S. at 411) (emphasis added). However, in *United Automobile, Aerospace, Agricultural Implement Workers of America International Union v. Fortuño*, 633 F.3d 37 (1st Cir. 2011), the First Circuit held that "*the plaintiffs* bear the burden on the reasonable/necessary prong of the Contract Clause analysis[,]" and that "neither [the First Circuit] nor the Supreme Court has ever held" that the state must prove reasonableness and necessity of the regulation. *Fortuño*, 633 F.3d at 42, 44 (emphasis added). The First Circuit has also acknowledged, however, that "many courts have concluded that this burden rests with the state, and others, including this court and the Supreme Court, have used language that arguably supports such a conclusion." *Id.* at 43 (footnotes omitted). Indeed, in *Energy Reserves Group, Inc.*, the United States Supreme Court held that, "[i]f the state regulation constitutes a substantial impairment, *the State, in justification*, must have a significant and legitimate public purpose behind the regulation[.]" *Energy Reserves Group, Inc.*, 459 U.S. at 411 (emphasis added); *see also United States Trust Company of New York*, 431 U.S. at 31 ("In the instant

case *the State* has failed to demonstrate that repeal of the 1962 covenant was similarly necessary.") (emphasis added).

This Court has not yet expressly adopted a burden-shifting analysis regarding the Contract Clause, but we have alluded to it: "if the law constitutes a substantial impairment, can *the state* show a legitimate public purpose behind the regulation * * *?" *Rhode Island Depositors Economic Protection Corporation v. Brown*, 659 A.2d 95, 106 (R.I. 1995) (citing *Energy Reserves Group, Inc.*, 459 U.S. at 411-12) (emphasis added). In that case we held, however, that no contractual right was implicated, and therefore we did not reach this factor of the Contract Clause analysis. *Id.* Given the language of the standard set out in the United States Supreme Court cases and the general logic that the City would have access to the information and motivation to demonstrate its justification for the contractual impairment, we find no fault in the trial justice's conclusion that the City bore the burden of production as to the reasonable-and-necessary element of the analysis.

We proceed now to plaintiff's argument that the trial justice erred in requiring the City to proffer only credible evidence of its justifications, and that she erred in her application of the burden of proof because she gave the City "nearly complete deference," which effectively failed to shift the burden of production to the City at all. We have previously held that "a duly enacted ordinance carries with it a presumption of constitutionality which will disappear only on a contrary showing beyond a reasonable doubt." *Town of*

Glocester v. Olivo's Mobile Home Court, Inc., 111 R.I. 120, 124, 300 A.2d 465, 468 (1973). "[H]owever, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Company of New York*, 431 U.S. at 25-26. Thus, as the trial justice in the present case noted, a "less deference" standard was appropriate to analyze the City's proffered evidence for the reasonableness and necessity of the 2013 ordinances. *See Baltimore Teachers Union, American Federation of Teachers Local 340, AFL-CIO v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1019 (4th Cir. 1993) ("While complete deference is inappropriate, however, at least some deference to legislative policy decisions to modify these contracts in the public interest must be accorded.").

The specific quantum of proof the City must meet has not been clearly set forth either by this Court or the United States Supreme Court. However, the Supreme Court has said that, if substantial impairment is found, "the State, *in justification*, must have a significant and legitimate public purpose behind the regulation," and that the government actor is afforded a limited amount of deference as to that showing. *Energy Reserves Group, Inc.*, 459 U.S. at 412. Thus, we find no error in the trial justice's determination of the burden of proof in this case.

With respect to her application of the burden of proof, a review of the record and the trial justice's decision demonstrates that the trial justice did not fail to shift the burden of production to the City. It is clear that the trial justice required the City to put forth

evidence demonstrating a significant and legitimate public purpose for the 2013 ordinances, and that the 2013 ordinances were reasonable and necessary. Moreover, we disagree with plaintiff that the trial justice afforded the City complete deference. In fact, the trial justice set forth a credible evidence standard to be sure that the City was not afforded complete deference as to its justifications.[7] The trial justice, as required of a factfinder at trial, weighed the evidence and made credibility determinations. The fact that she gave "great weight" to testimony at trial by Strom, Sherman, and Mayor Fung does not equate to "complete deference." Thus, we also find no error in the trial justice's application of the burden of proof.

2

Substantive Claim

We will next examine plaintiff's arguments as to the merits of its Contract Clause claim. In her decision following trial, the trial justice concluded that plaintiff had met its burden of establishing that the 2013 ordinances substantially impaired the contractual rights of plaintiff's members beyond a reasonable doubt. The trial justice specifically found that the 3 percent COLA was a vested right under the contract,

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[7] Before trial, the trial justice rejected the City's request for an "any admissible evidence" standard, noting that "[a]n any admissible evidence standard does not allow for any level of judicial scrutiny." The trial justice instead determined that she would employ the higher standard of credible evidence in order to balance the interests between the "constitutional context here and the utilization of less deference scrutiny."

and that the "cumulative impact [of the 2013 ordinances] to the individual was substantial." Moreover, the trial justice found that the City had demonstrated a significant legitimate public purpose: "to remedy the fiscal emergency and keep at bay threatened cuts in state aid which would inexorably worsen the fiscal situation." The trial justice also concluded that the 2013 ordinances were reasonable and necessary, finding that the City presented sufficient evidence that it had considered alternatives, a more moderate course was not available, and the 2013 ordinances were reasonable in light of the surrounding circumstances because they were "circumscribed, temporary, precipitated by a fiscal emergency, and prospective."

The City argues that the trial justice erred in concluding that plaintiff proved the existence of a contractual right and that, therefore, the 2013 ordinances could not have substantially impaired a contractual obligation. Although we recognize the significance of this argument, because the City did not file a cross-appeal, this argument is not properly before us. *Miller v. Metropolitan Property and Casualty Insurance Company*, 88 A.3d 1157, 1162 n.8 (R.I. 2014) ("[I]f the prevailing party in the trial court wishes to overturn one of the lower court's rulings below, a cross appeal must be filed.") (quoting David A. Wollin, *Rhode Island Appellate Procedure* § 4:5, 4-11 (West 2004)). Thus, we assume, without deciding, the correctness of the trial justice's conclusion in that regard, and instead move to the third part of the Contract Clause analysis, which requires an inquiry as to "whether the [contractual] impairment [was] reasonable and

necessary to fulfill an important public purpose." *Nonnenmacher*, 722 A.2d at 1202. The plaintiff challenges the trial justice's findings as to both whether a legitimate public purpose existed and whether the 2013 ordinances were reasonable and necessary. We will take each argument in turn.

a

Significant and Legitimate Public Purpose

First, plaintiff contends that the trial justice erred in finding that a significant and legitimate public purpose existed because the factors she relied on to reach this conclusion, according to plaintiff, "neither individually nor combined, constitute[d] a 'fiscal emergency' as a matter of law to trigger forgiveness under the Contracts Clause." Specifically, plaintiff avers that the financial problems faced by the City were common to many other municipalities, no immediate action was necessary to remedy the issues, the crisis was not created by the enactment of the pension statute, and a crisis of the City's own making cannot allow for a finding of a legitimate public purpose.

As we have stated, the United States Supreme Court has held that, "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, * * * such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc.*, 459 U.S. at 411-12. The Supreme Court has further instructed that "the public purpose need not be addressed to an

emergency or temporary situation." *Id.* at 412. We are mindful, however, that a legitimate public purpose is not to be found in all circumstances, particularly when related to economic issues. "If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *United States Trust Company of New York*, 431 U.S. at 26; *see also Allied Structural Steel Company v. Spannaus*, 438 U.S. 234, 242 (1978) ("If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State * * *.") (emphasis in original). Thus, "the purpose may not be simply the financial benefit of the sovereign." *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006).

This Court has previously discussed public purposes for challenged legislative actions in the context of the Contract Clause. For example, in *Nonnenmacher*, although we found that an ordinance requiring a setoff of disability payments under a city's pension plan did not result in a substantial impairment of a contractual right, we stated that, assuming it did, there would be no violation of the Contract Clause because the ordinances in question "serve[d] to protect the solvency of the pension system and thereby serve[d] an important public purpose." *Nonnenmacher*, 722 A.2d at 1201, 1203, 1204; *see Retired Adjunct Professors of State of Rhode Island v. Almond*, 690 A.2d 1342, 1347 (R.I. 1997) (holding that, assuming a statute limiting the amount of part-time work in which a state employee could engage while receiving state pension benefits substantially impaired the contract, it was

"both reasonable and necessary to advance the legitimate public purpose of fostering public confidence in the State's retirement system by restricting the proclivity of some public pensioners to indulge in what is colloquially referred to as 'double dipping'"). Furthermore, in *In re Advisory Opinion to the Governor (DEPCO)*, 593 A.2d 943 (R.I. 1991), this Court stated that "[t]he concept of public purpose * * * is not static but must be sufficiently flexible to meet the ever-changing needs of our complex society[,]" and, further, that "[t]he modern trend of authority is to expand and to construe liberally the meaning of public purpose, especially in the area of economic welfare." *In re Advisory Opinion to the Governor (DEPCO)*, 593 A.2d at 948.

Here, the trial justice found that "the 2013 [o]rdinances were passed for a significant and legitimate public purpose[,]" reasoning, in part, that "the City has produced sufficient credible evidence through the testimony of Mayor Fung, Mr. Strom, and Mr. Sherman that the Great Recession, the decline in state aid, and RIRSA's requirements created an unprecedented fiscal emergency neither created nor anticipated by the City." The trial justice further concluded that "there is no indication that the 2013 [o]rdinances sought to benefit one particular group or individual over others."

We, too, are of the opinion that the City has demonstrated a significant and legitimate public purpose for the passage of the 2013 ordinances. These ordinances were not intended merely for the "financial benefit of the sovereign[,]" *Buffalo Teachers Federation*,

464 F.3d at 368, but, rather, were designed to address the City's serious fiscal crisis, one that was brought about by several factors, many not within the City's control. One of the most critical factors precipitating the 2013 ordinances was a severe and historic recession in the years just prior to the passage of the ordinances, which the trial justice found "had far reaching and devastating economic and general social consequences" for the City. Moreover, as noted, we have previously opined that "protect[ing] the solvency of [a] pension system" could be a legitimate public purpose—one that, here, is critically important to plaintiff's members, who derive income from the system. *Nonnenmacher*, 722 A.2d at 1204. Thus, we find no error in the trial justice's conclusion that the 2013 ordinances served a "significant and legitimate public purpose[.]" *See Energy Reserves Group, Inc.*, 459 U.S. at 411.

b

Reasonable and Necessary

The plaintiff also argues that "the City's suspension of the COLA was neither reasonable nor necessary." The plaintiff specifically contends that the trial justice erred as to her determination of reasonableness because: (1) the underfunding of the pension plans existed when the City's contractual obligation to the pensioners began; (2) the trial justice misconstrued the ordinances as "prospective" and "temporary"; and (3) the City did not adequately consider other policy alternatives, but instead chose a drastic impairment which was politically expedient. For its part, the City counters that, as to the "prospective" and "temporary" argument, the proper focus should be on the

government action, rather than the effect. The City further asserts that plaintiff's argument regarding the policy alternatives "completely ignores the record testimony."

Although courts typically "defer to legislative judgment as to the necessity and reasonableness of a particular measure[,]" a municipality will be afforded less deference "[w]hen [it] impairs the obligation of its own contract[.]" *United States Trust Company of New York*, 431 U.S. at 23. The Second Circuit Court of Appeals has summarized this principle as follows:

> "Ultimately, for impairment to be reasonable and necessary under *less deference scrutiny*, it must be shown that the state did not (1) 'consider impairing the contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances[.]'" *Buffalo Teachers Federation*, 464 F.3d at 371 (emphasis in original) (deletion omitted) (quoting *United States Trust Company of New York*, 431 U.S. at 30-31).

Furthermore, "the extent of the impairment is 'a relevant factor in determining its reasonableness.'" *Id.* (quoting *United States Trust Company of New York*, 431 U.S. at 27).

Here, the trial justice found the ordinances to be reasonable and necessary because the City presented

credible evidence that "it adequately considered and tried other policy alternatives"; "a more moderate course was not available"; and "the 2013 [o]rdinances were circumscribed, temporary, precipitated by a fiscal emergency, and prospective." The trial justice further held that plaintiff did not rebut the City's evidence beyond a reasonable doubt.

Although the plaintiff correctly points out that the underfunding of the pension system existed well before the passage of the 2013 ordinances, it is significant that, quite apart from the historic underfunding, the financial condition of the City and its pension system was greatly impacted by a number of circumstances in the years leading up to the passage of the 2013 ordinances. We appreciate plaintiff's emphasis on a holding from our neighboring commonwealth that "[i]f the foreseen problem has changed between the time of the contracting and the time of the attempted impairment, but has changed only in degree and not in kind, the impairment is not reasonable." *Massachusetts Community College Council v. Commonwealth*, 649 N.E.2d 708, 713 (Mass. 1995). However, the evidence at trial demonstrates that the City's predicament grew out of more than its continued contractual obligations under CBAs and its failure to adequately fund the pension system. Rather, the difficult economic climate, a ruinous flooding situation, and the reduction in state aid compounded the initial underfunding issue. *See Baltimore Teachers Union*, 6 F.3d at 1021 n.13 ("To the extent the City was aware of its precarious financial condition and of possible reductions in state aid when it enacted its budget, however, we believe that the magnitude of the reductions in state aid rendered the

budgetary shortfall that gave rise to the salary reductions tantamount to a difference in kind from one the City might otherwise have anticipated."). We are of the opinion that the trial justice did not misconceive or misconstrue evidence in this regard, and thus we afford significant deference to her factual determinations regarding the City's financial condition.

Furthermore, after reviewing the evidence, we do not discern error in the trial justice's determination that the City adequately considered other policy alternatives. The trial justice listened to the testimony of several witnesses—whom she deemed credible—who testified to that effect. Indeed, Mayor Fung testified that the City considered raising taxes, making more cuts to city personnel, and drastically reducing city services. Mayor Fung also testified that, in order to meet the City's obligations under the funding improvement plan with these alternative measures, the budget cuts or tax raise would need to be significant. Moreover, we agree with the trial justice's conclusions that the 2013 ordinances were narrowly tailored to the problem and that the impairment was temporary and prospective in nature because the 2013 ordinances suspended a *future* benefit for a finite period of time. The 2013 ordinances did not eliminate the COLA benefit altogether, and only affected COLAs not yet made available to retirees. Thus, granting the trial justice due deference, we find no reversible error in her determination that a more moderate course was not available and that the impairment was reasonable in light of the circumstances.

Accordingly, we agree with the trial justice's conclusion that the 2013 ordinances did not violate the Contract Clauses of the United States or Rhode Island Constitutions.

B

Expert Testimony

The plaintiff argues that the trial justice misconceived and misapplied the testimony of plaintiff's expert at trial. The plaintiff first avers that, because the trial justice disposed of several pretrial motions regarding plaintiff's expert, she, "as fact-finder, repeatedly reviewed the matters analyzed by the expert and the facts underpinning [Fornia's] anticipated testimony before he ever had a chance to testify[,]" and thus she "essentially pre-judged CPRAC's expert's opinion before the expert was given a chance to offer it." The plaintiff also argues that the trial justice "effectively disqualified" Fornia's expert opinion because she actively disregarded evidence that was undisputed. The plaintiff further contends that the trial justice promoted form over substance during the trial because "the hoops that [Fornia] was required to jump through to impart his testimony effectively neutered any opinion or guidance he attempted to give the court as factfinder * * *."[8] Finally, plaintiff argues that the trial justice, in error, effectively shifted the burden of production back to plaintiff to prove, through Fornia's testimony, that the COLA suspension was the least drastic alternative.

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[8] At trial, Fornia's testimony was frequently interrupted by objections as to the form of questions posed to him.

Conversely, the City contends that, ultimately, Fornia was not prevented from testifying as to any of his opinions. The City also argues that, because this was a bench trial, plaintiff was not harmed if, in fact, the trial justice elevated form over substance, because she ultimately weighed the testimony. Finally, the City asserts that it proved that the COLA suspension was the least drastic alternative, and that asking Fornia to provide calculations to support his opinion that it was not the least drastic alternative was not impermissible.

"On review, we accord great weight to a trial justice's determinations of credibility, which, inherently, are the functions of the trial court and not the functions of the appellate court." *Gregoire*, 138 A.3d at 191 (brackets omitted) (quoting *South County Post & Beam, Inc.*, 116 A.3d at 210). As we have stated, this Court will not interfere with the trial justice's findings unless the trial justice "misconceived or overlooked material evidence." *Id.* (deletion omitted).

"It is the duty of the triers of fact to examine and consider the testimony of every witness regardless of his qualifications, and to grant to particular testimony only such weight as the evidence considered as a whole and the proper inferences therefrom reasonably warrant." *Kyle v. Pawtucket Redevelopment Agency*, 106 R.I. 670, 673, 262 A.2d 636, 638 (1970). Moreover, "[i]t is the duty of a trial justice who is passing upon an issue of fact to determine such issue according to his own judgment, upon all the evidence, enlightened but not controlled by the opinion of experts." *Ashton v. Tax Assessors of Town of Jamestown*, 60 R.I. 388, 396, 198 A. 786, 790 (1938).

We begin our discussion by noting that, after reviewing the trial justice's commentary as to the motion seeking to exclude Fornia's testimony, as well as Fornia's actual testimony at trial, we are not persuaded by plaintiff's claim that the trial justice was "pre-disposed to constrain" the expert's testimony. The trial justice ultimately denied the City's motion *in limine* to exclude Fornia's testimony and, significantly, at trial, allowed him to testify about his opinions set forth in a disputed expert report, which was admitted as a full exhibit during his testimony.

Furthermore, we perceive no reversible error in the trial justice's handling of the witness and reliance—or lack thereof—on his testimony. In her decision, the trial justice clearly articulated the parts of Fornia's testimony that she considered to be significant. The trial justice first indicated that she gave weight to Fornia's opinion that the loss caused by the ordinance was material.[9] As to his opinion about the significant and legitimate public purpose of the 2013 ordinances, the trial justice gave Fornia's testimony "little weight" and clearly articulated the problems she saw in his calculations relating to his testimony on this issue. Finally, the trial justice gave no weight to Fornia's opinion that the City did not choose the least drastic alternative, stating: "Mr. Fornia's opinion did not consider the feasibility of raising taxes, the decline in state aid, or RIRSA's requirements. * * * As such, this opinion is unsupported." The trial justice, sitting

[9] While the trial justice gave weight to portions of Fornia's opinion, she did not rely on Fornia's specific calculation regarding the average loss incurred by individual retirees.

without a jury, was entitled to make credibility determinations and weigh the evidence. *See Gregoire*, 138 A.3d at 191. It is clear that the trial justice carefully considered all of Fornia's testimony.

Moreover, we do not see how plaintiff was prejudiced by the trial justice exalting form over substance during Fornia's testimony. While we note that there were many objections as to the form of questions and as to evidentiary foundation during trial, it did not appear that Fornia's testimony was substantively limited in any significant way. Thus, we find no abuse of discretion in the trial justice's handling of the plaintiff's expert at trial, or in her analysis of his testimony.

C

Takings Clause

One month prior to trial, defendants filed a motion for summary judgment on plaintiff's Takings Clause claim. In support of their motion, defendants argued that plaintiff's members did not have a "constitutionally protected property interest in a lifetime, uninterrupted three-percent COLA." The defendants further argued that, even if plaintiff's members had a constitutionally-protected interest, the 2013 ordinances temporarily suspending their annual COLA did not constitute a taking. In its objection to the motion, plaintiff asserted that issues of material fact precluded summary disposition as to this particular claim. The trial justice issued a decision from the bench following a hearing, concluding that "a COLA is a vested benefit" and therefore was a property right for

the purpose of the Takings Clause. Ultimately, however, the trial justice found that "the changes to the plaintiff's COLA benefits do not constitute an illegal taking[,]" and she granted defendants' motion for summary judgment.[10]

On appeal, plaintiff contends that the trial justice erred in ruling that no unconstitutional taking occurred. The plaintiff argues that the trial justice improperly treated the COLA benefits as "unearned future compensation, or some type of state-created entitlement" and further incorrectly analyzed the issue as a regulatory taking as opposed to a physical taking. The plaintiff also argues that genuine issues of material fact as to the City's subjective intent and the ordinances' impact, necessity, and superfluity should have precluded the entry of summary judgment.

The defendants counter that there was no genuine issue of material fact that the 2013 ordinances "were prospective, temporary, impaired only a portion of the benefits provided under the collective bargaining agreements, and were part of a larger public program seeking to stabilize the City's finances," and thus the trial justice did not err in granting summary judgment. Additionally, defendants argue that plaintiff did not demonstrate a disputed material fact with respect to

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[10] In its brief to this Court, plaintiff asserts that the trial justice decided defendants' motion for summary judgment without having received plaintiff's objection to the motion. However, we find this contention meritless. Immediately after stating that the court did not have the objection, the trial justice went on to say: "Wait a minute. I do have it. Yes. It was filed on Friday. Yes. We do have that."

the City's legislative findings supporting the ordinances.

It is well settled that "[t]his Court will review the grant of a motion for summary judgment *de novo*, employing the same standards and rules used by the hearing justice." *Cancel v. City of Providence*, 187 A.3d 347, 349 (R.I. 2018) (quoting *Newstone Development, LLC v. East Pacific, LLC*, 140A.3d 100, 103 (R.I. 2016)). Furthermore, the trial court's decision will be affirmed "only if, after reviewing the admissible evidence in the light most favorable to the nonmoving party, we conclude that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Id.* at 350 (quoting *Newstone Development, LLC*, 140 A.3d at 103). In a motion for summary judgment, "the nonmoving party bears the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." *Id.* (quoting *Newstone Development, LLC*, 140 A.3d at 103).

The Takings Clauses of the United States and Rhode Island Constitutions provide that a government may not take private property for public use "without just compensation."[11] U.S. Const. Amend. V; R.I. Const. art. 1, § 16. The first step in the analysis of a takings claim is to determine whether a recognizable property

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[11] The Fifth Amendment to the United States Constitution reads, in part: "[N]or shall private property be taken for public use, without just compensation." Similarly, article 1, section 16 of the Rhode Island Constitution states, in part: "Private property shall not be taken for public uses, without just compensation."

right is at stake. *See Parella v. Retirement Board of Rhode Island Employees' Retirement System*, 173 F.3d 46, 58 (1st Cir. 1999). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

To answer this threshold question, the trial justice looked to this Court's decision in *Arena v. City of Providence*, 919 A.2d 379 (R.I. 2007), which analyzed whether a COLA benefit for pensioners in the City of Providence was gratuitous or vested. *Arena*, 919 A.2d at 393. We held that, "in Rhode Island, pension benefits vest once an employee honorably and faithfully meets the applicable pension statute's requirements." *Id.* For this determination, a court "must look to the applicable pension ordinance." *Id.* In the case at bar, the trial justice found that the "pervasive" and specific "lifetime language" in the 2013 ordinances supported the conclusion that the COLA was a vested benefit for plaintiff's members. Neither party challenges the trial justice's decision in this respect. Thus, for the purposes of our Takings Clause analysis, we assume, without deciding, that plaintiff's members have a protected property interest in future COLA payments.

According to plaintiff, the trial justice erred in analyzing the COLA suspension as a regulatory taking as opposed to a physical taking. Both this Court and the United States Supreme Court have distinguished

between physical and regulatory takings. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002); *Brunelle v. Town of South Kingstown*, 700 A.2d 1075, 1081-82 (R.I. 1997). "Physical takings (or physical invasion or appropriation cases) occur when the government physically takes possession of an interest in property for some public purpose." *Buffalo Teachers Federation*, 464 F.3d at 374. Physical takings "are takings per se and always necessitate compensation." *Brunelle*, 700 A.2d at 1081.

In contrast, "[a] regulatory taking transpires when some significant restriction is placed upon an owner's use of his property for which 'justice and fairness' require that compensation be given."[12] Philip Morris, Incorporated v. Reilly, 312 F.3d 24, 33 (1st Cir. 2002). "Regulatory takings are further subdivided into categorical and non-categorical takings." *Sherman v. Town of Chester*, 752 F.3d 554, 564 (2d Cir. 2014) (quoting *Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1378 n.2 (Fed. Cir. 2008)). "'Anything less than a complete elimination of value, or a total loss,' is a non-categorical taking, which is analyzed under the framework created in" *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). *Id.*

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[12] While we have not addressed a regulatory taking in the context of contract rights, this Court has defined a "regulatory taking" in the context of land use as that which "result[s] from 'a radical curtailment of a landowner's freedom to make use of his or her land; that is, by regulatory action which is neither a physical invasion nor a physical restraint.'" *Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997) (quoting 26 Am. Jur. 2d *Eminent Domain* § 10 at 453 (1996)).

(quoting *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 330). In *Penn Central*, the United States Supreme Court listed three factors it considered of "particular significance"in the regulatory taking analysis: "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Penn Central*, 438 U.S. at 124.

As a threshold matter, we agree with the trial justice that the 2013 ordinances fall under the regulatory takings framework. The trial justice aptly reasoned that "the City's ordinances do not present the classic taking in which a government directly appropriates private property for its own use. * * * Rather, the interference with the plaintiffs' COLA benefits 'arises from a public program adjusting the benefits and burdens of economic life to promote the common good.'" (Quoting *Buffalo Teachers Federation*, 484 F.3d at 374.) *See Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225 (1986) (analyzing a takings claim involving contract rights under the *Penn Central* framework). Because the 2013 ordinances apply only temporarily and prospectively to contract rights, the City did not physically take back a payment already made to retirees to appropriate the money for its own use. Thus, we will proceed to consider this Takings Clause claim under the *Penn Central* regulatory takings framework.

The crux of the regulatory analysis focuses on whether a regulation of a property right "goes too far[.]" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)

(quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). The United States Supreme Court cautioned, however, that "we must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good,'" *id.* at 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)), and that: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[.]" *Id.* (quoting *Mahon*, 260 U.S. at 413); *see also Connolly*, 475 U.S. at 223 ("Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.").

First, as to the economic impact and interference with investment-backed expectations, we recognize that the 2013 ordinances had a financial impact on plaintiff's members. Indeed, the trial justice found, as part of her Contract Clause analysis, and we agree, that the cumulative impact of the COLA suspension on CPRAC's members was significant. However, critical to this analysis is that the suspension of COLA benefits is "temporary and operates only during a control period." *Buffalo Teachers Federation*, 464 F.3d at 375. Furthermore, the COLA suspension impacts only part of the total pension benefits received; it does not take away the base pension payments or any other retirement benefits. *See id.* ("[T]his is not a case in which a law abrogates an entire contract."). We agree with the trial justice that these facts are not disputed.

Additionally, the government action was focused on future benefits and did not affect any COLA payments made prior to its enactment. The City did not "physically invade or permanently appropriate any of the [retirees'] assets for its own use." *Connolly*, 475 U.S. at 225. Moreover, the government action was motivated by a critical need to improve the health of the City's pension system. Indeed, the legislative findings codified in the 2013 ordinances state that:

> "It is in the best interests of residents, individual employees, retirees and beneficiaries of the City of Cranston to maintain a viable and sustainable local police and fire pension plan and to develop a reasonable alternative funding improvement plan to emerge from 'critical status' as required by Rhode Island General Laws section 45-65-6." Providence Code of Ordinances § 2013-6 (Apr. 23, 2013).

Thus, given that it is undisputed that the 2013 ordinances effectuate only a limited suspension of a small part of the overall pension retirement benefits, and that the 2013 ordinances were prospective, we agree with the trial justice that defendants were entitled to summary judgment on plaintiff's Takings Clause claim.[13]

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[13] We further note that we find no fault in the trial justice's use of the legislative findings to support her decision. Legislative findings as to the purpose of legislation are "entitled to great deference by the judiciary." *In re Advisory Opinion to Governor*, 113 R.I. 586, 593, 324 A.2d 641, 646 (1974). Therefore, we are of the opinion that

D

Res Judicata & Estoppel

Prior to trial, plaintiff moved for summary judgment on the count of its complaint seeking a declaratory judgment that the 2013 ordinances were void *ab initio* because prior litigation challenging changes made to retiree pension benefits through ordinances enacted by the City in 2003 precluded future legislative changes to pensions made outside the collective bargaining process.[14] The plaintiff in the instant case alleged in its complaint—and argued in its summary judgment motion—that the Superior Court's decision in the prior litigation (the 2005 decision) meant that the 2013 ordinances were void from their inception based on the doctrine of *res judicata*. The defendants filed a cross-motion for summary judgment, arguing that the 2005 decision was not binding on the

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the trial justice did not err by according these findings some deference.

[14] In 2003, the City repealed ordinances that had provided pension benefits for retired police officers and retired fire fighters. *City of Cranston v. International Brotherhood of Police Officers, Local 301*, Nos. P.M. 04-1043, P.M. 04-1646, 2005 WL 375087, at *1 (R.I. Super. Ct. Feb. 11, 2005). The two unions to which the retirees had belonged challenged the repeal of the ordinances as a breach of the respective CBAs. *Id.* Arbitration resulted in decisions favorable to the unions, and the City sought to vacate the arbitration awards on the basis that the arbitrators had strayed from the relevant language in the CBAs and that the unions did not have standing to negotiate on behalf of the retirees after they had retired. *Id.* at *6, *7. The Superior Court upheld the arbitration awards, deciding that "any modification of retirees' benefits must be accomplished through collective bargaining." *Id.* at *10.

trial justice and that *res judicata* did not apply to the present dispute. After the hearing on these cross-motions, the trial justice concluded that *res judicata* did not apply to the enactment of the 2013 ordinances, denied plaintiff's motion, and granted defendants' cross-motion for summary judgment.

Before us, plaintiff switches the focus of its preclusion claim, arguing that collateral estoppel bars defendants from defending the 2013 ordinances because the 2005 decision clearly stated that defendants could modify retirees' benefits only through a collective bargaining process. The plaintiff contends that the trial justice erred by allowing defendants to relitigate the issue of whether pension benefits could be changed through ordinances rather than through a collective bargaining process. The plaintiff also asserts that there are no meaningful distinctions between the instant litigation and the prior litigation. The defendants, for their part, argue that the issues are different in the instant litigation as compared to the prior litigation because the two sets of ordinances do not change the pension benefits in the same way and the cases were litigated on different legal principles. The defendants also assert that the 2005 decision cannot be applied to prospectively restrain the City from exercising its police powers.

As we have stated earlier in this opinion, we review an appeal from cross-motions for summary judgment *de novo*. *See Cancel*, 187 A.3d at 349. We begin and end our discussion of this issue by concluding that plaintiff's collateral estoppel argument is not properly before us. The plaintiff's claim in its complaint, as well

as its argument in connection with its motion for summary judgment, focused exclusively on *res judicata*, and the trial justice resolved the parties' cross-motions after considering the arguments set forth regarding *res judicata*. There is no indication that the trial justice also considered the doctrine of collateral estoppel. The plaintiff mentions collateral estoppel for the first time before us, on appeal. "[A]n issue that has not been raised and articulated previously at [the] trial [court] is not properly preserved for appellate review[.]" *Pineda v. Chase Bank USA, N.A.*, 186 A.3d 1054, 1060 (R.I. 2018) (quoting *In re Shy C.*, 126 A.3d 433, 435 (R.I. 2015)).

Collateral estoppel, or issue preclusion, is, of course, related to *res judicata*, or claim preclusion, but its focus is different. As we have previously described, "[t]he doctrine of res judicata relates to the effect of a final judgment between the parties to an action and those in privity with those parties." *E.W. Audet & Sons, Inc. v. Fireman's Fund Insurance Company of Newark, New Jersey*, 635 A.2d 1181, 1186 (R.I. 1994). "Usually asserted in a subsequent action based upon the same claim or demand, the doctrine precludes the relitigation of all the issues that were tried or might have been tried in the original suit." *Id.* Related, but distinguishable, "[t]he doctrine of collateral estoppel makes conclusive in a later action on a different claim the determination of issues that were actually litigated in a prior action." *Id.* "[C]ollateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same

parties in any future lawsuit.'" *Id.* (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)).

While the elements of the two doctrines are basically the same, the differing focuses of each means that the consideration of arguments related to one does not mean that both doctrines have been considered. Because plaintiff did not raise the doctrine of collateral estoppel before the trial justice and does not argue the principles of *res judicata* before us on appeal, plaintiff's arguments challenging the trial justice's decision on the parties' cross-motions for summary judgment on this claim are not properly before us. Accordingly, judgment as a matter of law in favor of defendants on plaintiff's *res judicata* claim is affirmed.[15]

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[15] Even if collateral estoppel had been alleged in plaintiff's complaint and argued in plaintiff's motion for summary judgment, defendants would still be entitled to judgment as a matter of law on this claim because they did not have an opportunity to actually litigate their ability to change their contractual obligations to police and firefighter retirees through the legislative process. *See Allen v. McCurry*, 449 U.S. 90, 94-95 (1980) (recognizing that "a litigant who was not a party to a * * * case [may] use collateral estoppel 'offensively' in a new * * * suit against the party who lost on the decided issue in the first case" (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)), and stating: "But one general limitation the [United States Supreme] Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case" (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979))).

As mentioned *supra*, the procedural posture of the prior litigation and the 2005 decision was a motion to vacate an arbitrator's awards. *International Brotherhood of Police Officers, Local 301*, 2005 WL 375087, at *1. The Superior Court's standard

E

Open Meetings Act

Prior to trial, plaintiff also sought summary judgment on its claim that the Cranston City Council violated the OMA when it introduced what would become the 2013 ordinances at its March 25, 2013 meeting and referred the proposed legislative changes to the finance committee without first placing the proposed changes to the ordinances on the agenda that had been posted prior to that meeting. The plaintiff alleged—and provided uncontroverted evidence—that the Attorney General's office had concluded that the Cranston City Council had indeed violated the OMA by entertaining new business during the March 25, 2013 meeting, when the agenda had not listed any items under the "new business" heading. The defendants filed a cross-motion for summary judgment, arguing that

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of review on a motion to vacate an arbitration award is extremely deferential; indeed, the 2005 decision is clear that the court was "*constrained* to find that the arbitrators' decisions * * * [we]re rational and dr[e]w their essence from the agreements between the parties." *Id.* at *10 (emphasis added). Moreover, the earlier litigation focused on the union-plaintiffs' standing to negotiate on behalf of the retirees as well as the defendants' obligation to honor their contractual obligations to the retirees and the union members under the CBAs. *Id.* at *8-10. While the City and its officials were defendants in both causes of action, they did not have an opportunity to defend their legislative actions through the litigation process and most certainly did not have an opportunity to defend against constitutional claims such as those asserted by plaintiff in the instant litigation. The 2005 decision indicates that the grievances at issue in that prior litigation concerned claims for breach of contract only. *Id.* at *3, *5.

plaintiff did not have statutory standing to bring the OMA violation claim in Superior Court. The defendants also argued that the proposed changes to the ordinances were not discussed or enacted at the March 25 meeting, and therefore there was no harm from failing to include this item on the printed agenda.

The trial justice heard oral argument on this issue at the summary judgment hearing on November 2, 2015, and rendered a decision from the bench on November 6, 2015. The trial justice found that plaintiff lacked statutory standing to file a complaint in Superior Court alleging a violation of OMA because the statute explicitly limits the right to file a complaint in Superior Court to "individuals," and plaintiff is a group. Accordingly, the trial justice denied plaintiff's motion for summary judgment and granted defendants' cross-motion for summary judgment.

Before us, plaintiff argues that the trial justice erred because the language of § 42-46-8 and this Court's previous interpretation of the statute provides plaintiff, as an organization, with the requisite statutory standing to file a complaint in Superior Court alleging an OMA violation.[16] The defendants argue that

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[16] The plaintiff also argues that defendants waived the standing argument because they failed to timely raise the issue of standing before the trial justice in that they did not include lack of standing to claim an OMA violation in their initial motion to dismiss. A review of the cross-motions for summary judgment, the memoranda submitted in support thereof, the transcript of the hearing on the cross-motions, and the trial justice's bench decision reveals that it is, in fact, plaintiff that has waived its argument: plaintiff did not raise this particular waiver argument before the

§ 42-46-8 unambiguously provides exclusive statutory standing to file an OMA violation claim in Superior Court to individuals.

"This Court reviews questions of statutory construction and interpretation *de novo*." *South County Post & Beam, Inc.*, 116 A.3d at 214-15. "When construing a statute, our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." *Id.* at 215 (quoting *Mendes v. Factor*, 41 A.3d 994, 1002 (R.I. 2012)). "When the statutory language is clear and unambiguous, we give the words their plain and ordinary meaning." *Id.* (quoting *National Refrigeration, Inc. v. Capital Properties, Inc.*, 88 A.3d 1150, 1156 (R.I. 2014)).

We have previously noted that "[a] party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing." *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 792 (R.I. 2005). "In statutory standing cases, such as this, the analysis consists of a straight statutory construction of the relevant statute to determine upon whom the Legislature conferred standing and whether the claimant in question falls in that category." *Id.* at 792 n.6 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)). "In conducting this analysis, we do not look at the

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trial justice, and therefore we will not consider it in the first instance. *See Pineda v. Chase Bank USA, N.A.*, 186 A.3d 1054, 1060 (R.I. 2018) ("[A]n issue that has not been raised and articulated previously at [the] trial [court] is not properly preserved for appellate review.") (quoting *In re Shy C.*, 126 A.3d 433, 435 (R.I. 2015)).

eventuality of success on the merits but, rather, at whether a party is arguably within the zone of interests to be protected or regulated by the statute in question." *Id.* (citing *Association of Data Processing Service Organizations, Inc. Camp*, 397 U.S. 150, 153-54 (1970)).

We have noted on more than one occasion that the OMA bestows broad statutory standing. *See Tanner*, 880 A.2d at 792; *Solas v. Emergency Hiring Council of State*, 774 A.2d 820, 823 (R.I. 2001). The OMA is in place because "[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." Section 42-46-1. Indeed, we have stated:

> "[T]he purpose of the OMA is to protect the public's right to participate in the political process, and not an individual's property or contract rights. Thus, the statutory requirement that an individual be 'aggrieved' by a violation of the OMA does not require that a plaintiff allege some harm to his or her economic or property interests, but rather that his or her right to be 'advised of and aware of' the performance, deliberations, and decisions of government entities was, or may be, violated." *Tanner*, 880 A.2d at 793 (quoting §§ 42-46-1 and 42-46-8).

The OMA provides in § 42-46-8 for the "[r]emedies available to aggrieved persons or entities." To determine who has standing to pursue these remedies, we need to consider two paragraphs within § 42-46-8. Paragraph (a) provides that:

> "Any citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general. The attorney general shall investigate the complaint and if the attorney general determines that the allegations of the complaint are meritorious he or she may file a complaint on behalf of the complainant in the superior court against the public body." Section 42-46-8(a).

Paragraph (c) provides that:

> "Nothing within this section shall prohibit any individual from retaining private counsel for the purpose of filing a complaint in the superior court within the time specified by this section against the public body which has allegedly violated the provisions of this chapter; provided, however, that if the individual has first filed a complaint with the attorney general pursuant to this section, and the attorney general declines to take legal action, the individual may file suit in superior court within ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty

> days of the alleged violation, whichever occurs later." Section 42-46-8(c).

In our view, § 42-46-8 is clear and unambiguous. Individuals and entities have standing to file a complaint with the Attorney General, and the Attorney General has the discretion to file a complaint on behalf of the complainant (individual or entity) in the Superior Court. Section 42-46-8(a). Individuals have the additional option to skip the Attorney General's office and file a complaint directly in Superior Court. Section 42-46-8(c). The trial justice read paragraph (c) as limiting the grant of statutory standing to individuals; according to the trial justice, entities such as plaintiff, a nonprofit corporation, do not have standing to file a claim in Superior Court. We agree. The plain language of § 42-46-8(c) includes "the individual" only and is silent as to entities of the state. We therefore conclude that plaintiff, as a nonprofit corporation, does not have standing to pursue a claim in Superior Court for violation of the OMA. Accordingly, judgment as a matter of law in favor of defendants on plaintiff's OMA violation claim is affirmed.

F

Legislative Immunity

The plaintiff also challenges both of the trial justice's pretrial rulings that were based on the doctrine of legislative immunity: (1) the grant of defendants' motion for a protective order concerning the deposition of defendant Lanni, a member of the Cranston City Council; and (2) the grant of defendants'

motion for summary judgment as to the Non-City defendants.

The doctrine of legislative immunity extends from the Speech or Debate Clause of the United States Constitution and the similar "speech in debate" clause of the Rhode Island Constitution. *See* U.S. Const., art. I, § 6, cl. 1; R.I. Const., art. 6, § 5; *see also United States v. Brewster*, 408 U.S. 501, 507 (1972); *Holmes v. Farmer*, 475 A.2d 976, 983 (R.I. 1984). We have previously held that "[t]he speech in debate clause contained in Rhode Island's Constitution confers a privilege on legislators from inquiry into their legislative acts or into the motivation for actual performance of legislative acts that are clearly part of the legislative process." *Holmes*, 475 A.2d at 983. Further, "[i]n order fully to effectuate the purpose and design of the speech in debate clause, it must be construed as an immunity from suit as well as a testimonial privilege." *Id.* at 984. This Court has made clear that the privilege extends to municipal officials. *Maynard v. Beck*, 741 A.2d 866, 872 (R.I. 1999). However, while the privilege protects legislators from being "questioned by any other branch of government for their acts in carrying out their legislative duties relating to the legislative process[,]" its scope "does not extend to actions by legislators outside the legislative process." *Holmes*, 475 A.2d at 983.

1

Lanni Protective Order

In the course of discovery, defendants filed a motion for a protective order to prevent plaintiff from deposing

defendant Lanni. The defendants argued that Lanni was protected from deposition by the privilege of legislative immunity, and that his testimony would not be relevant to the central issue of the case. The plaintiff objected to defendants' motion, arguing that the topics plaintiff sought to cover in Lanni's deposition were outside the scope of legislative immunity, including "information concerning the various police and firefighter Collective Bargaining Agreements, the general financial condition of the City, the actions of actuarial consultants, City spending, and budget * * *." The plaintiff also argued that it was entitled to ask Lanni about subjects listed as accomplishments and future goals on his campaign website.[17]

The trial justice granted defendants' motion on the basis that Lanni enjoyed the privilege of legislative immunity, and that the topics plaintiff sought to question Lanni about were related to his position as a legislator. Specifically, the trial justice held that: "Much of what [CPRAC] requests—information relating to police and firefighter Collective Bargaining Agreements, financial conditions and spending of the City, and actuarial reports—can be easily obtained." The trial justice also found that the subjects related to

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[17] The subjects found on Lanni's website, as outlined in plaintiff's objection to defendants' motion, were: "Tax Freeze 2005-2006"; "Tax Decrease 2006-2007"; "Tax Freeze 2008-2009"; "Reduce the City's $300,000,000 unfunded pension liability"; "Improve the City's Bond Rating"; "Protect the 'Rainy Day Fund'"; "Achieve Tax Stability"; and "Control 'Runaway' city spending." Lanni's website, formerly located at http://www.johnlanniforcranston.com, is no longer active. Accordingly, we rely on plaintiff's filings and the Superior Court's September 15, 2015 decision for this information.

statements on Lanni's campaign website were "less clearly within legislative immunity[,]" but that the privilege applied because "the information from that website is, in substance, material relating to Mr. Lanni's legislative duties."

On appeal, plaintiff argues that the trial justice erred in granting defendants' motion because the protective order was excessive in scope and prevented plaintiff from deposing Lanni on subjects that should be considered outside the protection of legislative immunity. The defendants counter that plaintiff has failed to identify a subject of inquiry that would not implicate legislative immunity, and therefore the trial justice did not err.

It is well settled that, "'in granting or denying discovery motions, a Superior Court justice has broad discretion,' which 'this Court will not disturb save for an abuse of that discretion.'" *State v. Lead Industries Association, Inc.*, 64 A.3d 1183, 1191 (R.I. 2013) (brackets and deletion omitted) (quoting *Colvin v. Lekas*, 731 A.2d 718, 720 (R.I. 1999)).

We see no abuse of discretion in the trial justice's analysis. We recognize that legislative immunity "does not protect the political activities of the legislators"; however, "[i]nquiry by the court into the actions or motivations of the legislators in proposing, passing, or voting upon a particular piece of legislation * * * falls clearly within the most basic elements of legislative privilege." *Holmes*, 475 A.2d at 983, 984. The information which plaintiff sought to obtain would have been disclosed to Lanni by virtue of his position as city council member and president; and, more

importantly, it formed part of the consideration and approval of the 2013 ordinances. Thus, we are of the opinion that the trial justice did not abuse her discretion in granting defendants' motion for protective order on the basis of legislative immunity.

2

Non-City Defendants

One month before trial, the Non-City defendants filed a motion for summary judgment, arguing that the allegations in the complaint against them were "premised on their legislative acts," and thus they enjoyed the privilege of legislative immunity related to those acts. The plaintiff objected to the motion, arguing that the Non-City defendants' acts were administrative in nature, and not legislative. The trial justice rejected plaintiff's argument that the acts were administrative in nature; instead, she found that "[i]t is hard for this [c]ourt to imagine something more clearly legislative in nature than the passage of an ordinance." Moreover, the trial justice ultimately found that there was "no genuine issue of material fact that the very core of the plaintiff's claims against the [N]on-City defendants is premised on their performance of legislative acts[,]" and thus, based on the doctrine of legislative immunity, the trial justice held that the Non-City defendants were entitled to summary judgment in their favor.

Before us, plaintiff reiterates the argument that the Non-City defendants' roles in the enactment of the 2013 ordinances were "administrative rather than legislative" in nature, and, thus, they did not enjoy the

privilege of legislative immunity.[18] As we have stated, we review the grant of a motion for summary judgment *de novo. Cancel*, 187 A.3d at 349.

"To determine whether challenged conduct is legislative * * * a court must consider the nature of the acts in question, rather than the motive or intent of the official performing them." *Maynard*, 741 A.2d at 870. According to the United States Supreme Court, some "quintessentially legislative" actions include the "introduction of a budget and signing into law an ordinance[,]" as well as other "integral steps in the legislative process." *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). While not all actions entitle a government official to the protection of legislative immunity, it is our opinion that the actions by the Non-City defendants here were certainly "legislative in character[.]" *See Maynard*, 741 A.2d at 870. It is clear that plaintiff's claims stem from the Non-City

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[18] The plaintiff also argues that the motion for summary judgment "should have been captioned as a Rule 12 motion [because] no matters were in consideration other than those that were in the pleadings[,]" and, if considered under that rule, defendants' assertion of legislative immunity for the Non-City defendants should have been deemed to have been waived because it was raised "on the eve of trial[.]" As defendants contend, plaintiff's argument as to Rule 12 is waived because it was not raised below. "[I]n accordance with this Court's longstanding 'raise-or-waive' rule, if an issue was not properly asserted, and thereby preserved, in the lower tribunals, this Court will not consider the issue on appeal." *Adams v. Santander Bank, N.A.*, 183 A.3d 544, 548 (R.I. 2018) (quoting *Miller v. Wells Fargo Bank, N.A.*, 160 A.3d 975, 980 (R.I. 2017)). The plaintiff failed to assert this contention in its papers or at the hearing below. Thus, we decline to address this argument.

defendants' participation in the legislative process, as plaintiff does not allege wrongful actions of the Non-City defendants beyond the enactment of the 2013 ordinances. Thus, the Non-City defendants were entitled to summary judgment.

G

Amendment to Answer

In November 2015, three days before the trial started, the City filed a motion to amend its answer to clarify its denial of certain allegations in the complaint and to conform the pleading to the evidence. The proposed amended answer included an additional affirmative defense: that the City exercised its police power when it enacted the 2013 ordinances. The plaintiff objected to the amendment on the basis that it was untimely and prejudicial because plaintiff would not have time to conduct additional discovery about the new affirmative defense prior to trial. The trial justice held a brief hearing on the City's motion on the morning of the first day of trial. At the hearing, the City argued that the exercise of its police power had been a dominant theme throughout the pretrial proceedings and that formally adding this affirmative defense to its answer merely ensured that the pleading conformed to the evidence. The trial justice granted the motion to amend, concluding that plaintiff had not demonstrated any prejudice that would be caused by the proposed amendments to the answer because the issue of the City's police power had been at the forefront since the beginning of the case.

Before us, plaintiff argues that the trial justice abused her discretion when she allowed the City to amend its answer on the first day of trial because plaintiff was "extreme[ly] prejudice[d]" by the surprise of the additional affirmative defense and had no time to conduct discovery on this new defense. The plaintiff also faults the trial justice for not asking the City why the amendment was requested so close to the beginning of the trial. The City responds that plaintiff has not adequately explained how it was prejudiced, and therefore, if there was any error in granting the motion to amend, the error was harmless. The City also reasserts that the exercise of police power is inextricably linked to plaintiff's Contract Clause claim, and therefore there was no surprise that the City added this to its answer.

Rule 15 of the Superior Court Rules of Civil Procedure allows litigants to request permission from the trial court to file an amended pleading and provides that such permission "shall be freely given when justice so requires." This Court "accord[s] great deference to the decision by a hearing justice to grant or deny a motion to amend and will not disturb his [or her] decision unless he [or she] abused his [or her] discretion." *CACH, LLC v. Potter*, 154 A.3d 939, 942 (R.I. 2017). We have previously held that amendments to pleadings should be allowed unless the nonmoving party can show the amendment will result in "extreme prejudice" to them, and that "mere delay is not enough to deny the amendment[,]" *id.* (internal citations omitted), unless the trial justice "find[s] that such delay creates substantial prejudice to the opposing party." *Lomastro v. Iacovelli*, 56 A.3d 92, 96 (R.I. 2012)

(quoting *Wachsberger v. Pepper*, 583 A.2d 77, 79 (R.I. 1990)).

The plaintiff was given an opportunity to explain to the trial justice how it would be prejudiced by the addition of the affirmative defense. Other than stating that it had no time to conduct additional discovery, plaintiff did not explain how it was prejudiced or what additional discovery it would have conducted had the amended answer been filed sooner. In our opinion, plaintiff did not demonstrate either substantial prejudice by the City's delay in requesting permission to amend the answer or extreme prejudice by allowing the amendment. We conclude, therefore, that the trial justice did not abuse her discretion when she granted the City's motion to amend its answer, and we affirm this order.

H

Bill of Costs/Motion to Stay Consideration of Bill of Costs

On August 5, 2016, one day after the final judgment entered, the City filed a bill of costs, requesting $14,708.01. These costs included fees for acquiring deposition and trial transcripts, printing exhibits, and scanning and making copies of documents. The plaintiff objected to the bill of costs, arguing that the request was excessive because some of the transcripts were generated from witness depositions that were not used during the trial. The plaintiff also filed a motion to stay consideration of the bill of costs until after the appeal was decided by this Court, arguing that the City would not be entitled to these costs if plaintiff prevailed on

any of the issues raised in its appeal. The City objected to the motion to stay, arguing that plaintiff had not established that it was entitled to the stay pending appeal. The City also argued that, because an award of costs generates an appealable order, principles of judicial economy dictated that the bill of costs should be decided immediately.

The trial justice held a hearing on October 13, 2016. She summarily denied plaintiff's motion to stay and granted the City's bill of costs, in part, awarding $9,717.85. The award excluded the trial transcript costs and half of the printing fees requested by the City.

On appeal, plaintiff argues that the trial justice erred by not considering its motion to stay prior to considering the bill of costs and denying the motion to stay without providing any reasoning to support her decision. The plaintiff asserts, without any legal support or discussion, that the trial justice "should have heard CPRAC's [m]otion to [s]tay and decided on the merits of that motion before passing on a bill of costs." The plaintiff also contends that the trial justice's ruling deprived plaintiff of its ability to seek a stay from this Court because the trial justice proceeded to immediately consider and rule on the City's request for costs after she denied the motion to stay. With respect to plaintiff's motion to stay consideration of the City's request for costs, we hold that plaintiff has waived its argument for failure to adequately develop it for our

review.[19] *See State v. Florez*, 138 A.3d 789, 798 n.10 (R.I. 2016) ("[T]his Court 'considers an issue to be waived when a party simply states an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues.'") (brackets and deletion omitted) (quoting *Bucci v. Hurd Buick Pontiac GMC Truck, LLC*, 85 A.3d 1160, 1170 (R.I. 2014)).

With respect to the order granting in part the City's request for costs, plaintiff argues that the trial justice abused her discretion by effectively penalizing plaintiff for bringing this litigation and by awarding costs for printing exhibits and deposition transcripts that the City did not prove were necessary to the litigation. The prevailing party in a civil action is entitled to recover costs, "except where otherwise specially provided, or as justice may require, in the discretion of the court." General Laws 1956 § 9-22-5; *see also* Super. R. Civ. P. 54(d) ("Costs (including costs on depositions as provided for in Rule 54(e)) shall be allowed as of course to the prevailing party as provided by statute and by these rules unless the court otherwise specifically directs."). Both the statute and the court rule "endow the trial justice with discretion in conducting a cost-distribution analysis. 'Discretion is not exercised by merely granting or denying a party's request.'" *State v. Lead Industries Association, Inc.*, 69 A.3d 1304, 1309 (R.I. 2013) (brackets omitted) (quoting *DiRaimo v. City of Providence*, 714 A.2d 554, 557 (R.I. 1998)). "The term

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[19] We do, however, take the opportunity to remind plaintiff that it could have sought a stay of the enforcement of the order granting the costs, pursuant to Article I, Rule 8 of the Supreme Court Rules of Appellate Procedure.

'discretion,' rather, denotes action taken 'in the light of reason as applied to all the facts and with a view to the rights of all the parties to the action while having regard for what is right and equitable under the circumstances and the law.'" *Id.* (quoting *DiRaimo*, 714 A.2d at 557).

The transcript of the hearing on the plaintiff's motion to stay and the City's bill of costs shows that the plaintiff had a full and fair opportunity to argue its objection to the City's request for costs. Moreover, the trial justice asked the City several questions about the items on the bill of costs and ultimately awarded some of the costs requested. In our opinion, the trial justice did not abuse her discretion in awarding the portion of the costs requested. The order granting in part the bill of costs and denying the plaintiff's motion to stay is, therefore, affirmed.

IV

Conclusion

For the foregoing reasons, we affirm the judgment of the Superior Court in favor of the defendants as to all counts. We also affirm the order granting the motion for a protective order, the order granting the City's motion to amend the answer to the complaint, and the order granting the City's motion for costs and denying the plaintiff's motion to stay. The record shall be remanded to the Superior Court.

Justice Robinson, concurring. It is with a decided lack of enthusiasm and only after prolonged research and reflection and hesitation that I concur in

the result reached in the opinion of the Court in this case; and I do so in a decidedly *dubitante* frame of mind. While my principal hesitation about concurring in the result in this case stems from my grave concern with the Contracts Clause aspect of the case, I am also deeply troubled by the Open Meetings Act issue in this case. With respect to the Open Meetings Act, I am particularly troubled about the result which controlling principles of statutory interpretation require us to reach with respect to the reach of that statutory scheme. For the sake of clarity, I shall address those two areas of concern separately, and I shall do so with relative brevity.[20]

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[20] It was only after reading over and over again the trial justice's meticulous fact-finding and credibility assessments and after poring over the often opaque and difficult-to-reconcile principles set forth in the controlling precedents that I concluded that I would be able in good conscience (albeit with much hesitation and many reservations) to concur with the result reached by the majority with respect to both the Contracts Clause and Open Meetings Act issues.

As for the other issues addressed by the majority (expert testimony; the Takings Clause; *res judicata* and collateral estoppel; legislative immunity; the amendment to the answer; and the bill of costs), I join in the opinion of the Court—although I view the bill of costs issue to be exceedingly close.

A

Impairing the Obligation of Contracts under the Contracts Clause [21]

I readily acknowledge the scholarly nature of the Court's opinion; it represents an impressively Herculean effort to summarize the complex factual background that the case involves.[22] It also represents an impressive effort to apply to those facts the subtle and very nuanced principles of law that presently prevail and by which one is required to abide in analyzing a claim that a particular enactment is violative of the Contracts Clause.

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[21] The relevant constitutional language should be borne in mind. The stark and straightforward Contracts Clause in the United States Constitution provides that "[n]o state shall * * * pass any * * * Law impairing the Obligation of Contracts." U.S. Const. Art. I, § 10, cl. 1. The parallel Rhode Island constitutional provision is similarly stark and straightforward: "No * * * law impairing the obligation of contracts shall be passed." R.I. Const. art. 1, § 12 (punctuation omitted).

[22] I also acknowledge the scholarly and detail-oriented nature of the trial justice's rescript decision. Her careful fact-finding and credibility assessments have made the task of this Court less onerous—especially in view of the deferential standard of review that is applicable with respect to same. *See Lamarque v. Centreville Savings Bank*, 22 A.3d 1136, 1140 (R.I. 2011) ("When we review the factual findings of a trial justice sitting without a jury, we accord those findings great deference."); *see also JPL Livery Services, Inc. v. Rhode Island Department of Administration*, 88 A.3d 1134, 1142 (R.I. 2014) ("[W]e accord great weight to a trial justice's determinations of credibility, which, inherently, are the functions of the trial court and not the functions of the appellate court.") (internal quotation marks omitted).

I have concluded that the relevant precedent compels me to concur when due weight is accorded to the collection of unanticipated occurrences (*e.g.*, events such as what the trial justice refers to as "the Great Recession" and as "two natural disasters in March of 2010") as well as the very crucial fact that the contractual impairment at issue is *temporally limited*. But for me this case is extremely close. To my mind, the Court's ruling in this case is the equivalent of standing on the banks of the Rubicon. In my heart of hearts, I think that we, as a nation and as a state, have strayed far from what the Contracts Clauses were clearly meant to prohibit: *i.e.*, *any law impairing the obligation of contracts*.

My own thinking in this regard is in accord with the historically-based approach to constitutional issues that Justice Neil Gorsuch of the United States Supreme Court has demonstrated in his perceptive and eloquent dissent in the quite recent case of *Sveen v. Melin*, 138 S.Ct. 1815 (2018). *Sveen*, 138 S.Ct. at 1826 (Gorsuch, J., dissenting); *see generally* Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hastings Const. L.Q. 525 (1987). In the portion of his dissent in *Sveen* where he reminds the reader of the unequivocal wording of the Contracts Clause in the United States Constitution, Justice Gorsuch writes as follows in language that I find to be particularly powerful and thought provoking:

> "The Contracts Clause categorically prohibits states from passing '*any* * * * Law impairing the Obligation of

> Contracts.' Art. I, § 10, cl. 1 (emphasis added). Of course, the framers knew how to impose more nuanced limits on state power. The very section of the Constitution where the Contracts Clause is found permits states to take otherwise unconstitutional action when 'absolutely necessary,' if 'actually invaded,' or 'wit[h] the Consent of Congress.' Cls. 2 and 3. But in the Contracts Clause the framers were absolute. They took the view that treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them * * *." *Sveen*, 138 S.Ct. at 1826-27 (Gorsuch, J., dissenting) (emphasis in original).

I for one yearn for the day when the courts will revert to something substantially closer to an "absolutist" understanding of the Contracts Clause. In the meantime, however, I bow obediently, but discontentedly, to the result that prevailing precedent dictates.

B

The Open Meetings Act

I also very reluctantly concur in that portion of the Court's opinion that deals with the Open Meetings Act issue. *See* G.L. 1956 chapter 46 of title 42. After correctly noting that § 42-46-8(a) authorizes "[a]ny citizen *or entity* of the state" to file an Open Meetings

Act complaint with the Attorney General, the Court goes on to point out that § 42-46-8(c) speaks exclusively of the right of an individual (without any mention of entities) to retain private counsel for the purpose of filing a complaint in the Superior Court under the Open Meetings Act. (Emphasis added.) Pursuant to our statutory interpretation jurisprudence, the statute at issue, which is undeniably clear and unambiguous, must be applied as written—*i.e.*, as not authorizing entities to file suit under the Act. *State v. Diamante*, 83 A.3d 546, 548 (R.I. 2014); *In re Harrison*, 992 A.2d 990, 994 (R.I. 2010) ("[W]hen we examine an unambiguous statute, there is no room for statutory construction and we must apply the statute as written.") (internal quotation marks omitted); *see Zambarano v. Retirement Board of the Employees' Retirement System of State*, 61 A.3d 432, 436 (R.I. 2013) ("It is well settled that 'the plain statutory language' is 'the best indicator' of the General Assembly's intent.") (quoting *McCain v. Town of North Providence*, 41 A.3d 239, 243 (R.I. 2012)); *see also Little v. Conflict of Interest Commission*, 121 R.I. 232, 237, 397 A.2d 884, 887 (1979) ("It is a primary canon of statutory construction that statutory intent is to be found in the words of a statute, if they are free from ambiguity and express a reasonable meaning.").

In the end, I have reluctantly concluded that the statutory language as it presently exists represents a deliberate legislative choice. *See Powers v. Warwick Public Schools*, 204 A.3d 1078, 1088 (R.I. 2019) ("[I]t is not the function of this Court to act as a super legislative body and rewrite or amend statutes already enacted by the General Assembly.") (internal quotation marks omitted); *Olamuyiwa v. Zebra Atlantek, Inc.*, 45

A.3d 527, 536 (R.I. 2012) ("It is not our role to contort the language of an unambiguous statute in order to include within its reach a situation which it plainly does not encompass."); *Little*, 121 R.I. at 237, 397 A.2d at 887 ("[W]e may not alter the meaning to make [a statute] applicable and promote what we think a more desirable result."). I must respectfully state, however, that I have great difficulty in conceiving of a sound public policy reason to allow individuals to bring suit while not giving entities[23] the same right—especially when one keeps in mind the crucially important concept that is the basis for the Open Meetings Act: the need for intense scrutiny of and critical comment about the doings of government. *See, e.g.*, Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (Frederick A. Stokes Company ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants * * *."); *see also Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) ("Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow."). And it should go without saying that the General Assembly remains free to amend the Open Meetings Act so as to give entities of this state the same statutory right to sue under the Act as individuals already possess. *See Pizza Hut of America, Inc. v. Pastore*, 519 A.2d 592, 594 (R.I. 1987).

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[23] It is worth bearing in mind the self-evident point that, after all, entities are made up of individuals.

C

Conclusion

For the above-discussed reasons, I reluctantly, and only in view of the relevant judicial precedent and statutory provisions, concur in the result reached by the majority.

APPENDIX B

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS KENT, SC. SUPERIOR COURT

No. KC-13-1059
(formerly PC-13-3212)

[Filed July 22, 2016]

CRANSTON POLICE RETIREES ACTION COMMITTEE,	)
Plaintiff,	)
v.	)
THE CITY OF CRANSTON, by and through its Finance Director ROBERT STROM and its City Treasurer DAVID CAPUANO, ALLAN FUNG, in his capacity as Mayor of the City of Cranston, Members of the Cranston City Council JOHN LANNI, JR., DONALD BOTTS, JR., MARIO ACETO, MICHAEL J. FARINA, MICHAEL W. FAVICCHIO, PAUL H. ARCHETTO, RICHARD D. SANTAMARIA, JR., SARAH KALES LEE, and STEVEN A. STYCOAS, in their capacity as	)

members of the Cranston City Council,)
Defendants.)
)

DECISION

TAFT-CARTER, J. This case is before the Court for decision following a non-jury trial on a Complaint filed by the Plaintiff, Cranston Police Retirees Action Committee (CPRAC), against Defendant, the City of Cranston (City). CPRAC is a non-profit corporation formed in 2012 whose membership is comprised of seventy-five retired members of the Cranston Police Department and the Cranston Fire Department who retained their right to sue the City by opting out of a class action settlement.[1] The Court is called upon to decide whether certain ordinances passed by the City violated the contract clauses of the Rhode Island and United States Constitutions.[2,3] In its Complaint, the Plaintiff asserts that the 3% compounded cost of living adjustment (COLA) was a vested contractual right for its members, the suspension of which amounts to a

[1] Although the Complaint lists sixty-five members of the CPRAC, testimony from the CPRAC's President, Mr. Glenn Gilkenson, lists the number at seventy-five original members. Four members have since passed away, leaving seventy-one remaining members. See Trial Tr. 11:5–6, Nov. 9, 2015.

[2] See U.S. Const. art. I, § 10; R.I. Const. art I, § 12.

[3] CPRAC also alleges breach of contract and requests declaratory and injunctive relief. See Compl. at Counts I, III, V; see also Pl.'s Post-Trial Mem. at 2 and Def.'s Post-Trial Br. at 3 (indicating that only three Counts remain of CPRAC's Compl.).

violation of the contract clause. The City maintains that its actions do not violate the contract clause, that CPRAC has not met its burden to show that the City's actions amounted to a substantial impairment, and that it has presented sufficient credible evidence that the City's actions were reasonable and necessary to achieve a significant and legitimate public purpose. In November of 2015, the matter proceeded to a non-jury trial. The Court exercises jurisdiction pursuant to G.L. 1956 §§ 8-2-13 and 9-30-1.

I

Findings of Fact

The Court has reviewed the evidence presented at trial by both parties and makes the following findings of fact.

The City established the Cranston Police Pension fund for permanent members of the Cranston Police Department and the Cranston Fire Pension fund for permanent members of the City Fire Department in 1937. Compl. at ¶¶ 6, 7. Throughout the years, the International Brotherhood of Police Officers, Local 301 (IBPO) on behalf of the police, and International Association of Fire Fighters, Local 1363 (IAFF) on behalf of the firefighters, engaged in mandatory and binding collective bargaining with respect to all terms and conditions of employment. Id. at ¶¶ 9, 10; see also Municipal Police Arbitration Act, G.L. 1956 § 28-9.2-1, Municipal Fire Fighters Arbitration Act, G.L. 1956 § 28-9.1-1. As a result, collective bargaining agreements (CBAs) were routinely negotiated between

the IBPO and the City and the IAFF and the City. Id. at ¶¶ 9, 10.

The health of the City pension fund was examined yearly through actuarial studies and reports. Trial Tr. 61:19–22, Nov. 10, 2015 (Mayor Traficante). By the early 1990s, the actuarial reports indicated that the "appropriations [to the pension] were not keeping up with that growth." Id. at 60:16–17. As a result, Mayor Traficante prudently addressed the issue of the expanding unfunded pension liability. Id. at 61:23–62:14. To achieve the goal, he sought the assistance of the police and fire unions. Id. at 62:3–14. The first step was to ask the unions to reopen their contracts with the potential of moving the employees from the City pension system into the state pension system. Id. Initially, this notion was dismissed by the unions; however, after discussions, an agreement was reached in 1996. Id. at 62:24–63:11.

This agreement transformed the City pension system by creating a two-tier pension system. Id. at 64:13–15, 70:18–71:1. Members of the police and fire departments hired after July 1, 1995 would enroll in the state pension system. Id. at 64:13–15, 70:18–71:1; see also Exs. 88A, Sec. 2-24-23(C)(1); 89A, Sec. 1-10-11(C)(1). Employees with less than five years of service on July 1, 1995 could elect to transfer into the state pension system or remain in the City pension system. Trial Tr. 70:7–11, Nov. 10, 2015; see also Exs. 88A, Secs. 2-24-23(B)(1), 2-24-23(A)(1); 89A, Secs. 1-10-11(B)(1), 1-10-11(A)(1). The agreement also provided, for the first time, a minimum 3% compounded COLA

upon retirement with an escalator clause.[4] Trial Tr. 72:12–23, 88:12–90:6, 101:21–25, Nov. 10, 2015; see also Exs. 88A, Sec 2-24-23(A)(20); 89A, Sec. 1-10-11(A)(3). The escalator clause ensured that there would be an increase in the compounded COLA equivalent to any raise active employees received. Trial Tr. 72:12–23, 88:12–90:6, 101:21–25, Nov. 10, 2015; see also Exs. 88A, Sec. 2-24-23(A)(20); 89A, Sec. 1-10-11(A)(3). The COLA was implemented by the City at the insistence of the unions to achieve parity with the state pension system. Trial Tr. 64:8–12, Nov. 10, 2015. This agreement was ratified by the unions and codified into law by the passage of two ordinances on November 25, 1996 (1996 Ordinances). Id. at 63:1–11, 68:24–69:22, 72:10–11; see also Exs. 88A, 89A.

CBAs[5] negotiated between the City and the IBPO after the 1996 Ordinances incorporated the provisions

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[4] The agreement provided, in pertinent part:

> "Retired members pension payments will automatically escalate in an amount equal to all contractual increases received by active duty members of similar rank or position and similar credited years with regard to annual salary. In any contractual year in which the annual salary for active members with over three (3) years of service does not increase by three (3%) percent, then said retired members shall receive a three (3%) percent escalation of said pension payment on June 30 of that year." Ex. 88A, Sec. 2-24-23(A)(20); see also Ex. 89A, Sec. 1-10-11(A)(3) (containing nearly identical language); see also Trial Tr. 88:12–90:6, Nov. 10, 2015 (Mayor Traficante).

[5] All CBAs, unless otherwise noted, are effective for the duration of the fiscal year, beginning on July 1 of the starting year and ending on June 30 of the ending year.

of the 1996 Ordinances, including the 3% compounded COLA with an escalator clause.[6] In addition, CBAs negotiated between the City and the IAFF subsequent to the 1996 Ordinances specifically included a minimum 3% compounded COLA with an escalator clause.[7]

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[6] Section 24-1 of the 1997–1999 CBA, 1999–2002 CBA, 2002–2005 CBA and Section 23-1 of the 2006–2008 CBA and the 2009–2012 CBA provides that:

> "All City ordinances, state statutes and current benefits now in existence as evidenced by a memorandum of understanding signed by [the] city and IBPO, providing the various forms of retirement benefits in existence upon the execution of the Agreement for members of the bargaining unit are hereby incorporated by reference as if fully stated herein and shall inure to all members of the bargaining unit for the duration of this Agreement. No changes shall be made to said benefits without the written agreement between the City and the I.B.P.O." Exs. 34, 35, 36, 37, 38.

Section 23-1 of the 2006–2008 CBA and 2009–2012 CBA additionally removed the escalator clause and fixed the compounded COLA at 3% per annum: "Notwithstanding the above, for all existing employees who retire after the execution of this collective bargaining agreement, the pension cost-of-living adjustments (COLAs) will be fixed at 3.0% per annum, compounded, without any escalation based on raises granted to active employees." Exs. 37, 38.

[7] Section 24(A)(3) of the 1997–1998 CBA, 1998–2001 CBA, 2001–2004 CBA, 2006–2007 CBA, 2007–2010 CBA, 2008–2011 CBA, and 2011–2013 CBA provides:

> "All retired employees' pension payments will automatically escalate based on any and all contractual increases received by active duty employees of similar rank or position and similar credited years of service with regard to weekly salary, longevity pay, and holiday pay. In

Prior to instituting these changes, Mayor Traficante considered many options such as accessing the rainy day fund. Trial Tr. 102:9–25, 107:24–108:10, Nov. 10, 2015 (Mayor Traficante). All alternatives were dismissed. Id. at 102:9–25, 107:24–108:10. For instance, the suggestion to secure a pension obligation bond was dismissed because it would have increased the debt service of the City. Id. at 104:21–105:7. A supplemental tax was also rejected. Id. at 108:14–109:14. Mayor Traficante felt that another tax increase would be harmful to City taxpayers who had faced no fewer than six tax increases since 1985. Id. Additionally, the privatization of the wastewater treatment plant was explored. Id. at 110:1–25. The option was deemed imprudent. Id.

Despite these crucial changes to the City pension system, the unfunded accrued liability continued to grow. By 1999, the unfunded accrued liability reached a total of $169 million for police officers and firefighters. Id. at 100:13–15; see also Ex. 60. One of the biggest factors that drove the growth of the unfunded accrued liability was the newly-implemented compounded COLA. Trial Tr. 100:22–101:4, Nov. 10,

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any contractual year in which the active employee's over three (3) years of service weekly salary does not increase by a gross of three (3%) percent, the retired employee's escalation of pension payments will automatically increase by three (3%) percent compounded on July 1 of that year. All active duty employees when retired shall have their pension payments adjusted, if necessary, to pension payments received by retired employees of similar rank or position and similar credited years of service at the time of their retirement." Exs. 14, 15, 16, 17, 18, 19, 22.

2015. Although the growth of the unfunded accrued liability was recognized as an issue, this administration was unable to achieve additional modifications due to the significant achievements accomplished in 1996. Id. at 101:11–25.

The structural deficit continued to grow in the years following the Traficante administration. Id. at 116:8–16 (Mayor O'Leary). Mayor John R. O'Leary was elected and assumed office in 1999. Id. at 115:1–6, 116:1–3. During his tenure, there remained a structural deficit as well as challenges with respect to the unfunded pension liability. Id. at 116:18–117:5. In an effort to meet the City's obligations to pay retirees' pension and healthcare obligations, Mayor O'Leary, during his fourth and final year as mayor, borrowed against the pension fund which was repaid the following year. Id. at 120:8–21, 122:24–123:12.

The issue of the expanding unfunded pension liability was confronted in 2008, when Allan Fung was elected Mayor. Trial Tr. 2:20–21, 9:19–23, Nov. 12, 2015 (Mayor Fung). As with his predecessors, Mayor Fung was responsible for overseeing the City's budget, including the City's pension plan. Id. at 2:22–4:1. The major sources of revenue for the City continued to be the tax levy, state aid, and grant money. Trial Tr. 3:19–23, Nov. 13, 2015 (Mr. Strom). These sources were substantially reduced because of the negative economic conditions developing during the initial days of the Fung administration. Among the many economic challenges encountered were the Great Recession, rising unemployment, and the devaluation of the City property assessment. Trial Tr. 13:9–17, 17:10–20, Nov.

12, 2015 (Mayor Fung). It was estimated that the property assessments decreased by one billion dollars between 2008 and 2009. Id. at 13:9–17, 17:10–20; see also Exs. YYY, ZZZ. This resulted in lower tax revenue for the City. Trial Tr. 17:10–20, Nov. 12, 2015. To compound matters, the City was challenged by two natural disasters in March of 2010 that cost the City in excess of $1.4 million. Id. at 24:17–25:5.

Colliding with these events came a substantial decrease in state aid due to the state budgetary crisis. Id. at 19:25–20:3. State aid decreased from twenty-two million dollars in fiscal year 2007 to less than six million dollars in fiscal year 2011. Trial Tr. 11:5–12:7, Nov. 13, 2015 (Mr. Strom); see also Exs. H, I, J, K, L. The reduction in aid created a nearly five percent gap in the budget. Trial Tr. 14:5–12, Nov. 13, 2015. The overall fiscal health of the City was disabled. Trial Tr. 22:18–23:19, Nov. 12, 2015 (Mayor Fung); see also Ex. R. As a consequence, Moody's Investors Services downgraded the City's bond rating. Trial Tr. 23:20–24:14, 27:25–28:25, Nov. 12, 2015; see also Exs. R, X. There were several reasons listed to support the downgrade, including the continued underfunding of the annual required contribution and the anticipated increase in the unfunded pension liability, among others. Id.; see also Exs. R, X.

Faced with these financial difficulties, the City undertook significant expenditure cuts and many attempts to increase City revenue. Trial Tr. 16:11–17:3, Nov. 13, 2015; see also Ex. MM. Mayor Fung began to tackle the problem through the implementation of a series of steps that included cost cutting measures.

Trial Tr. 12:8–19, Nov. 12, 2015 (Mayor Fung). The administration explored cuts that included a reduction in staff and an increase in the healthcare co-pays for City employees. Id. A multi-year pay freeze was instituted to further reduce costs. Id. at 71:12–72:17; see also Ex. JJ. Public motor vehicles and buildings were sold for revenue. Trial Tr. 70:20–71:3, 144:7–16, Nov. 12, 2015; see also Ex. JJ.

The Fung administration also reviewed the City's pension system. Trial Tr. 29:1–6, Nov. 12, 2015. The City pension system's large, unfunded liability was a result of historical underfunding as well as the high cost of the compounded COLAs. Id. at 31:4–17. By 2011, the unfunded liability totaled $256 million, with $35 million in assets. Id. at 30:6–15, 39:5–21; see also Exs. U, Y. There were approximately 480 participants and beneficiaries in the City pension system. Trial Tr. 29:7–12, Nov. 12, 2015. Of those, an estimated fifty-seven were active employees. Id. at 29:13–18. A 2011 report estimated that—with demographic and economic assumption changes—the unfunded and accrued liability actually would increase to approximately $271 million. Id. at 46:11–21; see also Ex. Y. Additionally, the City made less than the 100% annual required contribution (ARC)[8] to the pension for fiscal years 2009,

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[8] There is some disagreement as to the meaning of the acronym "ARC." Mayor Fung testified that ARC stood for "annual [] required contribution." Trial Tr. 41:15–42:16, Nov. 12, 2015 (Mayor Fung). The Government Accounting Standards Board uses this same definition. See, e.g., "Protecting Pension and Retiree Health Care Benefits: A Glossary of Actuarial and Accounting Terms and Concepts for Retirement Plans." National Education Association, Jan. 2015, 4 (http://www.nasra.org/Files/Topical%20Reports/

2010, and 2012. Trial Tr. 41:15–42:16, Nov. 12, 2015; see also Ex. U. With demographic and economic assumption changes taken into account, the ARC increased by several million dollars a year in fiscal year 2010. Trial Tr. 47:13–21, Nov. 12, 2015; see also Ex. U.

The decision to act was based on a real fear of bankruptcy. Trial Tr. 81:11–19, 82:1–15, 121:18–122:2, 126:11–23, Nov. 12, 2015 (Mayor Fung). Mayor Fung had witnessed the Central Falls bankruptcy in 2011, and he recognized that bankruptcy was also a possibility for Cranston. Id. Mayor Fung noted that the Auditor General's report from 2011 detailed Cranston's pension problem and that all three ratings agencies indicated pension issues in Cranston. Id. at 82:19–83:11. Although it was conceded that the Auditor General had sounded the alarm in its 2002 report on the City's pension system, there was a firm testified belief that the total context of budgetary crises, inherited deficits, unanticipated cuts in state aid, and the 2010 natural disasters constituted an unexpected fiscal emergency in 2009. Trial Tr. 13:3–14:24, Nov. 13, 2015 (Mayor Fung); see also Exs. HHHH, IIII, 57.

Also occurring during this timeframe was the state's undertaking to address the status of locally administered pension plans. Trial Tr. 33:21–25, Nov. 12, 2015. Mayor Fung was a member of the Pension Study Commission charged with analyzing pension

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Actuarial/Glossary%20of%20Actuarial%20Terms.pdf). However, CPRAC's expert, Mr. Fornia, defined ARC as the "actuarial required contribution." Trial Tr. 27:18–20, Nov. 13, 2015 (Mr. Fornia). For purposes of clarity and consistency, the Court will use ARC to mean "annual required contribution."

issues and formulating recommendations to the Governor and the General Treasurer. Id. at 34:1–6.

Ultimately, the Rhode Island Retirement Security Act (RIRSA) was passed in 2011. G.L. 1956 §§ 45-65-1 et seq.; see also Ex. VVV. Under RIRSA, any municipal pension plan that was less than sixty percent funded was defined to be in "critical status." Trial Tr. 5:22–6:5, 35:1–36:19, Nov. 12, 2015 (Mayor Fung); see also Ex. VVV. A municipality that was deemed to be in critical status was tasked with two responsibilities: (1) submitting a notice of critical status to plan participants and beneficiaries and to the general assembly, governor, general treasurer, director of revenue, and auditor general within thirty days; and (2) submitting a reasonable alternative funding improvement plan to emerge from critical status to the Pension Study Commission within 180 days of sending the critical status notice. Trial Tr. 36:7–19, Nov. 12, 2015; see also Ex. VVV. If a critical status municipality failed to comply, it faced reductions in state aid. Trial Tr. 36:12–19, 37:6–14, Nov. 12, 2015; see also Ex. VVV. If deemed to be in critical status, the City had twenty years to achieve sixty percent funding status—and thus emerge from critical status—or it would face significant further reductions in state aid. Trial Tr. 85:16–86:8, 95:4–6, 102:17–25, Nov. 12, 2015.

The City met the rubric for critical status. Id. at 48:1–11. As a result, on April 1, 2012, the City's actuary sent a letter to the Cranston Finance Director indicating that the City was in critical status as defined in RIRSA. Id. at 48:6–11; see also Ex. Z. A notice of critical status designation was sent to all of

the City pension system participants and beneficiaries as well as to the various state officials required by RIRSA on April 6, 2012. Trial Tr. 48:23–49:19, Nov. 12, 2015; see also Exs. AA, BB, CC, DD, EE, FF. The City had 180 days to submit a reasonable alternative funding improvement plan to the Pension Study Commission. Trial Tr. 87:19–25, Nov. 12, 2015; see also Ex. VVV. At the time, Cranston's pension was 16.9% funded and one of the worst in the state. Trial Tr. 61:16–20, Nov. 12, 2015; see also Ex. GG. For fiscal year 2012, the City was required to increase its ARC to pension payments by $14 million to 100% fund the plan. Trial Tr. 53:15–54:6, Nov. 12, 2015; see also Ex. GGGG. It was concluded that obtaining $14 million through spending cuts would decimate city services, eliminate parks and recreation services, and shutter libraries. Trial Tr. 57:3–20, Nov. 12, 2015; see also Ex. GGGG.

Ultimately, it was decided that the solution involved the suspension of the 3% compounded COLA. The suspension of the 3% compounded COLA, however, was not the only option considered by the Fung administration. Trial Tr. 89:1–11, 94:9–15, 112:6–11, Nov. 12, 2015 (Mayor Fung); see also Trial Tr. 9:19–11:7, Nov. 13, 2015 (Mayor Fung). Over twenty-five different alternatives were researched and considered with City actuaries, and it was only after a long process that the ten-year suspension of the 3% compounded COLA was chosen. Trial Tr. 89:1–11, 94:9–15, 112:6–11, Nov. 12, 2015 (Mayor Fung); see also Trial Tr. 25:25–26:11, Nov. 13, 2015 (Mr. Strom). With the assistance of consultants from Buck Consulting, the City examined prudent measures to

achieve a more sustainable City pension system. Trial Tr. 25:25–26:11, Nov. 13, 2015 (Mr. Strom). Raising the employee contributions was not seriously considered because of the relatively small number of current employees and the large size of the unfunded liability. Trial Tr. 77:25–78:13. Nov. 12, 2015 (Mayor Fung). Funds in the rainy day fund were also not considered in resolving the pension crisis, as Mayor Fung thought it unwise to use those funds for a systemic problem. Id. at 120:9–17.

Equally unsuitable to achieve fiscal readiness was raising taxes. Trial Tr. 18:6–16, Nov. 13, 2015 (Mr. Strom). The City had recently undergone tax increases and further tax increases were deemed unsustainable to taxpayers. Id. In Cranston, the assessed value of real and tangible property from 2008 to 2015 declined, whereas the net tax levy increased. Id. at 18:25–21:11, 22:2–12; see also Exs. YYY, ZZZ, AAAA, BBBB, CCCC, DDDD, EEEE, FFFF. Indeed, the City was listed by the State as a "[d]istressed [c]ommunity" for at least two years, indicating a high tax burden. Trial Tr. 22:13–23:4, Nov. 13, 2015. In fact, between 1985 and 2013, there were at least fifteen tax increases in the City. Trial Tr. 76:13–16, Nov. 12, 2015 (Mayor Fung); see also Ex. XXX. Cranston residents were paying high taxes for extremely limited services. Trial Tr. 59:2–5, Nov. 12, 2015. Any subsequent tax increases to deal with the crisis were not feasible. Id. at 76:21–23, 80:11–15. Furthermore, a tax increase would defy the state property tax cap. Trial Tr. 37:10–23, Nov. 13, 2015 (Mr. Strom). The cap prevents any municipality from raising the tax levy by more than 4% in any fiscal year. Id.

It was clear that to avert disaster the City had to act. The primary reason that the suspension of the 3% compounded COLA for ten years appeared fruitful was to rescue the pension plan from extinction. Trial Tr. 121:20–23, Nov. 12, 2015 (Mayor Fung). The suspension of the 3% compounded COLA suspension was a measure of last resort. Trial Tr. 27:15–23, Nov. 13, 2015 (Mayor Fung). In the end, it was concluded that the 3% compounded COLA suspension would reduce the City's unfunded pension liability and ultimately reverse the Moody's Investors Service's negative outlook on the City's bonds. Trial Tr. 28:14–29:16, Nov. 13, 2015; see also Exs. X, PPP, QQQ.

The Mayor created an alternative funding improvement plan and presented it to stakeholders through a series of meetings. Trial Tr. 59:10–15, 81:20–24, Nov. 12, 2015; see also Exs. HH, KK. The Mayor attempted to openly and transparently resolve the crisis. Trial Tr. 61:21–62:12, Nov. 12, 2015. Over one hundred police officers, firefighters, and/or retirees attended a meeting on September 13, 2012 with Mayor Fung to discuss what could be done. Id. at 63:19–64:13; see also Ex. JJ. At this meeting, Mayor Fung presented a PowerPoint slideshow that provided information as to the City's past and present financial situation, RIRSA's requirements, and a proposed funding improvement plan. Trial Tr. 64:24–70:13, Nov. 12, 2015; Ex. JJ. The slideshow attempted to explain to pension plan participants and beneficiaries why the City needed to act now, how precarious the City's financial situation was, and how the compounded COLAs impacted the pension fund. Trial Tr. 81:5–83:24, Nov. 12, 2015; see also Ex. JJ. The

suspension of the 3% compounded COLA was proposed. Trial Tr. 84:19–85:15, Nov. 12, 2015; see also Ex. JJ. It was explained by Mayor Fung that the proposal would accomplish the goal of removing the City pension system from critical status within twenty years. Trial Tr. 86:9–14, Nov. 12, 2015. The presentation included a suggestion that retirees engage legal counsel to negotiate; Mayor Fung insisted that, although he had proposed a solution, he was open to considering additional alternatives. Id. at 88:21–89:11; see also Ex. JJ. Mayor Fung had a similar meeting on September 25, 2012. Trial Tr. 90:11–19, Nov. 12, 2015.

Mayor Fung proposed two ordinances at a special meeting of the Cranston City Council Finance Committee on October 25, 2012. Trial Tr. 90:14–92:2, Nov. 12, 2015; see also Ex. NN. The ordinances would implement a ten-year suspension of the 3% compounded COLA. Trial Tr. 90:14–92:2, Nov. 12, 2015; see also Ex. NN. During this meeting, Mayor Fung made a presentation that contained much of the same information from the slideshow presented on September 13, 2012. Trial Tr. 93:19–94:24, Nov. 12, 2015; see also Ex. MM. By this time, the City and its actuaries had considered over twenty-five different alternatives and had narrowed the alternatives to four options for consideration. Trial Tr. 93:19–94:24, Nov. 12, 2015; see also Ex. MM. These options compared the effect of suspending the 3% compounded COLA with various amortization periods on ARC contributions to determine the year in which the City was expected to emerge from critical status. Trial Tr. 94:9–98:5, Nov. 12, 2015; see also Ex. MM. If the status quo was to remain, the City would be required to infuse an

additional $100 million over twenty years to emerge from critical status in a timely fashion. Trial Tr. 95:11–97:7, Nov. 12, 2015; see also Ex. MM. By suspending the 3% compounded COLA for ten years, the City would emerge from critical status by 2032, within the Pension Study Commission's twenty-year requirement. Trial Tr. 97:8–22, Nov. 12, 2105; see also Ex. MM.

On November 11, 2012, Mayor Fung sent a letter to the Pension Study Commission containing the four potential scenarios for emerging from critical status. Trial Tr. 98:9–19, Nov. 12, 2015; see also Ex. QQ. The four options included a ten-year suspension of the 3% compounded COLA, a fifteen-year suspension of the 3% compounded COLA, a permanent suspension of the 3% compounded COLA with large ARC in fiscal years 2013 and 2014, and a permanent suspension of the 3% compounded COLA with different ARC in fiscal years 2013 and 2014. Trial Tr. 99:2–100:11, Nov. 12, 2015; see also Ex. QQ.

During this timeframe, Mayor Fung was approached by retirees as well as union representatives from the IBPO and the IAFF seeking to resolve the crisis. Trial Tr. 103:4–25, Nov. 12, 2015. In an attempt to negotiate in good faith, Mayor Fung suspended his efforts to seek passage of the ordinances. Trial Tr. 104:1–12, Nov. 12, 2015. He commenced a dialogue with the City pension system participants and beneficiaries. Id. Starting in January of 2013, Mayor Fung met with Mr. Paul Valletta, president of the IAFF; Mr. Ken Rouleau, vice president of the IAFF; Mr. Stephen Antonucci, president of the IBPO; police

retiree representatives, and others. Trial Tr. 106:17–107:20, Nov. 12, 2015. Meetings between Mayor Fung and interested parties occurred on January 11, 2013; January 29, 2013; February 14, 2013; February 26, 2013; March 4, 2013; and March 8, 2013. Id. at 108:17–109:11; see also Ex. TT. Mayor Fung testified that all of these meetings were designed to provide information to retirees and engage in an open dialogue. Trial Tr. 109:9–21, 110:4–18, Nov. 12, 2015. At the meetings, over twenty different scenarios were discussed with retirees, including alternative compounded COLA suspension scenarios. Id. at 112:6–11; see also Exs. XX, ZZ, AAA, DDD, III. Ironically, one goal of holding these meetings was to avoid a court challenge. Trial Tr. 110:11–18, Nov. 12, 2015. Ultimately, the stakeholders reached an agreement. Id. at 115:11–14.

The agreement resulted in the passage of two ordinances by the Cranston City Council on April 23, 2013 amending the Cranston City Code that governed police and firefighter retiree pensions to suspend the 3% compounded COLA for a period of ten years (2013 Ordinances).[9] Id. at 101:1–7, 116:17–117:1, Nov. 12,

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[9] Ordinance 2013-5, concerning the police officer pension funds, states, in pertinent part:

> "22. Notwithstanding any language in Chapter 2.20 entitled Policeman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, for any officer or member of the permanent police department who was hired prior to July

> 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan, any automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary in accordance with these sections shall be suspended for a period of ten (10) years beginning July 1, 2013.
>
> "23. Notwithstanding any language in Chapter 2.20 entitled Policeman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, upon the expiration of the ten year period provided for above, for any officer or member of the permanent police department who was hired prior to July 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan the automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary shall automatically escalate in an amount fixed at three percent per annum, compounded, without any further escalation based on raises granted to active employees." Ex. HHHH.

Ordinance 2013-6, dealing with the firefighter pension funds, states, in pertinent part:

> "7. Notwithstanding any language in Chapter 2.28 entitled Fireman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, for any officer or member of the permanent police

2015; see also Exs. HHHH, IIII. In year eleven, the COLA is reinstated at a fixed 3% compounded amount. Trial Tr. 22:12–16, Nov. 13, 2015 (Mayor Fung); see also Exs. HHHH, IIII.

The implementation of these changes led the Cranston Police Department Retirees Association, Inc. and the Local 1363 Retirees Association to bring suit in

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department who was hired prior to July 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan, any automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary in accordance with these sections shall be suspended for a period of ten (10) years beginning July 1, 2013.

"8. Notwithstanding any language in Chapter 2.28 entitled Fireman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, upon the expiration of the ten year period provided for above, for any officer or member of the permanent fire department who was hired prior to July 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan the automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary shall automatically escalate in an amount fixed at three percent per annum, compounded, without any further escalation based on raises granted to active employees." Ex. IIII.

April 2013 against the City, alleging that the 2013 Ordinances violated, inter alia, the contract clauses of the Rhode Island and United States Constitutions. See Joint Statement of Undisputed Facts at ¶ 31; see also Local 1363 Retirees Ass'n v. City of Cranston, PC-2013-1899. The parties negotiated and reached an agreement in the summer of 2013 (Settlement Agreement). Id. at ¶ 32. Paul Valletta Jr., President of the local IAFF, was the lead negotiator for the union. Trial Tr. 2:10–3:2, Nov. 17, 2015 (Mr. Valletta). Mr. Valletta was gravely concerned with the passage of RIRSA in 2011. Id. at 6:12–21. The purpose of the Settlement Agreement was to save the pension. Id. at 12:12–17. Prior to the Settlement Agreement, other options were explored, including increasing taxes, lay-offs, reductions in pay, and selling City assets. Id. at 13:4–15:17. It was concluded that these were not feasible or reasonable. Id.

The terms of the Settlement Agreement included a suspension of the 3% compounded COLA on alternating years for a period of ten years; in years eleven and twelve a compounded COLA is set at one and a half percent; and for years thirteen and forward the COLA returns to 3% compounded. See Trial Tr. 115:15–116:3, Nov. 12, 2015 (Mayor Fung); Trial Tr. 23:11–19, Nov. 13, 2015 (Mayor Fung); see also Ex. JJJJ. During a fairness hearing, the Court found the Settlement Agreement fair and reasonable and approved it on December 13, 2013. Joint Statement of Undisputed Facts at ¶ 41.

Those dissatisfied with the Settlement Agreement were afforded the opportunity to elect to exclude

themselves from the Settlement Agreement. Id. at ¶¶ 36, 40. Those individuals retained the right to sue the City. Id. CPRAC is comprised of those individuals who opted out of the Settlement Agreement. Trial Tr. 51:17–52:22, Nov. 9, 2015 (Mr. Gilkenson).

A non-jury trial was held over the course of six days, during which sixteen witnesses testified. At the close of CPRAC's evidence, the City moved for judgment as a matter of law pursuant to Super. R. Civ. P. 52(c). Trial Tr. 117:25–122:24, Nov. 17, 2015. The Court reserved on the City's motion. Id. at 127:19.

II

Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure (Rule 52(a)) provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law . . . ." Super. R. Civ. P. 52(a). Accordingly, in a non-jury trial, "'[t]he trial justice sits as a trier of fact as well as of law.'" Parella v. Montalbano, 899 A.2d 1226, 1239 (R.I. 2006) (quoting Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984)). In so doing, she "'weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences.'" Id. (quoting Hood, 478 A.2d at 184). Additionally, "it is permissible for the trial justice to 'draw inferences from the testimony of witnesses, and such inferences, if reasonable, are entitled on review to the same weight as other factual determinations.'" Cahill v. Morrow, 11 A.3d 82, 86 (R.I. 2011) (quoting

DeSimone Elec., Inc. v. CMG, Inc., 901 A.2d 613, 621 (R.I. 2006)).

However, "'extensive analysis'" is not required of the trial justice. Wilby v. Savoie, 86 A.3d 362, 372 (R.I. 2014) (quoting Connor v. Schlemmer, 996 A.2d 98, 109 (R.I. 2010)). Indeed, the "'trial justice's analysis of the evidence and findings in the bench trial context need not be exhaustive . . . if the decision reasonably indicates that [he or she] exercised [his or her] independent judgment in passing on the weight of the testimony and credibility of the witnesses . . . .'" Id. (quoting Notarantonio v. Notarantonio, 941 A.2d 138, 144–45 (R.I. 2008)). Brief findings of fact and conclusions of law are sufficient as long as they squarely address and resolve controlling factual and legal issues.[10] See Broadley v. State, 939 A.2d 1016,

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[10] Rule 52(c) of the Rhode Island Superior Court Rules of Civil Procedure (Rule 52(c)) permits a Court, in a non-jury trial, to enter judgment as a matter of law after a party has been fully heard on an issue. Rule 52(c) provides, in pertinent part, as follows:

> "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule." Super. R. Civ. P. 52(c).

Importantly, the Court must adhere to the same standard of review exercised under Rule 52(a). See Cathay Cathay, Inc. v. Vindalu, LLC, 962 A.2d 740, 745 (R.I. 2009); see also Broadley, 939

1021 (R.I. 2008).

This Court, sitting without a jury, also possesses discretion "to grant or deny declaratory relief pursuant to the [Uniform Declaratory Judgments Act]" as well as discretion "to grant or deny injunctive relief as a court of general equitable jurisdiction." R.I. Republican Party v. Daluz, 961 A.2d 287, 295 (R.I. 2008); see also §§ 9-30-1 to 9-30-16; see also § 8-2-13. The Uniform Declaratory Judgments Act grants the Superior Court "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed . . . and such declarations shall have the force and effect of a final judgment or decree." Sec. 9-30-1. Furthermore, "[a] decision to grant or deny declaratory or injunctive relief is addressed to the sound discretion of the trial justice . . . ." Foster Glocester Reg'l Sch. Bldg. Comm. v. Sette, 996 A.2d 1120, 1124 (R.I. 2010).

III

Analysis

A

Contract Clause

The contract clause of the United States Constitution as well as the Rhode Island Constitution

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A.2d at 1021 ("[A] finding on a Rule 52(c) motion must comport with the requirements in Rule 52(a), which does not require extensive analysis and discussion of all the evidence presented in a bench trial."). The trial justice must therefore "assess the credibility of witnesses and weigh the evidence presented by the nonmoving party." Cathay Cathay, Inc., 962 A.2d at 745 (citing Broadley, 939 A.2d at 1020).

serves to limit the power of the state to modify and regulate contracts. See Brennan v. Kirby, 529 A.2d 633, 638 n.7 (R.I. 1987) (holding that Rhode Island courts "will rely on federal case authority in this area"); R.I. Const. art. I, § 12; U.S. Const. art. I, § 10. Although the contract clause appears to be an absolute bar to impairment of public and private contracts, the United States Supreme Court has not interpreted it as such. U.S. Trust Co. of N.Y. v. N.J., 431 U.S. 1, 20 (1977) (holding that the contract clause "'is not to be read with literal exactness like a mathematical formula.'") (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934)); see also Energy Reserves Grp., Inc. v. Kan. Power and Light Co., 459 U.S. 400, 410 (1983).

The apparent absolute prohibition of the contract clause has been "accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Energy Reserves Grp., Inc., 459 U.S. at 410 (quoting Blaisdell, 290 U.S. at 434). Central to the interpretation of the contract clause is the careful balance struck between retaining "any meaning at all" from the words of the text and "the exercise of [a state's] otherwise legitimate police power." Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978); see also Patrick J. Rohan, 1 Zoning and Land Use Controls § 5.05[3] (1997) (noting the tension from the "conflict between the contracts clause of the United States Constitution and the necessary powers inherent in a sovereign state"). This balance furthers the "principle of harmonizing the constitutional prohibition with the necessary residuum of state power . . . ." City of El Paso v. Simmons, 379 U.S. 497, 508 (1965).

Therefore, "state laws that impair an obligation under a contract do not necessarily give rise to a viable Contracts Clause claim." Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362, 368 (2d Cir. 2006) (citing U.S. Trust Co., 431 U.S. at 16).

Determining whether a state law unconstitutionally impairs the obligations of contract requires this Court to conduct a three-prong analysis. See Energy Reserves Grp., 459 U.S. at 411–13; see also In re Advisory Op. to the Governor (DEPCO), 593 A.2d 943, 949 (R.I. 1991). The Court must consider the following:

> "[1] A court first must determine whether a contract exists. [2] If a contract exists, the court then must determine whether the modification results in an impairment of that contract and, if so, whether this impairment can be characterized as substantial. [3] Finally, if it is determined that the impairment is substantial, the court then must inquire whether the impairment, nonetheless, is reasonable and necessary to fulfill an important public purpose." Nonnenmacher v. City of Warwick, 722 A.2d 1199, 1202 (R.I. 1999) (internal citations omitted); see also Retired Adjunct Professors v. Almond, 690 A.2d 1342 (R.I. 1997) (applying the same three-part analysis).

Plaintiff bears the burden of production in establishing beyond a reasonable doubt that the ordinances in question constitute a substantial impairment of a contract. See Retired Adjunct Professors, 690 A.2d at 1344–45; see also Parella, 899 A.2d at 1233; see also Nonnenmacher, 722 A.2d at

1203–04. In the event that plaintiff fails to meet its burden, the case ends. Otherwise, the burden of production shifts to the City to provide sufficient credible evidence that the ordinances were reasonable and necessary to fulfill a "significant and legitimate . . . purpose[.]" Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 323 (6th Cir. 1998); see also Energy Reserves Grp., 459 U.S. at 411; see also "Credible Evidence," Black's Law Dictionary (10th ed. 2014) ("[e]vidence that is worthy of belief; trustworthy evidence."). Thereafter, plaintiff may rebut defendant's credible evidence on factor three, but it must do so beyond a reasonable doubt. See Donohue v. Mangano, 886 F. Supp. 2d 126, 160 (E.D.N.Y. 2012) ("A lack of reasonableness or necessity is an element of a Contract Clause claim which the Plaintiffs bear the burden of establishing.") (citations omitted). Although the burden of production shifts, plaintiff bears the burden of persuasion throughout. see also Dowd v. Rayner, 655 A.2d 679, 681 (R.I. 1995) ("[T]he party challenging the constitutional validity of a statute carries the burden of persuading the court beyond a reasonable doubt . . . ."); see also Parella, 899 A.2d at 1232–33 ("[E]very statute enacted by the Legislature is presumed constitutional and will not be invalidated by this Court unless the party challenging the statute proves beyond a reasonable doubt that the legislative enactment is unconstitutional.") (emphasis in original).

1

Existence of a Contractual Obligation

As a threshold matter, it must be determined whether a contract exists between the parties. See

Nonnenmacher, 722 A.2d at 1202; see also Baltimore Teachers Union v. Mayor and City Council of Baltimore, 6 F.3d 1012, 1015 (4th Cir. 1993). This analysis "goes not just to whether there is any contractual relationship between the parties, but to whether there is a 'contractual agreement regarding the specific . . . terms allegedly at issue.'" Cycle City, Ltd. v. Harley-Davidson Motor Co., Inc., 81 F. Supp. 3d 993, 1004 (D. Haw. 2014) (quoting Gen. Motors Corp. v. Romein, 503 U.S. 181, 187 (1992)). Plaintiff must prove the existence of a contractual obligation beyond a reasonable doubt. See Dowd, 655 A.2d at 681.

Here, CPRAC established through credible testimony beyond a reasonable doubt that its members made contributions to the City pension system through payroll deductions and that all its members retired under various CBAs that provided a 3% compounded COLA. See Trial Tr. 3:20–4:1, 9:16–17, 40:5–20 (Mr. Gilkenson), 104:9–12, 105:2–106:6, 107:16–23, 111:22–23 (Mr. Matrumalo), 153:22–154:14, 156:16–22, 157:9–24, 159:12–14 (Mr. Walsh), 175:9–176:10 (Mr. Lynch); 185:12–186:14, 191:23–192:5 (Mr. Greene), Nov. 9, 2015; see also Trial Tr. 3:10–19, 5:15—6:8 (Mr. Davies), 16:3–19, 20:14–21:3, 21:23–22:3, 22:24–23:12 (Mr. Galligan), 31:23–32:16, 36:9–21 (Mr. Evans), 45:5–46:6, 46:14–23, 47:14–16 (Mr. Maccarone), Nov. 10, 2015; see also Exs. 18, 35, 36, 37, 38. The evidence provided by CPRAC established that for firefighter retirees, Section 24(A)(3) of the 1997–1998 CBA, 1998–2001 CBA, 2001–2004 CBA, 2006–2007 CBA, 2007–2010 CBA, 2008–2011 CBA, and 2011–2013 CBA provide: "All retired employees' pension payments will automatically escalate based on any and all contractual

increases received by active duty employees . . . . [T]he retired employee's escalation of pension payments will automatically increase by three (3%) percent compounded on July 1 of that year." Exs. 14, 15, 16, 17, 18, 19, 22. The plain and unambiguous language of the firefighter CBAs confers a 3% compounded COLA to the retired firefighter. See Local 369 Util. Workers v. NSTAR Elec. and Gas Corp., 317 F. Supp. 2d 69, 75–76 (D. Mass 2004) ("It is certainly possible for an employer to 'oblige itself contractually to maintain benefits at a certain level . . . .'") (quoting Vasseur v. Halliburton Co., 950 F.2d 1002, 1006 (5th Cir. 1992)).

In addition, it was demonstrated that for police officer retirees, Section 24-1 of the 1997–1999 CBA, 1999–2002 CBA, and 2002–2005 CBA, and Section 23-1 of the 2006–2008 CBA and 2009–2012 CBA specifically incorporate the 1996 Ordinances.[11] See Rotelli v. Catanzaro, 686 A.2d 91, 94 (R.I. 1996) ("[I]nstruments referred to in a written contract may be regarded as incorporated by reference and thus may be considered

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[11] Section 24-1 of the 1997–1999 CBA, 1999–2002 CBA, and 2002–2005 CBA and Section 23-1 of the 2006–2008 CBA and 2009–2012 CBA provides:

> "All City ordinances, state statutes and current benefits now in existence as evidenced by a memorandum of understanding signed by [the] city and IBPO, providing the various forms of retirement benefits in existence upon the execution of the Agreement for members of the bargaining unit are hereby incorporated by reference as if fully stated herein and shall inure to all members of the bargaining unit for the duration of this Agreement. No changes shall be made to said benefits without the written agreement between the City and the I.B.P.O." Exs. 34, 35, 36, 37, 38.

in the construction of the contract.") (citing 17A Am. Jur. 2d Contracts § 400 (1991)). Our Supreme Court considered a related issue in Arena v. City of Providence, 919 A.2d 379, 392 (R.I. 2007). There, the City of Providence applied new, less generous COLA calculations to police and fire department employees who had retired before the effective dates of the ordinances providing the new calculations. Id. at 384. The Arena Court held that the plaintiff had a vested interest in the COLA provided by the ordinance, noting that it was "a municipality's duty to carefully craft an ordinance granting a pension benefit so that it is clear whether the benefit is gratuitous or vested . . . ." Id. at 394. A determination of whether the COLA benefits are vested thus requires a "look to the applicable pension ordinance." Id. at 393.

Here, the plain language of the 1996 Ordinances provides a 3% compounded COLA with an escalator clause: "Retired members pension payments will automatically escalate in an amount equal to all contractual increases received by active duty members . . . . [If there is no increase for active members] retired members shall receive a three (3%) percent escalation of said pension payment on June 30 of that year." Ex. 88A, Sec. 2-24-23(A)(20); see also Arena, 919 A.2d at 394 (finding an ordinance conferred a vested compounded COLA to retirees based on the "plain language" of the ordinance).[12] Additionally, the

[12] For police officers who retired under the 2006–2008 CBA or the 2009–2012 CBA, the compounded COLA was fixed at 3% annually, without an escalator clause: "the pension cost-of-living adjustments (COLAs) will be fixed at 3.0% per annum,

collective bargaining origins of the 3% compounded COLA weigh in favor of vesting. See Arena, 919 A.2d at 394 ("[W]e are further persuaded that this is the correct interpretation because the COLA provisions in question were negotiated during the collective bargaining process . . . ."). The Court therefore finds that the plain and unambiguous language of the 1996 Ordinances, as referenced by the police officer CBAs, confers a 3% compounded COLA to the retired police officers.

As such, the Court is satisfied that CPRAC has shown beyond a reasonable doubt that members of CPRAC have a vested right to a 3% compounded COLA in accordance with the respective CBAs under which they retired. Accordingly, the 3% compounded COLAs are contractual obligations, the impairment of which is subject to contract clause scrutiny. See Buffalo Teachers Fed'n, 464 F.3d at 368 (analyzing impairment of union labor contracts under the contract clause).

2

Substantial Impairment

The contract clause is only invoked if the state law's impairment of the contractual obligation is sufficiently "substantial." See Nonnenmacher, 722 A.2d at 1202; see also Liberty Mut. Ins. Co. v. Whitehouse, 868 F. Supp. 425, 431 (D.R.I. 1994). Underlying this analysis is a respect for the important role of contract:

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compounded . . . ." Exs. 37, Sec. 23-1; 38, Sec. 23-1 (emphasis added).

> "The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." Spannaus, 438 U.S. at 245.

The United States Supreme Court has not specifically indicated what constitutes a "substantial" contractual impairment. The Supreme Court has indicated that not all impairments are substantial for contract clause purposes. For example, "technical" impairments are unlikely substantial. See Spannaus, 438 U.S. at 245 ("Minimal alteration of contractual obligations may end the inquiry at its first stage."); see also U.S. Trust Co., 431 U.S. at 21 ("[A] finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution."). However, "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." Energy Reserves Grp. Inc., 459 U.S. at 411; see also U.S. Trust Co., 431 U.S. at 26. As the Fourth Circuit has noted, "[t]he ground between these spectral ends, though, has yet to be charted with any precision." Baltimore Teachers Union, 6 F.3d at 1017.

It is clear, however, that two key factors are to be examined: (1) whether the impaired right was the one

that "substantially induced" the parties to contract in the first place, City of El Paso, 379 U.S. at 514, and (2) whether the abridged right is one that was reasonably and especially relied on by the complaining party. Spannaus, 438 U.S. at 246. Either factor may be independently sufficient for a finding of substantial impairment. See Buffalo Teachers Fed'n, 464 F.3d at 368 (finding substantial impairment based on reasonable reliance alone).

In examining inducement, it has been concluded that no substantial impairment exists where the abridged right "was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking." City of El Paso, 379 U.S. at 514. Only rights that are "important," "basic," or "central" to the underlying contract are sufficient to find a substantial impairment based on inducement. See U.S. Trust Co., 431 U.S. at 19; see also Spannaus, 438 U.S. at 246; see also Baltimore Teachers Union, 6 F.3d at 1018; see also City of Charleston v. Pub. Serv. Comm'n of W. Va., 57 F.3d 385, 394 (4th Cir. 1995).

Reliance on the contractual expectation requires that the complaining party "relied heavily, and reasonably, on th[e] legitimate contractual expectation . . . ." Spannaus, 438 U.S. at 246; see also U.S. Trust Co., 431 U.S. at 31 (noting that in City of El Paso, a statute impairing contracts was upheld where it "'restrict[ed] a party to those gains reasonably to be expected from the contract[.]'") (quoting City of El Paso, 379 U.S. at 515). Thus, a plaintiff must demonstrate reasonable reliance on the impaired contractual provision to prove substantial impairment. See

Baltimore Teachers Union, 6 F.3d at 1018 (noting that a finding of substantial impairment requires evidence of especial reliance); see also Buffalo Teachers Fed'n, 464 F.3d at 368 ("[T]he wage freeze so disrupts the reasonable expectations of Buffalo's municipal school district workers that the freeze substantially impairs the workers' contracts with the City.").

It is clear that, "at the very least, where the contract right or obligation impaired was one that induced the parties to enter into the contract and upon the continued existence of which they have especially relied, the impairment must be considered 'substantial' for purposes of the Contract Clause." Baltimore Teachers Union, 6 F.3d at 1018 (emphasis in original). Plaintiff must prove these factors beyond a reasonable doubt. See Dowd, 655 A.2d at 681; see also Parella, 899 A.2d at 1232–33.

Here, despite the fact that the compounded COLA suspension is temporary and not a complete repudiation, the length of the suspension of the COLA is not so sufficiently minimal as to be a technical deprivation. See Energy Reserves Grp. Inc., 459 U.S. at 411, ("Total destruction of contractual expectations is not necessary for a finding of substantial impairment."); cf. Spannaus, 438 U.S. at 245 ("Minimal alteration of contractual obligations may end the inquiry at its first stage."). A more searching look at the inducement and reliance of CPRAC on the 3% compounded COLA is therefore warranted. See Baltimore Teachers Union, 6 F.3d at 1018.

Testimony from members of CPRAC lacks any description of what, precisely, induced them to enter

the police force or fire department in the first place. See generally, Trial Tr. Nov. 9–10, 2015. Indeed, not one member of CPRAC testified that the 3% compounded COLA induced him or her to enter into a contract with the City. See id. This is almost certainly due to the fact that all members of CPRAC who testified were hired prior to the enactment of the 1996 Ordinances, which first introduced the 3% compounded COLA. See Exs. 88A, 89A; see also Trial Tr. 89:6–90:6, Nov. 10, 2015 (Mayor Traficante). Nevertheless, based on the testimony presented, the Court must conclude that the 3% compounded COLA was not a "central undertaking" of the employment contract. See City of El Paso, 379 U.S. at 514. With no testimony as to the inducement of the employment contract presented, CPRAC has not done the necessary lifting required to prove its burden beyond a reasonable doubt. See Dowd, 655 A.2d at 681; see also Parella, 899 A.2d at 1233.

Notwithstanding, CPRAC has presented credible evidence beyond a reasonable doubt that its members especially and reasonably relied on the 3% compounded COLA. Members of CPRAC testified that the compounded COLA suspension's impact was substantial. See Trial Tr. 135:6–9, 136:8–14 (Mr. Matrumalo), 161:2–162:18 (Mr. Walsh), 180:12–19 (Mr. Lynch), 189:11–23 (Mr. Greene), Nov. 9, 2015; see also Trial Tr. 9:17–23 (Mr. Davies), 40:4–8 (Mr. Evans), 47:23–48:20 (Mr. Maccarone), Nov. 10, 2015. Members of CPRAC testified almost uniformly, and credibly, that if they had known of the forthcoming changes to the compounded COLA, they would not have retired when they did. See Trial Tr. 48:25–49:7 (Mr. Gilkenson), 132:21–24, 134:20–135:5 (Mr. Matrumalo), 160:9–16

(Mr. Walsh), 175:9–19 (Mr. Lynch), Nov. 9, 2015; see also Trial Tr. 8:12–14 (Mr. Davies), 24:2–15 (Mr. Galligan), 39:24–40:13 (Mr. Evans), 48:21–49:3 (Mr. Maccarone), Nov. 10, 2015. Indeed, many members of CPRAC testified that they based their financial plans on the continued indefinite availability of the 3% compounded COLA. See Trial Tr. 132:20–133:11 (Mr. Matrumalo), 161:2–162:18 (Mr. Walsh), Nov. 9, 2015. Many cited to the fact that there was an impact on their family, including an inability to assist family members as well as the need to rearrange retirement plans. See, e.g., Trial Tr. 135:6–9, 136:8–14 (Mr. Matrumalo), 161:2–162:18 (Mr. Walsh), 180:12–19 (Mr. Lynch), Nov. 9, 2015. For example, Mr. Greene credibly testified that the suspension of the COLA had an immediate financial impact on his family. See Trial Tr. 189:9–190:23, Nov. 9, 2015. Mr. Lynch testified that the compounded COLA suspension impacted his ability to pay for his children's college education. See id. at 179:5–180:2. Although most testified that the annual loss amount was nominal, the Court finds that the evidence credibly demonstrated that the cumulative impact to the individual was substantial. See id. at 137:20–138:7 (Mr. Matrumalo), 164:21–23 (Mr. Walsh), 180:12–19 (Mr. Lynch); see also Trial Tr. 27:25–28:3 (Mr. Galligan), 52:15–22 (Mr. Maccarone), Nov. 10, 2015; see also Cahill, 11 A.3d at 86 (holding that reasonable inferences are entitled to the same weight as factual determinations).

Buttressing the position that the loss was substantial was the testimony of CPRAC's expert, William Fornia. Mr. Fornia rendered an opinion to a reasonable degree of actuarial certainty that the loss to

the retiree was material. See Trial Tr. 38:20–39:12, 42:17–43:4, Nov. 13, 2015 (Mr. Fornia); see also Exs. 91, 93. His testimony on the issue of impairment was given weight.[13]

Therefore, CPRAC has established an especial reliance on the 3% compounded COLA. See Spannaus, 438 U.S. at 246 (finding substantial impairment where a party "relied heavily, and reasonably, on this legitimate contractual expectation"); see also Welch v. Brown, 551 F. App'x. 804, 810 (6th Cir. 2014) (finding substantial impairment where "most of the Plaintiffs live on fixed incomes, and the proposed changes are material"). This reliance is considered by the Court to be reasonable. See Arena, 919 A.2d at 395 ("[P]lantiffs had a reasonable expectation at the time they retired that they would receive a . . . compounded COLA that would vest upon their retirement.").

Accordingly, the Court finds that CPRAC has demonstrated beyond a reasonable doubt that members of CPRAC especially and reasonably relied on the 3% compounded COLA. See Baltimore Teachers Union, 6 F.3d at 1018; see also Dowd, 655 A.2d at 681. As such, the Court finds that the 2013 Ordinances constitute a substantial impairment of the contract between

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[13] Mr. Fornia calculated the actual loss per retiree resulting from the suspension of the compounded COLA to be $210,000. See Trial Tr. 40:22–42:2, 42:17–43:4, 55:15–21, Nov. 13, 2015 (Mr. Fornia); see also Ex. 91. However, this specific number was given little weight because it was based upon assumptions related to the consumer price index (CPI). See id. at 59:13–60:8. For instance, the CPI is currently lower than 3%, and a lower CPI would affect the outcome of the calculation. See id. at 60:9–61:4.

members of CPRAC and the City. See, e.g., Buffalo Teachers Fed'n, 464 F.3d at 368 ("Contract provisions that set forth the levels at which union employees are to be compensated are the most important elements of a labor contract."); see also Baltimore Teachers Union, 6 F.3d at 1018 n.8 ("[B]ecause individuals plan their lives based upon their salaries, we would be reluctant to hold that any decrease in an annual salary beyond one that could fairly be termed de minimis could be considered insubstantial.").

3

Significant and Legitimate Public Purpose

Notwithstanding a finding of substantial impairment, a contract modification remains constitutionally valid if the City produces sufficient credible evidence that the modification was done to further a significant and legitimate public purpose and if doing so was reasonable and necessary. See Buffalo Teachers Fed'n, 464 F.3d at 368; see also Nonnenmacher, 722 A.2d at 1202. CPRAC may rebut the credible evidence by establishing beyond a reasonable doubt that there was no significant and legitimate public purpose behind the City's actions. See Donohue, 886 F. Supp. 2d at 160.

A significant and legitimate public purpose is "one 'aimed at remedying an important general social or economic problem rather than providing a benefit to special interests.'" Buffalo Teachers Fed'n, 464 F.3d at 368 (quoting Sanitation and Recycling Indus. v. City of N.Y., 107 F.3d 985, 993 (2d Cir. 1997)). It may not be one "for the mere advantage of particular individuals

. . . ." Blaisdell, 290 U.S. at 445. "'[A]dressing a fiscal emergency is a legitimate public interest' however, 'the purpose may not be simply the financial benefit of the sovereign.'" Kent v. N.Y., No. 1:11-CV-1533, 2012 WL 6024998, at *21 (N.D.N.Y. Dec. 4, 2012) (quoting Buffalo Teachers Fed'n, 464 F.3d at 368). "Although economic concerns can give rise to the City's legitimate use of the police power, such concerns must be related to 'unprecedented emergencies . . . .'" Am. Fed'n of State, Cnty., and Mun. Emps. v. City of Benton, Ark., 513 F.3d 874, 882 (8th Cir. 2008) (quoting Spannaus, 438 U.S. at 242).

Since the 3% compounded COLA was added in 1996, the City pension system has faced a significant unfunded liability. See Trial Tr. 100:13–101:4, Nov. 10, 2015 (Mayor Traficante). By 1999, the total unfunded liability reached $169 million. See id. at 100:13–15. Mayor Michael Traficante and Mayor John O'Leary credibly testified that their respective administrations were unable to address this crisis. See id. at 101:11–25 (Mayor Traficante), 120:8–21, 122:24–123:12 (Mayor O'Leary).

The imposition of the compounded COLA alone did not create the severe economic issues resulting in the passage of the 2013 Ordinances. Rather, the City pension system's unfunded liability problems were compounded by the Great Recession. The Great Recession had far reaching and devastating economic and general social consequences that affected the entire City. Mayor Fung, as well as Mr. Strom, credibly testified as to the seriousness of this fiscal emergency. See Trial Tr. 10:23–12:1, 13:9–17, 19:25–20:3, 27:7–10,

Nov. 12, 2015 (Mayor Fung); see also Trial Tr. 9:4–8, 10:3–10, 11:1–8, Nov. 13, 2015 (Mr. Strom). Their testimony is given great weight. The Great Recession resulted in profound devastation, including the devaluation of the assessed values of property. See Trial Tr. 13:9–17, 17:10–20, Nov. 12, 2015 (Mayor Fung); see also Exs. YYY, ZZZ. The uncontroverted evidence demonstrates that in Cranston the devaluation amounted to more than one billion dollars between 2008 and 2009. See Trial Tr. 13:9–17, 17:10–20, Nov. 12, 2015 (Mayor Fung); see also Exs. YYY, ZZZ; see also William C. Burnham, Public Pension Reform and the Contract Clause: A Constitutional Protection for Rhode Island's Sacrificial Economic Lamb, 20 Roger Williams U. L. Rev. 523, 526 (2015) ("While every state felt the ripple effect of the [Great Recession] . . . few were as dramatically impacted as Rhode Island."). In addition, two natural disasters in March of 2010 cost the City in excess of $1.4 million. See Trial Tr. 24:17–25:5, Nov. 12, 2015. Moreover, state aid to the City decreased by over $18 million from fiscal year 2007 to fiscal year 2011. See id. at 27:7–10; see also Exs. H, I, J, K, L. According to the credible testimony of Mr. Strom, the decrease in state aid between 2010 and 2011 created a nearly five percent gap in the City's budget. See Trial Tr. 14:5–12, Nov. 13, 2015. As a result, the City's general obligations bonds were downgraded to a negative outlook in 2010 and 2012 by Moody's Investors Services. See Trial Tr. 23:20–24:14, 27:25–28:14, Nov. 12, 2015 (Mayor Fung); see also Exs. R, X.

These events resulted in the unfunded accrued liability of the City's pension system increasing to $256

million. See Trial Tr. 30:6–15, 39:5–21, Nov. 12, 2015 (Mayor Fung); see also Exs. U, Y. In addition, there was only $35 million in assets. See Trial Tr. 30:6–15, 39:5–21, Nov. 12, 2015; see also Exs. U, Y. The unfunded liability was estimated to increase to approximately $271 million. See Trial Tr. 46:11–21, Nov. 12, 2015; see also Ex. Y. The City pension system was 16.9% funded. See Trial Tr. 61:16–20, Nov. 12, 2015.

Compounding that were the requirements imposed upon the City pursuant to RIRSA. See id. at 5:22–6:5, 35:22–36:19, 85:16–86:8; see also Trial Tr. 17:13–18:5, Nov. 13, 2015 (Mr. Strom); see also Ex. VVV. RIRSA's provisions were clear: any municipality designated as being in critical status had to rectify the funding of its pension system to at least sixty percent funded or that municipality would face severe cuts in state aid. See Trial Tr. 5:22–6:5, 35:22–36:19, 85:16–86:8, Nov. 12, 2015 (Mayor Fung); see also Ex. VVV. Plaintiff characterized the twenty-year guideline for emerging from critical status created by the Pension Study Commission as "toothless." This interpretation ignores the clear language in the statute that threatens to withhold funds for non-complying municipalities. See Trial Tr. 85:16–86:8, 95:4–6, 102:17–25, Nov. 12, 2015 (Mayor Fung); see also Ex. VVV. The Pension Study Commission produced the twenty-year guideline, and the Pension Study Commission was also responsible for reviewing and certifying that critical status municipalities had created a "reasonable alternative funding improvement plan to emerge from critical status." Sec. 45-65-6(2), Ex. VVV. It was reasonable for the City to have believed that the twenty-year timeline

was an important target. Indeed, City officials credibly testified that they believed that the twenty-year deadline was controlling. See Trial Tr. 85:16–86:8, Nov. 12, 2015 (Mayor Fung); see also Trial Tr. 17:13–18:5, 23:13–25, Nov. 13, 2015 (Mr. Strom); see also Ex. LL. Furthermore, CPRAC President Mr. Gilkenson agreed that it was in the best interest for the City to develop a reasonable alternative funding improvement plan to emerge from critical status. See Trial Tr. 61:2–18, Nov. 9, 2015 (Mr. Gilkenson). Mr. Gilkenson also agreed that it is equally important to comply with state law. See id. at 61:10–18; see also Ex. HHHH. With 16.9% of its pension plan funded, the City was required to undertake significant and painstaking actions to comply with state law. See Trial Tr. 61:16–20, 85:16–86:8, Nov. 12, 2015 (Mayor Fung). The failure of the City to do so would result in dire consequences.

CPRAC presented William Fornia in rebuttal to discuss the issue of a significant and legitimate public purpose. Mr. Fornia opined that the pension funding problem was in large part the City's own creation. See Trial Tr. 46:9–47:19, Nov. 13, 2015 (Mr. Fornia); see also Ex. 93. Mr. Fornia also opined that the City was given clear information years ago that there was a funding problem that needed to be addressed. See Trial Tr. 25:2–11, 28:11–19, Nov. 17, 2015 (Mr. Fornia); see also Ex. 93. Mr. Fornia's testimony is given little weight, and as a result, CPRAC has not established beyond a reasonable doubt that the modification failed to further a significant and legitimate purpose. Mr. Fornia noted that the City's historical underfunding of the pension since 1999 created a $96 million accumulated shortfall; however, he admitted that his

calculations did not include fiscal years 2004 and 2007. See Trial Tr. 81:1–82:2, Nov. 13, 2015 (Mr. Fornia); see also Ex. 93. Furthermore, he conceded that by excluding those two fiscal years, his calculations may have double counted figures to some extent. See Trial Tr. 85:10–88:14, Nov. 13, 2015. Indeed, the City's expert, Daniel Sherman, credibly testified and refuted Mr. Fornia on the issue of the calculation of the shortfall. See Trial Tr. 25:21–27:11, Nov. 17, 2015 (Mr. Sherman); see also Exs. UUUU, VVVV. Mr. Sherman opined that the shortfall was a much smaller figure—$37.9 million. See Trial Tr. 25:21–27:11, Nov. 17, 2015 (Mr. Sherman); see also Exs. UUUU, VVVV. In addition, Mr. Fornia acknowledged that his expert opinion did not take into account the decline in state aid or the decline in the City's taxable property values or levy, and therefore, he had no opinion as to whether alternate courses of action would comply with RIRSA. See Trial Tr. 68:10–25, 69:23–70:5, 95:22–25, 96:21–97:8, Nov. 17, 2015 (Mr. Fornia). These two items were significant in the fiscal issues confronting the City. Accordingly, the Court finds that CPRAC has not rebutted the City's credible evidence beyond a reasonable doubt. See Donohue, 886 F. Supp. 2d at 160.

Rather, the Court is satisfied that the City has produced sufficient credible evidence through the testimony of Mayor Fung, Mr. Strom, and Mr. Sherman that the Great Recession, the decline in state aid, and RIRSA's requirements created an unprecedented fiscal emergency neither created nor anticipated by the City. See Exs. HHHH, IIII; see also Buffalo Teachers Fed'n, 464 F.3d at 368 (finding a legitimate public purpose in actions attempting to remedy a fiscal crisis); see also

Donohue v. Paterson, 715 F. Supp. 2d 306, 320 (N.D.N.Y. 2010) ("Broadly speaking, a [] government's interest in addressing a fiscal emergency constitutes a legitimate public interest."). Additionally, there is no indication that the 2013 Ordinances sought to benefit one particular group or individual over others. See Blaisdell, 290 U.S. at 445. Rather, the 2013 Ordinances sought to remedy the fiscal emergency and keep at bay threatened cuts in state aid which would inexorably worsen the fiscal situation. See Buffalo Teachers Fed'n, 464 F.3d at 369 ("[T]he legislature passed the law 'for the protection of a basic interest of society.'") (quoting Blaisdell, 290 U.S. at 445). As such, the Court finds that the City presented sufficient credible evidence that the 2013 Ordinances were passed for a significant and legitimate public purpose.

4

Reasonable and Necessary

The Court's inquiry continues to ensure that the 2013 Ordinances are "specifically tailored to 'meet the societal ill [they are] supposedly designed to ameliorate.'" Kent, 2012 WL 6024998, at *21 (quoting Spannaus, 438 U.S. at 243). Essentially, this next step "reads like a form of intermediate scrutiny." Jack M. Beermann, The Public Pension Crisis, 70 Wash. & Lee L. Rev. 3, 48 (2013). The "reasonable and necessary" analysis "involves a consideration of whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." Id.

Crucial to this analysis is the level of judicial deference afforded to a state, and thus a municipality, in establishing that the statute was reasonable and necessary. See Buffalo Teachers Fed'n, 464 F.3d at 369. When a state law impairs a private contract, the state is accorded substantial deference. See Baltimore Teachers Union, 6 F.3d at 1018. Notwithstanding, public contracts are scrutinized by a heightened level of judicial inquiry. See id. Indeed, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." U.S. Trust Co., 431 U.S. at 26. Providing complete deference to a state on a public contract would eviscerate the meaning of the contract clause. See Spannaus, 438 U.S. at 242 ("If the Contract Clause is to retain any meaning at all, however, it must be understood to impose some limits upon the power of a State to abridge existing contractual relationships . . . ."). Municipalities, as subdivisions of the state, are treated as states in contract clause jurisprudence. See Nonnenmacher, 722 A.2d at 1202 (citing N. Pac. Ry. Co. v. Minn. ex rel. Duluth, 208 U.S. 583, 590 (1908)). This case involves a public contract, and therefore, the Court will afford the City less deference.

However, "less deference does not imply no deference." Buffalo Teachers Fed'n, 464 F.3d at 370. The discerning lens applicable here "does not require courts to reexamine all of the factors underlying the legislation at issue and to make a de novo determination whether another alternative would have constituted a better statutory solution to a given problem." Id. Surely, this Court will not revert to the strict scrutiny employed during the Lochner era. See

Lochner v. N.Y., 198 U.S. 45 (1905), overruled; see Day-Brite Lighting, Inc. v. State of Mo., 342 U.S. 421 (1952); see also Laurence H. Tribe, Constitutional Choices 182 (1985) (arguing that heightened scrutiny under the contract clause is a reversion to Lochner-era ideology).

Rather, this Court will use "less deference scrutiny" in evaluating the City's position that the legislation was reasonable and necessary. See Buffalo Teachers Fed'n, 464 F.3d at 371 (utilizing "less deference scrutiny" to assess whether the state's impairment of the contract was reasonable and necessary). To prove that the legislation was reasonable and necessary, the City must make a sufficient showing of credible evidence on three criteria: that it "did not (1) 'consider impairing the . . . contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances.'" Buffalo Teachers Fed'n, 464 F.3d at 371 (quoting U.S. Trust Co., 431 U.S. at 30–31).

a

Other Policy Alternatives

The Fourth Circuit noted:

> "[i]t is not enough to reason . . . that [t]he City could have shifted the burden from another governmental program or that it could have raised taxes . . . [w]ere these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny . . . ." Baltimore

> Teachers Union, 6 F.3d at 1019–20 (internal quotations omitted) (emphasis in original).

Indeed, as a means of determining reasonableness of a government action, the subject action must have been imposed "only after other alternatives had been considered and tried." Buffalo Teachers Fed'n, 464 F.3d at 371. Such efforts must be genuine and not merely for "political expediency." Ass'n of Surrogates & Supreme Court Reporters v. State of N.Y., 940 F.2d 766, 773 (2d Cir. 1991).

Here, the City presented sufficient credible evidence that it adequately considered and tried other policy alternatives. Mayor Fung credibly testified to the significant cuts in City spending he pursued before enacting the 2013 Ordinances. See Trial Tr. 12:8–19, 70:20–73:15, Nov. 12, 2015 (Mayor Fung); see also Ex. JJ. In 2009, Mayor Fung implemented cuts to personnel in his own office, a multi-year pay freeze for City employees, and a plan to reduce energy costs. See Trial Tr. 12:8–19, 70:20–73:15, Nov. 12, 2015. In addition, he credibly testified to the effect on the City in the event that there was an elimination of City services to fill the $14 million shortfall in ARC funding. See id. at 57:3–58:15. The result was described as decimating City services. See id. If $14 million were cut, parks and recreation services, emergency services, library services, and trash services would be eliminated. See id. The impact to the citizens of the City would encompass not only the elimination of the services but also a substantial reduction in federal aid.

See id. These services are critical for a livable and safe City.

The Court gives great weight to Mayor Fung and Mr. Strom's repeated statements that City residents were already overtaxed and overburdened. See id. at 59:2–5, 76:13–23, 80:11–15 (Mayor Fung); see Trial Tr. 18:6–16, Nov. 13, 2015 (Mr. Strom). Increased taxation, as CPRAC suggests, was not a feasible option. See Buffalo Teachers Fed'n, 464 F.3d at 372 ("[I]t is always the case that to meet a fiscal emergency taxes conceivably may be raised. It cannot be the case, however, that a legislature's only response to a fiscal emergency is to raise taxes."). Indeed, the City raised taxes at least fifteen times between 1985 and 2013, with tax increases every year between 2009 and 2012. See Trial Tr. 74:13–25, 76:13–16, 130:9–14, Nov. 12, 2015 (Mayor Fung); see also Ex. XXX. Moreover, with the property tax cap imposed on municipalities, the City could not look only to taxpayers to increase revenue. See Trial Tr. 37:10–23, Nov. 13, 2015 (Mr. Strom); see also Buffalo Teachers Fed'n, 464 F.3d at 372 ("[D]efendant ha[s] shown that [the City] had already increased City taxes to meet its fiscal needs, and it is reasonable to believe that any additional increase would have further exacerbated [the City's] financial condition.").

Furthermore, numerous credible witnesses testified to the other alternatives considered by the City. See Trial Tr. 89:1–11, 94:9–15, 112:6–11, Nov. 12, 2015 (Mayor Fung); see also Trial Tr. 14:19–15:17, Nov. 17, 2015 (Mr. Valletta); see also Trial Tr. 25:25–26:11, Nov. 13, 2015 (Mr. Strom); see also Exs. MM, QQ, XX, ZZ,

AAA, DDD. Specifically, Mayor Fung presented four options for consideration at a meeting of the Cranston City Council Finance Committee on October 25, 2012. See Trial Tr. 93:19–94:24, Nov. 12, 2015 (Mayor Fung); see also Ex. MM. On November 11, 2012, Mayor Fung sent a letter to the Pension Study Commission containing four options for emerging from critical status. See Trial Tr. 98:9–19, Nov. 12, 2015 (Mayor Fung); see also Ex. QQ. Over twenty different scenarios were shared with retirees at open meetings on September 13, 2012; January 11, 2013; January 29, 2013; February 14, 2013; February 26, 2013; March 4, 2013; and March 8, 2013. See Trial Tr. 108:17–109:11, Nov. 12, 2015 (Mayor Fung); see also Exs. TT, XX, ZZ, AAA, DDD, III. Paul Valletta Jr., President of the local IAFF, discussed numerous options with the City, including further tax increases, a pay freeze, selling buildings, and closing fire stations. See Trial Tr. 13:4–15:17, Nov. 17, 2015 (Mr. Valletta). Mr. Strom considered over thirty scenarios with consultants from Buck Consulting to more sustainably fund the City pension system. See Trial Tr. 25:25–26:11, Nov. 13, 2015 (Mr. Strom). Indeed, the fact that the 2013 Ordinances were not considered until 2012—years after the fiscal crisis brought on by the Great Recession, after the City was designed as critical status under RIRSA, and after Mayor Fung pulled his initial proposed ordinances to negotiate with the City pension system's participants and beneficiaries—demonstrates that the 3% compounded COLA suspension was genuinely a last resort measure. See Trial Tr. 104:1–12, Nov. 12, 2015 (Mayor Fung); see also Trial Tr. 27:15–23, Nov. 13, 2015 (Mayor Fung); see also Buffalo Teachers Fed'n, 464 F.3d at 371 (finding the

government's actions reasonable and necessary in part because it was "a last resort measure"). The Court therefore finds that the City presented sufficient credible evidence that it did consider other policy alternatives on par with the chosen course of action.

b

More Moderate Course Available

The government action is also examined to determine whether or not a more moderate course was available. See, e.g., Buffalo Teachers Fed'n, 464 F.3d at 371. In analyzing this factor, courts have looked to whether the government action was "no greater than [] necessary" to remedy the problem, impaired only a portion of the contractual obligation, or was less drastic than at least one alternative. See Baltimore Teachers Union, 6 F.3d at 1020.

The City presented sufficient credible evidence that a more moderate course was not available. First, the government action was narrowly tailored to remedy the problem. Id. The City's expert, Mr. Sherman, credibly testified that lowering the 3% compounded COLA to one percent compounded or two percent compounded, as opposed to suspending it, would not have complied with RIRSA. See Trial Tr. 28:19–30:3, 30:8–31:3, Nov. 17, 2015 (Mr. Sherman); see also Exs. WWWW, XXXX. Additionally, there is no indication that by suspending the 3% compounded COLA for ten years, the 2013 Ordinances over-remedied the situation; Mr. Sherman testified that the plan ultimately pursued by the City does not actually get the City out of critical status until 2038, several years after the twenty-year deadline. See

Trial Tr. 42:4–9, 45:18–20, Nov. 17, 2015 (Mr. Sherman); see also Ex. JJJJ.

Furthermore, the 2013 Ordinances impaired only a portion of the contractual obligation. See Baltimore Teachers Union, 6 F.3d at 1020. Without minimizing the impact the 2013 Ordinances have on members of CPRAC, the Court notes that the 2013 Ordinances did not modify the pension base payment, the health benefits, or other aspects of the pension, only affecting the 3% compounded COLA for a temporary period. See Trial Tr. 115:17–116:3, Nov. 12, 2015 (Mayor Fung); see also Baltimore Teachers Union, 6 F.3d at 1020 (finding only a portion of the contractual obligation modified where "the plan did not alter pay-dependent benefits, overtime pay, hourly rates of pay, or the orientation of pay scales") (citing U.S. Trust Co., 431 U.S. at 27).

Moreover, the ten-year suspension of the 3% compounded COLA was less drastic than numerous alternatives. See Baltimore Teachers Union, 6 F.3d at 1020. Other more drastic alternatives—such as cutting the pension base payments or suspending the 3% compounded COLA indefinitely—were not pursued. See Trial Tr. 28:19–30:3, 30:20–31:3, Nov. 17, 2015 (Mr. Sherman); see also Baltimore Teachers Union, 6 F.3d at 1020 ("Indeed, the plan was less drastic than at least one alternative, additional layoffs, which could have been more detrimental to appellees.").

CPRAC's expert, Mr. Fornia, opined that the City did not choose the least drastic alternative in suspending the 3% compounded COLA for ten years. See Trial Tr. 42:8–43:12, Nov. 17, 2015 (Mr. Fornia);

see also Ex. 93. Without calculating the impact of any plausible alternatives, Mr. Fornia opined that the City could have done something different in its spending to achieve the required savings. See Trial Tr. 42:15–24, 94:13–95:21, 97:9–22, 107:15–108:6, Nov. 17, 2015; see also Ex. 93. The Court does not give this testimony weight. Mr. Fornia's opinion did not consider the feasibility of raising taxes, the decline in state aid, or RIRSA's requirements. See Trial Tr. 70:6–22, 68:1–25, 95:22–25, 96:21–97:8, Nov. 17, 2015. As such, this opinion is unsupported. See Baltimore Teachers Union, 6 F.3d at 1019 ("It is not enough to reason . . . that [t]he City could have shifted the burden from another governmental program . . . .") (internal quotations omitted) (emphasis in original). Rather, the Court finds credible the corroborated testimony of Mayor Fung, Mr. Strom, and Mr. Sherman that a more moderate course was not available given the unprecedented fiscal emergency and RIRSA's requirements. See Trial Tr. 27:15–23, Nov. 13, 2015 (Mayor Fung); see also Trial Tr. 18:6–16, Nov. 13, 2015 (Mr. Strom); see also Trial Tr. 28:19–30:3, 30:20–31:3, Nov. 17, 2015 (Mr. Sherman).

Therefore, the Court finds that the City presented sufficient credible evidence that "the City clearly sought to tailor the plan as narrowly as possible" to address the City's fiscal crises. Baltimore Teachers Union, 6 F.3d at 1020. The Court is satisfied that the City did not "'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well . . . .'" Buffalo Teachers Fed'n, 464 F.3d at 371 (quoting U.S. Trust Co., 431 U.S. at 30–31).

c

Acting Reasonably in Light of Surrounding Circumstances

The last consideration in determining whether the challenged government action was reasonable and necessary is whether the government acted reasonably in light of surrounding circumstances. Buffalo Teachers Fed'n, 464 F.3d at 371 (quoting U.S. Trust Co., 431 U.S. at 30–31). The Supreme Court has noted that "[t]he extent of impairment is certainly a relevant factor in determining its reasonableness." U.S. Trust Co., 431 U.S. at 27. Additionally, "the existence of an emergency and the limited duration of a relief measure are factors to be assessed in determining the reasonableness of an impairment . . . ." Id. at 22 n.19; see also Energy Reserves Grp., Inc., 459 U.S. at 418–19 (finding contractual impairment justified where regulation is temporary). Courts have also found impairments reasonable if they operate prospectively. See Buffalo Teachers Fed'n, 464 F.3d at 371–72.

Here, the City demonstrated through credible evidence that the 2013 Ordinances were circumscribed, temporary, precipitated by a fiscal emergency, and prospective. See U.S. Trust Co., 431 U.S. at 22 n.19, 27, 30–31; see also Buffalo Teachers Fed'n, 464 F.3d at 371–72. As noted, the 2013 Ordinances affect only the 3% compounded COLA and leave intact all other components of the pension. See Trial Tr. 115:17–116:3, Nov. 12, 2015 (Mayor Fung); see also Exs. HHHH, IIII; see also U.S. Trust Co., 431 U.S. at 27. The 2013 Ordinances are also a temporary ten-year suspension. See Trial Tr. 101:1–7, 116:17–117:1, Nov. 12, 2015

(Mayor Fung); see also Exs. HHHH, IIII; see also U.S. Trust Co., 431 U.S. at 23 n.19. The Court has already noted that the City acted in response to an unprecedented fiscal emergency. See Trial Tr. 13:9–17, 27:7–10, 85:16–86:8, 95:4–6, Nov. 12, 2015 (Mayor Fung); see also Trial Tr. 9:4–8, 10:3–10, 11:1–4, Nov. 13, 2015 (Mr. Strom). Additionally, the 2013 Ordinances operate prospectively, only impairing future compounded COLAs. See Trial Tr. 101:1–7, 116:17–117:1, Nov. 12, 2015 (Mayor Fung); see also Exs. HHHH, IIII; see also Buffalo Teachers Fed'n, 464 F.3d at 372 (finding impairment reasonable where "[t]he impairment [] does not affect past salary due for labor already rendered or money invested. It only suspends temporarily the two percent increase in salary for services to be rendered.").

CPRAC, in its post-trial memorandum, relies heavily on the recent Rhode Island Superior Court case, Hebert, to argue that the 2013 Ordinances were not reasonable in light of the surrounding circumstances.[14] See Hebert v. City of Woonsocket, No. PC-2013-3287, 2016 WL 493215, at *1 (R.I. Super. Feb. 4, 2016). The Court is mindful that the quantum of proof necessary to prove or disprove a violation of the contract clause is considerable. As a result, cases involving contract clause claims are fact-intensive and fact-specific. See Stephen F. Belfort, Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause, 59 Buff. J. Int'l L. 1 (2011) ("Contract clause analysis under the United

[14] As a Superior Court case, Hebert does not operate as binding authority on this Court.

States Trust [Co.] standard is a fact-intensive endeavor.").

CPRAC's reliance on Hebert is misplaced. Hebert concerned the City of Woonsocket's unilateral alteration of health insurance for retired police officers. Hebert, 2016 WL 493215, at *1–5. The Hebert Court found that the extreme modification of the health insurance of retired police officers was likely a violation of the contract clause of the Rhode Island Constitution. See id. at *15. Unlike the instant matter, Hebert was decided at the preliminary injunction stage, a procedural posture that requires a different, and more relaxed, standard of review than a decision following a bench trial. See id. at *1; see also Iggy's Doughboys, Inc. v. Giroux, 729 A.2d 701, 705 (R.I. 1999) (holding that a preliminary injunction requires a "reasonable likelihood of success on the merits"); cf. Parella, 899 A.2d at 1239 (holding that after a bench trial the trial justice sits as the trier of fact as well as of law). Additionally, Hebert concerned the City of Woonsocket's "indefinite" unilateral alteration of health insurance for retired police officers, distinguishable from the temporary 3% compounded COLA suspension here. See Hebert, 2016 WL 493215, at *9. Furthermore, the City of Woonsocket based its authority to act on the Fiscal Stability Act, § 45-9-1. The Court in Hebert found that the Fiscal Stability Act did not "provide the authority for . . . the City of Woonsocket to avoid the[ir] binding contractual obligations." Id. at *15. Here, the Fiscal Stability Act is not at issue, and the City does not base its authority to act solely on RIRSA. As such, the instant matter is not analogous to Hebert.

The Court is satisfied—"[i]n light of the magnitude and timing of the [] cuts in state funding that prompted the City's [2013 Ordinances], . . . the City's concerted efforts to exhaust numerous alternative courses of cost reduction before resorting to the challenged reductions, [and] the circumscribed nature of the [] plan . . ."—that the 2013 Ordinances were reasonable under the circumstances. Baltimore Teachers Union, 6 F.3d at 1022. Indeed, CPRAC concedes that it is in the best interest of the residents, employees, and retirees of the City to maintain a viable and sustainable pension system. See Trial Tr. 61:2–18, Nov. 9, 2015 (Mr. Gilkenson); see also Ex. HHHH. The Court "find[s] no need to second-guess the wisdom of picking the [ten-year compounded COLA suspension] over other policy alternatives . . . ." Buffalo Teachers Fed'n, 464 F.3d at 372 (citing Blaisdell, 290 U.S. at 447–48 ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned.")).

Accordingly, the Court finds that the City presented sufficient credible evidence that the 2013 Ordinances were reasonable and necessary. See Buffalo Teachers Fed'n, 464 F.3d at 371; see also U.S. Trust Co., 431 U.S. at 22. The Court also finds that CPRAC has not rebutted this credible evidence beyond a reasonable doubt. See Donohue, 886 F. Supp. 2d at 160. The Court's conclusion comports with federal case law. See Ronald D. Rotunda, John E. Nowak, Treatise of Constitutional Law: Substance and Procedure (5th ed. 2012) § 15.8 ("Within the last 100 years, however, the [Supreme] Court rarely has relied on the [Contract] Clause as a reason to invalidate state legislation which retroactively affected contractual rights or

obligations."). As such, the 2013 Ordinances do not violate the contract clauses of either the Rhode Island or United States Constitutions.[15]

B

Breach of Contract

Having ruled on CPRAC's contract clause claim, the Court now turns to CPRAC's breach of contract claim. Even assuming, arguendo, that the Court did not find the 2013 Ordinances justified, CPRAC's breach of contract claim fails because CPRAC lacks organizational standing to bring the claim.

The City raised CPRAC's lack of standing as an affirmative defense in its answer. See Answer at 9. The City notes that the CPRAC itself did not have any contract with the City and that CPRAC failed to present sufficient evidence setting forth the identity of the CPRAC's members or whether each of CPRAC's members has a contract with the City. CPRAC maintains that it has standing to bring its breach of contract claim. Because the question of whether the CPRAC had a contract with the City is "a threshold inquiry into whether the party seeking relief is entitled to bring suit[,]" the Court will treat the argument as a

[15] Following the non-jury trial of this case, the Court elects to make its findings of fact and conclusions of law and render judgment under Rule 52(a). It would reach the same conclusion were it to decide the case as a matter of law pursuant to Rule 52(c). See Broadley, 939 A.2d at 1021 (noting that Rule 52(c) and Rule 52(a) motions require the same standard of review).

standing inquiry. Narragansett Indian Tribe v. State, 81 A.3d 1106, 1110 (R.I. 2014).[16]

"Standing is an access barrier that calls for the assessment of one's credentials to bring suit." Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n, 452 A.2d 931, 932 (R.I. 1982). Accordingly, standing is a threshold inquiry that this Court must consider before reaching the merits of the claim. See id. at 933. As the Rhode Island Supreme Court has noted, "[t]he essence of the question of standing is whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to ensure concrete adverseness that sharpens the presentation of the issues upon which the court depends for an illumination of the questions presented." Id. (citing Baker v. Carr, 369 U.S. 186, 204 (1962)). A party must demonstrate an invasion of a legally protected interest which is (1) concrete and particularized and (2) actual or imminent, not hypothetical or conjectural. See Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997).

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[16] In its January 27, 2014 Bench Decision, the Court previously addressed the issue of organizational standing with respect to CPRAC's constitutional claims, civil rights claim, and breach of fiduciary duty claim. See Cranston Police Rets. Action Comm. v. The City of Cranston, et al., KC-2013-1059, Bench Decision, Jan. 27, 2014. There, the Court found that CPRAC had organizational standing to pursue its contract clause, takings clause, and facially unconstitutional claims but lacked organizational standing to pursue its civil rights and breach of fiduciary duty claims. See Trial Tr. 7:18–19; 13:14–20; 15:7–16:12, Jan. 27, 2014. The Court did not address CPRAC's standing to bring its breach of contract claim. See id.

This requirement of a personalized injury does not act as a wholesale bar to organizations bringing claims on behalf of their members; organizational standing may be found where three factors are met: (1) "'when [the organization's] members would otherwise have standing to sue in their own right[;]'" (2) when "'the interests at stake are germane to the organization's purpose[;]'" and (3) when "'neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit.'" In re Town of New Shoreham Project, 19 A.3d 1226, 1227 (R.I. 2011) (mem.) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)); see also Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) (articulating identical test for federal organizational standing).[17] Importantly, a party must demonstrate standing for each claim sought. See Blackstone Valley Chamber of Commerce, 452 A.2d at 932–33; see also Baur v. Veneman, 352 F.3d 625, 641 n.15 (2d Cir. 2003).

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[17] Although the state and federal tests for organizational standing employ identical language, they differ in premise in that the federal test stems from Article III of the United States Constitution. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992). However, given that the language of the two tests is identical, "[w]hen our own . . . case law [is] silent on a particular issue, '[i]t makes eminent good sense to consider the experience and the reasoning of the judges in other jurisdictions . . . .'" Kedy v. A.W. Chesterton Co., 946 A.2d 1171, 1182 (R.I. 2008) (quoting Ciunci, Inc. v. Logan, 652 A.2d 961, 962 (R.I. 1995)). The Court also notes that the Rhode Island Supreme Court articulated the state organizational standing test by quoting federal case law. See In re Town of New Shoreham Project, 19 A.3d at 1227 (quoting Friends of the Earth, Inc., 528 U.S. at 181). As such, the Court will look to federal case law for guidance.

The first prong of the organizational standing test—whether the organization's members have standing to sue in their own right—is evaluated by examining the injury in fact to the individual members of the organization. See 13A Fed. Prac. & Proc. Juris. § 3531.9.5 Rights of Others–Organizational Standing (3d ed. 2016) ("Standing is regularly recognized once member injury is shown."). Importantly, "'[t]he line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury.'" Pontbriand, 699 A.2d at 862 (quoting Matunuck Beach Hotel, Inc. v. Sheldon, 121 R.I. 386, 396, 399 A.2d 489, 494 (1979)).

Here, members of CPRAC have presented evidence of a current, concrete, and particularized injury. See id. Members of CPRAC testified that the passage of the 2013 Ordinances suspended their 3% compounded COLAs for a period of ten years. See Trial Tr. at 9:24–10:19. 11:5–6, 12:7–13:1, Nov. 9, 2015 (Mr. Gilkenson). For example, Mr. Matrumalo testified that the loss of his 3% compounded COLA was approximately $2200 in 2013. See id. at 137:20–138:7 (Mr. Matrumalo). The Court therefore finds that members of CPRAC have established injury in fact and thus have standing to sue in their own right. Accordingly, CPRAC has met the first prong of the organizational standing test. See In re Town of New Shoreham Project, 19 A.3d at 1227.

The second prong of the organizational standing test—whether the suit is germane to the organization's purpose—"addresses the basic justification for organizational standing to represent members'

interests." 13A Fed. Prac. & Proc. Juris. § 3531.9.5 Rights of Others–Organizational Standing (3d ed. 2016). Courts have noted that "[t]oo restrictive a reading of the [germane] requirement would undercut the interest of members who join an organization in order to effectuate 'an effective vehicle for vindicating interests that they share with others.'" Humane Soc'y of the U.S. v. Hodel, 840 F.2d 45, 56 (D.C. Cir. 1988) (quoting Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. Brock, 477 U.S. 274, 275–76 (1986)). Indeed, "[g]ermaness is often found without difficulty." 13A Fed. Prac. & Proc. Juris. § 3531.9.5 Rights of Others–Organizational Standing (3d ed. 2016). The Court must only find that the "lawsuit would, if successful, reasonably tend to further the general interests that individual members sought to vindicate in joining the association and whether the lawsuit bears a reasonable connection to the association's knowledge and experience." Bldg. and Constr. Trades Council of Buffalo, N.Y. and Vicinity v. Downtown Dev., Inc., 448 F.3d 138, 149 (2d Cir. 2006).

The Court has little trouble concluding that the present lawsuit is germane to the CPRAC's purpose. All members of CPRAC opted out of the Settlement Agreement and did so because they believed that the City had an obligation to pay the 3% compounded COLA. See Trial Tr. 9:24–10:19, 11:5–6, 12:7–13:1, Nov. 9, 2015 (Mr. Gilkenson). The CPRAC was specifically formed to fight the 2013 Ordinances. See id. at 9:24–10:19. The present lawsuit thus clearly furthers the organization's purpose. See Bldg. and Constr. Trades Council of Buffalo, N.Y. and Vicinity, 448 F.3d at 149. As such, the Court finds that CPRAC

has met the second prong of the organizational standing test. In re Town of New Shoreham Project, 19 A.3d at 1227.

The third prong of the organizational standing test "asks whether individual participation is required by the nature of the underlying claim[.]" 13A Fed. Prac. & Proc. Juris. § 3531.9.5 Rights of Others–Organizational Standing (3d ed. 2016). The United States Supreme Court has held that "so long as the nature of the claim . . . does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." Warth v. Seldin, 422 U.S. 490, 511 (1975); see also Hunt, 432 U.S. at 343; see also Brock, 477 U.S. at 275–76. This prong is not met in "situations in which it is necessary to establish 'individualized proof[.]'" Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 602 (7th Cir. 1993) (quoting Hunt, 432 U.S. at 344); see also Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168, 174 (2d Cir. 2005) ("[A] plaintiff normally lacks associational standing to sue on behalf of its members where 'the fact and extent of injury would require individualized proof.'") (quoting Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004)). Such individualized proof is commonly found in cases seeking damages. See Warth, 422 U.S. at 515 (finding no organizational standing where "damages claims are not common to the entire membership, nor shared by all in equal degree" and where "whatever injury may have been suffered is peculiar to the individual member concerned[.]"). Additionally, "[s]ome substantive claims

may seem inherently so personal that individual participation should be required simply because of the nature of the claim." 13A Fed. Prac. & Proc. Juris. § 3531.9.5 Rights of Others–Organizational Standing (3d ed. 2016).

The Court must therefore consider the nature of CPRAC's breach of contract claim. See In re Town of New Shoreham Project, 19 A.3d at 1227. A breach of contract claim is distinct from a constitutional contract clause claim in that a breach of contract claim requires "'the availability of a remedy in damages.'" See TM Park Ave. Assocs. v. Pataki, 214 F.3d 344, 349 (2d Cir. 2000) (quoting E&E Hauling, Inc. v. Forest Preserve Dist. of Du Page Cnty., III, 613 F.2d 675, 679 (7th Cir. 1980)); see also Horwitz-Matthews, Inc. v. City of Chicago, 78 F.3d 1248, 1251 (7th Cir. 1996) ("The essence . . . of a breach of contract is that it triggers a duty to pay damages . . . ."). A breach of contract claim requires CPRAC to prove the following elements: "a valid contract between the parties; the plaintiffs' performance under the contract; the defendant's nonperformance; and resulting damages." See 17B C.J.S. Contracts § 824; see also Petrarca v. Fidelity and Cas. Ins. Co., 884 A.2d 406, 410 (R.I. 2005). Importantly, CPRAC must prove the damages "'with a reasonable degree of certainty, and [] [CPRAC] must establish reasonably precise figures and cannot rely upon speculation.'" Guzman v. Jan-Pro Cleaning Sys., Inc., 839 A.2d 504, 508 (R.I. 2003) (quoting Mktg. Design Source, Inc. v. Pranda N. Am., Inc., 799 A.2d 267, 273 (R.I. 2002)).

Therefore, the nature of CPRAC's breach of contract claim requires individualized proof of damages. See Guzman, 839 A.2d at 508; see also Sanner v. Bd. of Trade of City of Chicago, 62 F.3d 918, 923 (7th Cir. 1995) ("Such a suit would apparently require the calculation of damages for each of the individual [members of CPRAC]."); see also 13A Fed. Prac. & Proc. Juris. § 3531.9.5 Rights of Others–Organizational Standing (3d ed. 2016) ("[The] calculation of damages requires proof of the extent of individual injuries."). The ten-year suspension of the 3% compounded COLA impacted every member of CPRAC differently. See Trial Tr. 137:20–138:7 (Mr. Matrumalo) (estimating yearly loss of the 3% compounded COLA to be $2200), 164:21–23 (Mr. Walsh) ($1500), Nov. 9, 2015; see also Trial Tr. 27:25–28:3 (Mr. Galligan) ($1000), 52:15–22 (Mr. Maccarone) ($1200), Nov. 10, 2015. Thus, the damages sustained from the breach of contract are "not common to the entire membership, nor shared by all in equal degree . . . ." Warth, 422 U.S. at 515. Indeed, "whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." Id. at 515–16.

As such, CPRAC's breach of contract claim "make[s] the individual participation of each injured party indispensable to proper resolution of the cause[.]" Id. at 511. Therefore, CPRAC cannot satisfy the third prong of the organizational standing test for its breach of contract claim. See In re Town of New Shoreham Project, 19 A.3d at 1227. Accordingly, the Court finds that CPRAC lacks standing to bring its breach of contract claim, and therefore, the Court need not reach

the merits of CPRAC's breach of contract claim. See Blackstone Valley Chamber of Commerce, 452 A.2d at 934 ("As we conclude that [] [CPRAC] lacks standing to maintain this action, we do not reach any other questions raised by the petition.").

C

Injunction

The decision to grant or deny injunctive relief rests within the sound discretion of the trial justice. See Cullen v. Tarini, 15 A.3d 968, 981 (R.I. 2011). The moving party must "'demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position.'" Nye v. Brousseau, 992 A.2d 1002, 1010 (R.I. 2010) (quoting Nat'l Lumber & Bldg. Materials Co. v. Langevin, 798 A.2d 429, 434 (R.I. 2002)). To grant a permanent injunction, the Court must find that (1) the plaintiff demonstrates success on the merits; (2) the plaintiff will suffer irreparable harm if the injunction is not granted; and (3) a balance of the equities and hardships, including the public interest, weighs in favor of the plaintiff. See Nat'l Lumber & Bldg. Materials Co., 798 A.2d at 434; see also Nye, 992 A.2d at 1010; see also Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 32 (2008) (noting that permanent injunctions require a showing of actual success on the merits).

Having found that CPRAC's contract clause claim fails as a matter of law and that CPRAC lacks standing to bring its breach of contract claim, the Court finds

that CPRAC has not demonstrated actual success on the merits of any claim. See Nat'l Lumber & Bldg. Materials Co., 798 A.2d at 434 ("A party seeking an injunction must also demonstrate likely success on the merits . . . ."). Accordingly, CPRAC's request for a permanent injunction is denied.

IV

Conclusion

After due consideration of all the evidence and arguments advanced by counsel before the Court and in their memoranda, the Court finds that CPRAC failed to meet its burden of demonstrating its claims. Thus, this Court denies and dismisses Counts I, III, and V in CPRAC's Complaint. Counsel shall confer and present to this Court forthwith for entry an agreed upon form of Order and Judgment that is reflective of this Decision.

APPENDIX C

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
KENT, Sc.
SUPERIOR COURT

CASE NO: KC/2013-1059

[Filed November 2, 2015]

CRANSTON POLICE RETIREES ACTION COMMITTEE	)
VS.	)
THE CITY OF CRANSTON, ET ALS	)

HEARD BEFORE THE HONORABLE JUSTICE SARAH TAFT-CARTER

ON MONDAY, NOVEMBER 2, 2015

MOTIONS AND DECISIONS

APPEARANCES:

PATRICK SULLIVAN, ESQUIRE . . . . . .
FOR THE PLAINTIFF

WILLIAM DOLAN, ESQUIRE and
WILLIAM WRAY, ESQUIRE . . . . . .
FOR THE DEFENDANTS

MARY M. GUGLIETTI, RPR
CERTIFIED COURT REPORTER

CERTIFICATION

I, Mary M. Guglietti, hereby certify that the succeeding pages, 1 through 74, inclusive, are a true and accurate transcript of my stenographic notes.

/s/Mary M. Guglietti
MARY M. GUGLIETTI, RPR
Certified Court Reporter

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MONDAY, NOVEMBER 2, 2015

MORNING SESSION

THE CLERK: The matter before the Court is Cranston Police Retirees v. The City of Cranston, KC/2013-1059.

Could counsels identify for the record, please.

MR. SULLIVAN: Patrick Sullivan for the plaintiff.

MR. WRAY: Good morning, Your Honor. William Wray for the defendants.

MR. DOLAN: Good morning, Your Honor. William Dolan for the defendants.

THE CLERK: Thank you.

THE COURT: There's several motions before the Court this morning. I've read everything, but we'll begin with the motion in limine regarding burden of proof.

Would you like to place anything else on the record other than what is in your memo?

MR. DOLAN: Well, I would.

THE COURT: Okay.

MR. DOLAN: If the Court would indulge me for just a few minutes. I think that based upon my reading of the papers, it appears that both the plaintiff and the defendant are in agreement that plaintiff bears the burden of proof on all three elements of the test in question, contract impairment, that is, the existence of a contract, the substantiality of the impairment, and

[p.2]

whether the impairment was effectuated for a reasonable and necessary public purpose.

But the Court has ruled previously in the state pension case -- and I don't want to presume that the Court is ruling this way in this case.

THE COURT: Right.

MR. DOLAN: But that the City here, the governmental actor, would bear the burden of production of going forward with evidence to establish the third element or -- well, to justify the third element. Let me just say that.

THE COURT: That's the word I prefer.

MR. DOLAN: Because the burden of proof remains on the plaintiff to prove all of those elements or the lack thereof beyond a reasonable doubt.

But I want to address my remarks to that part of the motion in limine that seeks instruction and guidance from the Court as to what it exactly is that the governmental actor here, the City of Cranston, needs to do to satisfy that burden of production.

And to be -- to be really plain here -- and let me just for one moment, just for purposes of the record, we respectfully disagree with the Court's decision in the state pension case that imposes the burden of production on us. We've argued against it in our papers. I'm not

[p.3]

going to rehash those arguments because the Court ruled in response to those arguments, not only in the state pension case but early on in this case when we filed a motion for order of proof and the Court said no, no, the presumption of constitutionality doesn't mean that you don't have a burden of production. So I assume the Court's going to rule the same way.

But for purposes of the record, I want to just reiterate that we disagree with the Court that we should have the burden of production but --

THE COURT: Finish.

MR. DOLAN: And should I --

THE COURT: You can finish your sentence.

MR. DOLAN: Should I continue on that issue?

THE COURT: Well, I want to ask you one question about the issue of justification.

MR. DOLAN: Yes.

THE COURT: Is there any -- well, I don't know if the word disagreement -- you don't disagree with courts. But do you take issue with the fact that the City has a burden or the burden with respect to justification?

MR. DOLAN: We do.

THE COURT: Okay.

MR. DOLAN: And I -- it's the argument we made before before the Court. It's the argument that was made

[p.4]

in the state pension case that the Court's imposition of the burden of production on the City violates the presumption that the law is constitutional. And I know the Court has struggled with this. I have too, frankly, Your Honor. It's not an easy issue to overlay the beyond a reasonable doubt standard onto a contract impairment analysis where the courts say, listen, the state's got to come up with some kind of showing. Right? And so, again, I respectfully disagree with the Court's decision there. I don't want to just focus my remarks on that. We've argued it in the papers. I've preserved it now here on the record if there's an appeal.

I want to focus on the question of, assuming the Court imposes a burden of production on us, what does it mean? And I want to take you back, if I could, to your March 18, 2015, decision. I have a copy here. I don't

know if the Court has it handy, but I'd like to hand it to the Court.

THE COURT: Sure.

MR. DOLAN: Because I want to -- I want to be specific about what I want to focus the Court's attention on.

THE COURT: I think I know but --

MR. DOLAN: So I think, to start, the operative passage for me or for my client appears on page 8. This

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is where Your Honor quite rightfully, I think, looked at those jurisdictions that have a beyond a reasonable doubt standard for overturning a law based on the constitutionality and also considered that in the context of the contract impairment claim. And you used the word "justification," which is exactly the words that those courts use. On page 8 there's several cases, among them, the *County v. State,* the State of Washington case from 2006, stating that a party challenging a state's constitutionality bears the heavy burden of proving that there is no reasonable doubt that the statute violates the constitution while stating in its Contract Clause analysis that the justifications for the reasonableness and necessity of the challenged statute must first be offered by those defendants, the state's constitutionality.

And I think that's where the Court came down, and I understand why the Court did that. Again, we respectfully disagree. But assuming that the burden of

production is going to be imposed upon us, the question then becomes, what is that?

If you turn to page 11 of your decision, Your Honor, it's there that you talk about what the State must establish. And you say, "Consequently" -- reading from the first full paragraph, "Consequently, the Contract

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Clause allows for the state to establish that the legislation is both reasonable and necessary for an important public purpose. In doing so, the state need not establish reasonableness and necessity beyond a reasonable doubt. Rather, the state must only show that . . ." and then you cite off the three elements.

Those three elements are the test. That's the test for determining whether or not it's reasonable and necessary for an important and legitimate public purpose. And the plaintiff bears the burden of persuasion on that. There's no question about that. They have to prove the absence of those things, right, beyond a reasonable doubt. That's what the Rhode Island Supreme Court case law imposes.

And so when you say in your decision "Rather, the state must only show that . . ." these three things, I would suggest to the Court that -- and in relying upon the Court's own decision in this case, in the state pension case -- the burden of production is only -- the presenter need only present facts sufficient for the question to go to the finder of fact rather than presenting facts that would peremptorily decide it, i.e. by summary judgment or otherwise.

So the burden of production on this question that the State has is not to prove these things at all beyond

[p.7]

a reasonable doubt or even a preponderance of the evidence. All that we have to show is a justification.

I go back to page 8 of Your Honor's decision and the State of Washington and the other cases that say yes, if we're going to impose the burden of production on the state, there's some modicum of proof that's necessary. What I would suggest to the Court, given what the burden of production is, it's only a showing of facts sufficient to present the question to the trier of fact. If -- if I couldn't advance enough facts to avoid summary judgment, I'd lose. But if I advance enough facts to get the fact question to the trier of fact, I've satisfied my burden of production. I've done it.

And so -- and that makes sense for several reasons. First of all, you're talking about a standard here that the plaintiff must establish beyond a reasonable doubt. And if -- I went back because I was curious. I hadn't looked at my criminal law in a long time, but that's the same standard. And McCormick on Evidence -- this is Section 341, it's on page 576 -- talks about this. And one of the most famous early statements on the -- on what that standard means was Chief Justice Shaw in the Massachusetts Supreme Judicial Court in the famous trial of the murder of Dr. Parkman, Professor Webster. And here's what Shaw said about this: It is -- it is that

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state of the case -- and again, this is a criminal standard so -- it is that state of the case, which, after entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. He goes on: Whether, if so requested, it is the judge's duty to define the term is a matter of dispute. But the wiser view seems to be that it lies in the court's discretion, which should ordinarily be exercised by declining to define unless the jury itself asked for a fuller explanation.

But what he talks about is that that standard requires the jury to find to a moral certainty. That's the reasonable doubt standard, to a moral certainty.

And I also pulled a decision of Judge Gale, actually, it's a Supreme Court decision, *State v. Imbruglia.* And these are not in our papers because I only -- when I was reading stuff this weekend, as I'm sure Your Honor was, I said we have to -- we have to inform the Court about what this standard means because it does have an impact on what it is that we're going to need to go forward on.

But *State v. Imbruglia,* 913 A.2d 1022, it's a 2007 decision of the Supreme Court in which Judge Gale had

[p.9]

charged the jury on what reasonable doubt means. And I'll hand this up to the Court in a moment.

THE COURT: I might have that. I was just looking for my charges in criminal cases.

MR. DOLAN: Well, I did too and --

THE COURT: Why don't you -- if you do have it handy, that would be great.

MR. DOLAN: May I read this to the Court first?

THE COURT: Sure.

MR. DOLAN: And then I'll do so. I'm reading from the Supreme Court decision. "In this case, the trial justice instructed the jury regarding reasonable doubt as follows."

And again, this is not a Jury trial, but the standard would be the same.

THE COURT: Correct.

MR. DOLAN: "Always bear in mind that a defendant does not have to prove or disprove anything. It is the State that has the burden of proving beyond a reasonable doubt each and every element of any offense under consideration and that the defendant did, in fact, commit that offense."

"The term beyond a reasonable doubt does not easily lend itself to definition. Let me begin by telling you what a reasonable doubt does not encompass. Obviously

[p.10]

the State's obligation to prove guilt beyond a reasonable doubt does not mean that it must do so

beyond all possible doubt or beyond a shadow of a doubt. Reasonable doubt is not a whimsical or fanciful doubt, nor is it a doubt which is prompted by sympathy."

I can see the jurors struggling as I read this. I mean, it's a hard standard to get.

"On the other hand, you may not convict a defendant merely because of suspicion, conjecture or surmise."

I know Your Honor has a murder trial coming up as well so --

THE COURT: No, that's my charge.

MR. DOLAN: "The State must present evidence which, upon examination, is found to be so convincing and compelling as to leave in your minds no reasonable doubt about the defendant's guilt."

"We know from experience what a doubt is, just as we know when something is reasonable or unreasonable. Reasonable doubt by definition is a doubt based upon reason and not conjecture or speculation. A reasonable doubt is doubt based upon evidence or lack of evidence."

Here's the important part, and it mimics McCormick. "Proof beyond a reasonable doubt exists when, after you have thoroughly considered and examined all of the evidence that is before you, you have a firm belief that

[p.11]

the defendant is guilty as charged."

Moral certainty. It's a moral certainty standard, I think, or close to it. And when you think about that as being the burden on this plaintiff in this civil case challenging the constitutionality of the statute, it cannot be it -- cannot be given that burden that the governmental actor here, the State, has anything more than an obligation to present evidence sufficient to get to the fact finder. That's it. That's -- I think that's the burden of production. Because that burden of persuasion is so high, it can't be on the State to have to prove, as Your Honor indicated on page 11 of her decision, the elements necessary to sustain a challenge to the constitutionality of a law based on the contract impairment clause.

So I think the burden on us is -- is not even a preponderance of the evidence. It's simply come forward with sufficient -- with a justification, which is the language that appears on page 11 -- page 8 of Your Honor's March, 2015, decision in the state pension case. Come forward with evidence that provides some justification. The burden then shifts to the plaintiff to prove these things beyond a reasonable doubt or to a moral certainty.

That also makes sense not only because in the

[p.12]

context of the burden of persuasion, but it also makes sense given the other constitutional principles that are in play here, the presumption of constitutionality.

In order to give effect to the presumption of constitutionality, the Court has to maintain the burden of persuasion on the plaintiff, which it's done, but I think that informs as well the burden of production. How can it be that the State would have to prove the constitutionality of the statute, would have to prove the elements that are set forth on page 11 in its -- in satisfying its burden of production? It can't by definition because the statute is presumed to be constitutional.

So to sum up on this argument, Your Honor, we think that the burden of persuasion informs and gives body to the burden of production. We think that the other constitutional principles that adhere here, such as the presumption of constitutionality, inform and give body to what the burden of production is.

And I'd like to suggest to the Court one final thing, which is that the -- the ordinance here in question -- and the Court may not have this, so I'm going to provide it, the ordinance. Just give me a moment, Your Honor. I have a copy for counsel.

THE COURT: Can I ask you a question?

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MR. DOLAN: Of course, Your Honor.

THE COURT: The standard you're asking the Court to apply --

MR. DOLAN: Yes.

THE COURT: -- would allow the defendants to present basically any evidence as sufficient, just the minimal amount of evidence?

MR. DOLAN: Yes.

THE COURT: How do you square that with the whole issue of deference?

MR. DOLAN: Yes. Yeah, that's a tough question.

THE COURT: There you go.

MR. DOLAN: I -- so the standard is that the Court doesn't give complete deference.

THE COURT: Correct.

MR. DOLAN: It gives some deference.

THE COURT: Right.

MR. DOLAN: So you're required to scrutinize this at some level. And this --

THE COURT: Not high scrutiny.

MR. DOLAN: No. This leads to my --

THE COURT: Low scrutiny.

MR. DOLAN: Yes. This leads to the point I was about to make when the Court asked the question, so we're on the same page.

[p.14]

So how much deference do you afford? What does that mean? And the only place that I could find some instructive guidance on this is in statutes or ordinances

that have legislative findings. Same thing. Same thing. And I -- although I don't -- I'm sorry for this, Your Honor. I didn't cite these in our papers because I was struggling with this over the weekend, and it came to me -- it came to me that this is where this is where it lies. And unfortunately, although the issue is the same, there's still not a whole lot of guidance.

But what our -- what our U.S. Supreme Court and what our Rhode Island Supreme Court have said on this, although legislative findings are subject to review, the determination of those, whether they're correct or not, is entitled to great deference by the judiciary. *Berman v. Parker,* 348 U.S. 26 (1954). *Narragansett Electric* --

THE COURT: I'm sorry.

MR. DOLAN: I'm sorry.

THE COURT: Excuse me. 348 U.S.?

MR. DOLAN: Yes. 26 (1954). *Narragansett Electric Lighting Company v. Sabre,* 50 R.I. 288 (1929). And then there's -- there's also another more recent decision. It's the Advisory Opinion to the Governor, 113 R.I. 586 (1474) [sic]. I mention all of that -- I'm sorry, Your Honor.

[p.15]

THE COURT: 1974?

MR. DOLAN: *In re Advisory Opinion.* It's 113 R. I. 586 (1974). I mention all of that because in this case we have legislative findings. Now, this has not been presented to the Court -- the Court's attention yet, but

I've handed counsel a copy of the original ordinance that was -- that is at issue in the case, the one that suspended the COLA for ten years. I'd like to present that to the Court, if I might.

THE COURT: You can. I have that.

MR. DOLAN: And also I have -- I have, Judge, oh, the Supreme Court decision in the charge case as well.

THE COURT: Yes. I've read the ordinances and did take note of the legislative findings.

MR. DOLAN: So there are legislative findings. I would suggest to the Court that if we simply present those and they detail why it is the City is doing what it's doing, we've established the public purpose.

THE COURT: You mean no testimony, just --

MR. DOLAN: Well, no, no, no. I'm not going to let the -- leave the record cold. I'm just -- I'm just addressing what is -- what's necessary for us to establish our burden of production. Because I don't think the plaintiffs are going to be able to show in

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their case beyond a reasonable doubt that this was not reasonable and necessary. I think that that's -- to a moral certainty, I don't see it at all.

So I'm just addressing what it is the Court's going to require of us. We're going to put on a full case. I mean, I -- it's not going to change the modicum of evidence, but it is going to change how the trial goes because if the plaintiff puts on its case and doesn't

satisfy its burden, I've got a Rule 52 motion right then. And I think that if we simply introduce this, this legislation with the legislative findings, we've satisfied our burden of production. If the plaintiff then can't establish in its case beyond a reasonable doubt the elements of Contract Clause analysis, the case is over. The case is over. Now, the Court might reserve on my motion. I would then go forward with additional evidence, which I'm -- I'm fully prepared to do obviously.

But I think this is an important point, and it's an important point to determine in this case. This is not the only case where these issues are going to be presented. You have the City of Providence case. You potentially have another state pension case depending upon what the Cranston Police and Fire do in that case. So I believe it's an issue that needs to be resolved. I

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think we're on the right track with it for the reasons I've articulated today, and that's the -- the guts of the motion.

THE COURT: Thank you. Objections?

MR. SULLIVAN: Judge, I'll be brief. I 'm going to rest on my -- on my pleadings. The City discusses the burden of proof to a moral certainty. Obviously he's citing some criminal -- the burden with McCormick.

Simply introducing the first two pages of this ordinance, to suggest that that satisfies their burden under your decision on page 11, I mean, the State must

show that it did not -- you'd have to prove the negative -- did not consider -- I'm sorry -- yeah, consider impairing the contracts on par with other policy alternatives, impose a drastic impairment when an evident and more moderate course would serve its purpose equally well and prove that it did not act unreasonably in light of the surrounding circumstances.

There's a ladder up against the wall. They want to stay on the ground as far as their burden. Then there's a default position. Let's get on the first rung. let's introduce a piece of paper, and that will satisfy our burden. Judge, we disagree. We agree with the decision that this Court made, and we believe that proof of a fact is proof of a fact, no matter how the City wants to

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describe how not to prove a fact. The elements of proof are the elements of proof.

THE COURT: I think what the defendant said was you're going to present your case. Then before they present their case, for the purposes of Rule 52, at the very basic level all they have to do is present a certified copy of the ordinance with the findings of fact and then, with respect to the justification phase, proceed with testimony afterwards. Is that what I heard?

MR. DOLAN: Well, I think so, Your Honor.

THE COURT: I mean very simply --

MR. DOLAN: Yes.

THE COURT: -- in a diagram sentence -- I mean in a diagram, plaintiff goes first, then this is what has to be done, the lowest of low burden. That's what their position is, is the findings of fact based on the cases, which I haven't read, regarding great deference to legislative findings. That's all they have to do.

MR. DOLAN: I think at a threshold level, that's our position.

THE COURT: Yes.

MR. DOLAN: If the Court -- if the Court didn't grant a Rule 52 motion, I'd obviously put on more evidence.

THE COURT: No, I get that. But I think what

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Mr. Sullivan was saying was different than what the defendants were saying.

MR. DOLAN: Yes.

THE COURT: What you were saying, Mr. Sullivan, what the defendants were saying, this is all they had to do, and that's not what I heard from the defendants. I heard that just, I guess --

MR. SULLIVAN: Right.

THE COURT: -- as Mr. Dolan said, from a threshold point of view, this is all that has to be done.

MR. SULLIVAN: And that's my metaphor, that they have to stand on the ground where the ladder is,

getting up -- you know, climbing the rungs as their burden increases as this Court rules.

THE COURT: They don't have much of a burden.

MR. SULLIVAN: I understand that.

THE COURT: What we're trying to figure out -- what I'm trying to figure out is what exactly what words to describe it. You're the one with the burden.

MR. SULLIVAN: I understand. But, I mean, according to your decision, they have to prove those three --

THE COURT: They don't have to prove anything. They have to justify.

MR. SULLIVAN: Justify. That's what I mean, Judge. But certain facts justify a burden. Okay. They don't

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have to -- they have to prove a fact. They don't have to prove the element, but facts tend to prove elements. A piece of paper with legislative findings -- and it's the first I heard of these cases too. Obviously I'm going to review them as well.

But we -- we respectfully disagree, Judge. I mean, especially when the State's a party to the contract, it just provides such a convenient way of just avoiding their responsibilities and their --

THE COURT: What's the issue with deference? What do you have to say about that?

MR. SULLIVAN: Judge, I would agree with the Court. I mean, deference -- there is deference and I believe -- well, I believe that -- that their burden is more than the piece of paper. Thank you.

MR. DOLAN: Can I just briefly reply, Your Honor?

THE COURT: Yes.

MR. DOLAN: I think -- and I'm trying to assist the Court in this on this question of deference. So we're entitled to some deference, not complete deference.

THE COURT: Correct.

MR. DOLAN: I think that means -- and, you know, if I were in your -- sitting in your chair, if I ever had the honor of doing that, I probably would have ruled the same way. Because how do you square contract impairment

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with beyond a reasonable doubt? Some deference. I think some deference can only mean -- given the high burden of persuasion that the plaintiff carries here, can only mean present enough to get to the finder of fact.

So we had a reason for doing this. We did. There's no question we had a reason for doing it. The pension system, as you'll hear next week, was in complete disarray. It had to be fixed. We fixed it. Now, these plaintiffs don't agree with that. Four hundred of their brethren did, but these plaintiffs don't. So they have the burden of proving that our fix was violative beyond a reasonable doubt. All we have to show is that there was a reason for fixing it. I think that's some deference.

Now, if the Court determines at the close of the plaintiff's case that they've made enough of a case that they can obviate or get by a Rule 52 motion, I've got to present more evidence, I think. I think I do at that point. But if they don't, I think we've made our showing in the case.

THE COURT: Anything else?

MR. SULLIVAN: That's it, Judge. Thank you.

THE COURT: All right. You'll hear from me on this.

Now, we have Takings Clause motion for summary judgment, defendants' motion for summary judgment, Takings Clause. Did I receive an objection from you on

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that?

MR. SULLIVAN: I believe you did.

MR. WRAY: I know that we have one in our possession. I don' t know --

MR. DOLAN: Does Your Honor want that?

THE COURT: What was that?

MR. DOLAN: I can give the Court that objection if you don't have it.

THE COURT: We don't have that objection.

MR. SULLIVAN: That was filed by Marisa, my co-counsel, Judge.

THE COURT: When was it filed; do you know?

THE CLERK: I have it on the 30th, Judge.

MR. SULLIVAN: I believe we filed it --

MR. WRAY: Friday at 1:15 p.m.

MR. SULLIVAN: I hand-delivered it.

MR. DOLAN: Would the Court --

THE COURT: You know what, let me just look. Do we have one? Wait a minute. I do have it. Yes. It was filed on Friday. Yes. We do have that. Okay. Thank you.

MR. WRAY: Good morning, Your Honor. The Takings Clause analysis here involves essentially three questions. The first one is whether there's a protectable property interest at issue here. The second

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one is, if there is, what sort of Takings Clause analysis should the Court undertake? And the third question is, that Takings Clause analysis, can the plaintiffs meet their burden of proof based on facts that are not in dispute?

As to that third element, the actual application of the *Penn Central* test, we're simply going to rest on our papers today. However, we would like to reply to what the plaintiff has submitted concerning whether there is a protectable property interest and also what test should apply if there is a protectable property interest.

Now, the answer to this first question essentially boils down to whether the plaintiff's members have a contractual right as against the City to a yearly 3

percent COLA that must be paid for the entirety of their lifetime.

Now, the question of whether there's a contract right depends on the well-established test that there must be competent parties, subject matter, a legal consideration, mutuality of agreement and mutuality of obligation. And those elements are from *Rhode Island Five v. Medical Associates of Bristol County,* 668 A. 2d 1250.

This case really comes down to mutuality of agreement here, whether in fact both parties agree to pay

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a COLA that must be paid every year and that must be paid for the duration of their lifetime.

Now, in the City's initial motion we pointed out that the documents upon which the plaintiff relies do not in fact establish such a COLA. Those documents are very clear that the base pension payment to the retirees must be made every year for the duration of their lifetime. The language is "he or she shall be paid annually for the remainder of his or her life." But no such words of duration or frequency are used with respect to the COLA. Instead, with respect to the COLA, the language is "Notwithstanding the foregoing, the pension cost-of-living adjustment paid to such officer or member shall be fixed at 3 percent per annum compounded without any escalation based on the raises granted" -- "granted to active employees."

Now, this case says the interest is 3 percent per annum as opposed to 3 percent per diem or per month. It doesn't state that this should be paid every year for the retirees for their entire lifetime.

The City also noted in its motion that the source of the retirees' belief that they were entitled to a COLA that must be paid every year didn't come from the text of the documents.

The question was: Do you see any language in here

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that states that the COLA would be lifetime?

And this is the 30(b)(6) deponent for the plaintiff.

He replied: No. It says upon retiring, you will receive 3 percent per year. I suspect that it would be until you die. I suspected it is until you die and that has been the case.

Question: So it was an assumption that you made rather than anything that is actually written in this contract, correct?

Answer: It's a fact, yes.

And there were some other sources for their belief that it must be paid every year for their lifetime, and that was based on what they were told by the president of their union.

Question: So earlier you testified that even though it might not be written here, it was your understanding or the police union's understanding this would be a lifetime benefit, right?

He said right.

And were you told that by members of, for instance, the police union?

Answer: Yes.

Question: Like the president?

Answer: Yes.

And Mr. Sullivan at his deposition, to be fair,

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doesn't recall saying this at the time. But neither the statements of the police union's president or the unilateral expectations of the retirees are sufficient to create a contractual right which, as we were speaking about before, requires mutuality of agreement. It has to be what the City also expected and intended.

And plaintiff's memorandum in fact seems to acknowledge that the City did not expect that this was the case. On page 3 of their memorandum, they say that the City used the word annual in its ordinance supports the plaintiff's expectations, not the defendants' expectations, suggesting that there was a breach between the two.

Plaintiff doesn't necessarily rely on the text of the documents concerning the COLA provision. Rather, it asks some questions, hypothetical questions about the ordinance, like if there was no lifetime COLA, why does the ordinance contemplate the death of the police and firefighter? I'm not sure how the answer to that question really resolves whether a COLA must be paid

each year. And the other question is, if the City thought there was no lifetime expectation of a COLA, why did they delete that COLA for only ten years? Wouldn't they simply have deleted it with no reference to a number of years? I don't understand how the answer to this

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question has to do with whether there was supposed to be payments of a COLA each year either.

In any event, for the City to undertake an action, it can't just decide internally, it's not a natural person, and then act on that. If it wants to be able to pay COLAs after a ten-year suspension period, it has to have authorization to do so in the ordinance. Same with paying widows.

But we don't need to resort to these questions that concern kind of the periphery of the effect and the logical consequences because we have the words in front of us. And the legislature did not need to say that this COLA will be fixed at 3 percent per annum and will not necessarily be paid each year because just the absence of those words does that work. And the fact that there's this stunning contrast between that language where it just says the amount of the COLA and the base pension payment where it does state that it will be given every year suggests that the COLA does not -- will not be given every year.

Most of plaintiff's arguments concerning whether there's a contractual tern actually sound in promissory estoppel. They frequently talk about the members' expectations that they would receive the 3 percent

right -- 3 percent COLA, rather. And we don't have a count for

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promissory estoppel in this case. So that's not before the Court. However, it is instructive that the Rhode Island Supreme Court in *Retired Adjunct Professors v. Almond,* which is 690 A.2d 1342, held that notions of promissory estoppel that are routinely applied in private contractual contexts are ill-suited to public contract rights analysis.

In doing so, they held that they relied upon a whole line of cases from federal and state courts demonstrating that it's -- the promissory estoppel doctrine is not applicable in the context of governments because, again, it's a different actor. It's like your brain changes every four to six years.

That's the question of whether there's a protectable property interest. And for the reasons expressed, we believe that there's not.

The second question is, if there is some protectable property interest, what test should apply? And the defendants have offered that the *Penn Central* test should apply while defendant has demurred -- plaintiff, I'm sorry, the plaintiff has demurred. And the plaintiff has cited to a portion of *Penn Central* where the Court addressed "direct overflights" -- and they mean by airplanes -- "above the claimant's land, that destroyed the present use of the land as a chicken farm," and

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plaintiff then said that the above-quoted language applies directly to the facts of this case.

We respectfully disagree, and we think that the closest case to the present case doesn't involve chickens or airplanes, and it's *Buffalo Teachers Federation v. Tobe* or *Tobe,* I'm not sure if I'm pronouncing that correctly, but that's at 464 F.3d 362. And in that case the Court addressed legislation which touched on the fiscal crisis of the City of Buffalo which had passed a wage freeze legislation. Various unions sued the state alleging that the wage freeze violated the Takings Clause. And then assuming that the plaintiffs had a protectable property interest but without deciding it, the Second Circuit actually overturned the trial court, which had analyzed this under a physical takings analysis, and instead ruled that the regulatory takings test under *Penn Central* applied. It held that the wage freeze does not present the classic taking in which a government directly appropriates private property for its own use. Rather, the interference with appellants' contractual right to a wage increase arises from a public program adjusting the benefits and burdens of economic life to promote the common good. And then it proceeded to adopt and apply the *Penn Central* test.

We think that the facts of that case are startlingly

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similar to those that are present here because the legislative enactments here don't take money out of a bank account. They don't affect the use of land. They simply say that this alleged contractual right, this

abstract alleged contractual right that would give you more payments in the future, is -- is suspended for ten years, Your Honor, and that the *Penn Central* test applies to that.

And as I mentioned before, concerning the actual application of the *Penn Central* test to this matter, we rest on our papers. Thank you.

THE COURT: Thank you. Objections?

MR. SULLIVAN: Judge, I can assure you the plaintiff will put evidence on through its members that there has been money taken from them since the enactment of these ordinances.

The defendants' argument begs the question, "Why not just delete the COLA forever? Why not -- why take any legislative action at all? It's -- it's a significant amount of a property interest, in the six figures for some of the members of the plaintiff, and it lasts for their lifetime, the taking. There's a -- I'll rest on my pleadings for the argument that was referenced by my brother.

However, there's a -- there's an issue about a total

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loss that was brought up in the *Penn Central* case and in the defendants' pleadings. The loss of a sum certain is total. It does get reinstated at a rate -- a lower rate in ten years, but the loss is permanent and it's -- it's calculable and it's permanent and it's not -- and it's not a temporary loss. It is total taking of that amount.

THE COURT: How can a ten-year suspension be a total loss?

MR. SULLIVAN: The amount that would have been paid otherwise, that 3 percent per year, is gone forever, and then the base at the end of the ten years of which --

THE COURT: It's a temporary suspension, similar to *Buffalo Teachers*.

MR. SULLIVAN: Right. It's a suspension of a benefit, but it's a taking of money.

THE COURT: Okay.

MR. SULLIVAN: Never to be returned.

THE COURT: Thank you.

MR. WRAY: May I reply on that point, Your Honor?

THE COURT: Yes.

MR. WRAY: What plaintiff is attempting to do here is to zoom in completely on the one thing that has been affected by the government and to say that that's the entire thing.

So if you -- we actually attached the entire

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collective bargaining agreement to our motion papers here, and it's quite comprehensive. It deals with matters such as uniforms, overtime, sick pay. And we went through with each of these plaintiffs and we said, apart from this alleged COLA, do you claim that any of this has been breached? And the answer was no. And

in fact, I believe in the complaint itself the plaintiff admits that the City has always undertaken its obligations under the CBA.

So if you look only at Section 24, which concerns pensions in most of these, and then within that section, which also deals with the base pension, I mean, you only look at the COLA paragraph, and within that paragraph you have to imagine a term that has to be paid every year, that's the only thing that has been affected by this ordinance here, Your Honor. The fact that it's only been suspended for ten years rather than for the entirety, that -- the rhetorical question, the premise of this question is that the City is out there to harm their retirees and to give them as little as possible. The answer to that is that that's of course not the case. The COLA is suspended for ten years because that's the least that we could do to effect a fiscal crisis that affected the City.

THE COURT: With respect to your argument concerning

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whether the 3 percent COLA benefit constitutes a property right afforded protection, how do you square your conclusion with the *Arena* case?

MR. WRAY: In the *Arena* case it actually did come down to the wording of the contracts. In *Arena* you had the Providence CBAs. I don't have them in front of me, and I won't until February so -- but right now I'm just looking at the contract wording in the Cranston case, which is really what this case comes down to. What in that document was promised to the police union

members? And in Providence it might have said 3 percent per annum paid each year for the rest of your lifetime. All we have here is that the COLA amount is going to be fixed at 3 percent and it doesn't say "and it's going to be paid every year for your lifetime."

THE COURT: Thank you. Respond?

MR. SULLIVAN: No. Thank you, Judge.

THE COURT: We'll move on to defendants' motion for summary judgment for non-City defendants.

MR. WRAY: We'll rest on our pleadings except to reply to what the plaintiff has vetted here. The plaintiff in its objection claims that the acts of the legislature in passing a piece of legislation were not legislative under the doctrine of legislative immunity.

Laying aside the merits, I actually believe that

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they are collaterally estopped from making this argument because earlier the Court adjudicated whether the plaintiff would be permitted to take the deposition of John Lanni, who was City Council President of the Cranston City Council, and in that case determined that all of the peripheral activities surrounding this legislation were themselves protected by legislative immunity, relying on the precedent that was before the Court at the time.

At that time the plaintiff did not make any argument that this legislation itself was not within the scope of legislative immunity, which means that we satisfy the elements of collateral estoppel: one, that

there be an identity of issues; two, that the prior proceeding was open and a final judgment on the merits; and three, that the party against whom collateral estoppel has been asserted be the same as or in privity with the party in the prior proceeding.

Turning to the merits, their very case law fails to establish that there's been any case in which a piece of legislation passed by the legislature has been deemed to be an administrative act. The case that they cited, which was *Cutting,* dealt with planning board members, who are not legislators, who imposed conditions on a permit that came before them. And that isn't even really a

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legislative act. It's closer to a quasi-judicial act. And that very case states that -- the *Cutting* case says I that these four other cases they address, they all involve enacting or vetoing general ordinances, actions that are clearly legislative activity. So in that very case, Your Honor, they state that any passage of an ordinance is clearly legislative activity.

The only other case cited was -- I'm going to mangle the pronunciation -- *Kaczorowski,* K-A-C-Z-O-R-O-W-S-K-I, *v. Town of North Smithfield.* And I'm not sure why this was relied upon in their papers because it says that the Supreme Court has determined that voting for legislation, introducing budgets and signing ordinances into law are "quintessentially legislative" functions. While employment decisions, however, generally are administrative in nature, when those decisions are made in the context of the quintessentially legislative

function, such as passing a budget, they become legislative. That's 974 F.Supp.2d 110.

And to the extent that this issue is not collaterally estopped, I think that the failure of the plaintiff to produce any case in which the passing of legislation has been deemed administrative is conclusive of the question.

THE COURT: Thank you. Mr. Sullivan, objections?

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MR. SULLIVAN: Judge, I'm going to rest on my pleadings. These ordinances were targeted at specific individuals, most of -- all of which received mail from the City and mail from Mr. Dolan's office regarding the settlement of the class action.

THE COURT: Thank you. Before the Court is the defendants' motion for summary judgment related to non-City defendants. The defendants' motion, in effect, seeks to strike all non-City defendants from the case due to the protections of legislative immunity.

Summary judgment standard. Summary judgment is appropriate when, after viewing the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party, the Court determines that there are no issues of genuine material fact in dispute, and the moving party is entitled to judgment as a matter of law. *Delta Airlines, Inc. v. Neary,* 785 A.2d 1123, 1126 (R.I. 2001), citing *Woodland Manor III Associates v. Keeney,* 713 A. 2d 802 at 810. The Court is mindful that the remedy

should be cautiously applied. *Steinberg v. State,* 427 A.2d 338.

Rhode Island legislators are granted robust protection under both the Rhode Island and United States Constitutions from questioning related -- from questioning related to their legislative duties. Based

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on English common law privileges, legislative immunity protects the legislature from threats to its deliberative autonomy. Laurence Tribe, American Constitutional Law, Section 5-20, Third Edition. See also *National Association of Social Workers v. Harwood,* 69 F. 3d 622, 629 (1st Cir. 1995). It functions as an important protection of the independence and integrity of the legislature. *United States v. Johnson,* 383 U.S. 169 at 178.

In particular, legislative immunity provides protection to legislators from "any other branch of government for their acts in carrying out their legislative duties relating to the legislative process." And that's the *Irons* case, 973 A.2d at 1131, quoting *Holmes,* 475 A.2d at 983. Such immunity includes all activities that are part of the legislative process. See the *Holmes* case. To determine whether the challenged conduct is legislative, a court must consider the nature of the acts in question, rather than the motive or intent of the individuals performing them. See the *Maynard* case, 741 A.2d at 870, quoting *Bogan v. Scott Harris,* 523 U.S. 44 at 54.

The Rhode Island Supreme Court has made it clear that the protections afforded by legislative immunity apply to municipal legislators. *See Maynard v. Beck*,

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741 A. 2d 866. Our Supreme Court has also made clear that legislative immunity applies to those outside the legislative branch when they perform legislative functions. Specifically, a mayor's role in both proposing and signing into law the ordinance is entitled to absolute legislative immunity. See *Maynard,* quoting *Bogan.*

In this case the alleged violations all stem from legislative acts of the non-City defendants. The complaint itself lists counts against the non-City defendants in terms related to the subject ordinances. See Complaint Count No. IV specifically. Moreover, the Court describes -- strike that. Moreover, the complaint describes the alleged violations as a consequence of legislative actions. Paragraph 26 of the complaint is referenced there. There is no genuine issue of material fact that the very core of the plaintiff's claims against the non-City defendants is premised on their performance of legislative acts.

Accordingly, the robust legislative immunity easily reaches these defendants. Consequently, the plaintiff's assertions that the actions by the non-City defendants are administrative in nature is not going to -- does not fly, so to speak. In passing the ordinance, non-City defendants were clearly carrying out the core of

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legislative duties. And I quote the *Irons* case. It is hard for this Court to imagine something more clearly legislative in nature than the passage of an ordinance. Both the City of Cranston members, council members, and the Mayor were thus acting in their legislative capacity in passing the ordinance. As such, they are entitled to be afforded the legislative immunity under our constitution, our Rhode Island Constitution and the Federal Constitution.

In holding this, the Court is mindful that the plaintiffs are not precluded from further pursuing their case. The plaintiff's claim against the City remains intact.

Therefore, based on the non-City defendants' motion for summary judgment and in accordance with my analysis, the motion for summary judgment in this instance is granted.

We'll move on now to the plaintiff's motion for summary judgment regarding the res judicata issue. Mr. Sullivan.

MR. SULLIVAN: Good morning, Your Honor. Judge, as the -- as the Court knows, one of the counts in the complaint is a count for a declaration of res judicata.

The pleadings are -- I'll rely on the pleadings, Judge, but I believe that the City's response to the

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plaintiff's motion is misplaced. The Mayor called the wording by Judge Procaccini at the end of the last paragraph of the case -- of the decision that refers to non-modification of retiree benefits without collective bargaining as dicta. It was pretty clear that it was not dicta. There's a final order that entered in the case. And the City cites several cases regarding the ability of a union to represent retirees. That's not part of our motion. It's not part of our case. If the City wanted to organize -- or if the retirees wanted to organize, they could under the State Labor Relations Act. They could consent to an organization, and that could be collectively bargained that way. I know there was -- someone had reached out to me over the years to see if there would be a consideration of organizing the retirees in an attempt to modify the COLAs. I think it's clear that -- although the case was about an arbitrator's decision, it's clear that the resulting holding in the decision by Judge Procaccini would have rendered the City in contempt of that case. Therefore, I ask the Court enter judgment.

THE COURT: Well, counsel, you'll agree, won't you, that in *Torrado Architects* the Rhode Island Supreme Court adopted the so-called transactional rule? Will you agree with that?

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MR. SULLIVAN: I will.

THE COURT: And could you please explain to me how this ordinance, the 2013 ordinance, is within the

same transaction as the 2005 decision, the ordinance effective in the 2005 decision?

MR. SULLIVAN: It's -- I'm sorry. It's within the realm of the transaction between the retiree and the City. There's a relationship there. There was an ordinance in 2005 to cut the COLAs. There's an ordinance in 2013 to cut the COLAs. That's as close as I can get.

THE COURT: I'm sorry. I didn't hear what you said.

MR. SULLIVAN: That's as close as I can get that between the transaction -- the ordinance that was in 2005 and the ordinance in 2013 were not part of the same transaction but they accomplish the same result, cutting the -- cutting the COLA for the retiree.

THE COURT: So you're saying that anytime there's a change in the ordinances, whether it's COLA or otherwise, and there's a decision out there based on a similar ordinance, then res judicata applies?

MR. SULLIVAN: I'm saying that if the -- if the language in that decision says that the ordinances the retirement benefits shall not be changed without collective bargaining, I'm saying that's the holding of the case.

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THE COURT: Well, didn't that case involve standing? Wasn't really that case -- wasn't that really what that case was about?

MR. SULLIVAN: I don't think so, Judge.

THE COURT: The 2005 decision.

MR. SULLIVAN: I don't think it was so much standing as -- I mean, it was about an arbitrator's -- enforcement of an arbitrator's decision, an appeal of an award about standing. Okay. The arbitration was about standing. Yes.

THE COURT: Right. The 2005 decision, really a large piece of that is centered on whether or not the unions had standing to represent the retirees. That was a big piece of that decision. Would you agree with me?

MR. SULLIVAN: I would say that was a part of it. Yes.

THE COURT: There's no standing considerations here, correct? Would you agree with me on that?

MR. SULLIVAN: I would agree with that. Yes.

THE COURT: Do you have anything else you'd like to say?

MR. SULLIVAN: No.

THE COURT: Thank you.

MR. DOLAN: Your Honor, since you're on the claims, the plaintiff's motion for summary judgment dealt with

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both res judicata and the Open Meetings Act count. I want to alert the Court, if it's not aware, that we cross-moved for summary judgment on both those claims. I

am going to address the res judicata question. Mr. Wray is going to address the Open Meetings Act violation, with the permission of the Court.

THE COURT: Just one second, please. I failed to have counsel address that, so I'm going to have him address the Open Meetings Act.

MR. DOLAN: Very well, Your Honor.

MR. SULLIVAN: Judge, I've represented cities and towns for the last 15 years, and I've had experience with this Open Meetings Act. I actually attended the council meeting and saw -- looked at the agenda, and I was surprised that they weren't going to act on -- on the ordinances. They weren't listed on the agenda. They weren't anywhere to be found. I searched the agenda. And to my chagrin, they announced -- the city clerk announced that these ordinances are being introduced. She named them and sent them to the Committee on Finance. I believe clearly the Open Meetings Act, Title 42, requires a recitation on this -- on the City Council's agenda of the business that it's going to conduct, whether collectively by the council or by any machination thereof, including the city clerk and what happened.

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THE COURT: Address the standing issue.

MR. SULLIVAN: The standing issue is the -- the complaining witness is the president of the -- I'm sorry, the complaining witness to the Attorney General's Office is the president of the plaintiff.

THE COURT: How can the --

MR. SULLIVAN: And I also -- I'm sorry. Go ahead.

THE COURT: -- association bring the -- there are no individual plaintiffs in this case.

MR. SULLIVAN: Right. The individual person, Mr. Gilkenson, brought the issue, and I believe the burden is on the City.

THE COURT: Well, how can the committee file the open meetings --

MR. SULLIVAN: They didn't.

THE COURT: Well, it's part of the complaint, isn't it?

MR. SULLIVAN: The committee -- the president of the committee filed it individually.

THE COURT: But he's not a plaintiff. Let me get the complaint.

MR. SULLIVAN: You're right.

THE COURT: Excuse me?

MR. SULLIVAN: You're correct.

THE COURT: I am correct. So address the issue.

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He's not a named plaintiff in this action.

MR. SULLIVAN: Right. But I still believe --

THE COURT: How can he bring an action?

MR. SULLIVAN: I still believe the authority to -- I mean the City's conduct violated the Open Meetings Act, okay, whether or not --

THE COURT: Well, I'm not weighing in on it, so the City's conduct may have.

MR. SULLIVAN: Right.

THE COURT: But the appropriate person has to bring the action. The Attorney General's passing on it is what I read.

MR. SULLIVAN: I'm sorry?

THE COURT: And how can the entity bring the action?

MR. SULLIVAN: But the Attorney General made a finding that they did violate the Open Meetings Act.

THE COURT: I understand that. But they're not bringing a suit to enforce their action.

MR. SULLIVAN: Right.

THE COURT: Correct? That's what the letter said.

MR. SULLIVAN: Right. Correct.

THE COURT: My question to you is, how can the Cranston Police Retirees Action Committee bring the suit? What's your authority?

MR. SULLIVAN: I believe it's a nonprofit

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corporation. And as its president, Mr. Gilkenson, he could bring the action -- the action.

THE COURT: Okay. How is the entity aggrieved?

MR. SULLIVAN: Well, there's certain things that could be argued at trial, Judge, whether or not even --

THE COURT: How is it aggrieved? You tell me. Give me the facts.

MR. SULLIVAN: The facts were that on March 25th, 2013, there was a surreptitious introduction of a pension ordinance that wasn't listed on the agenda. I think the --

THE COURT: But how do you relate that to the entity? It might be related to a citizen, but there's no individual plaintiff. So how does this entity, who I don't believe was -- which was not even in existence at the time -- was it?

MR. SULLIVAN: Yes, it was. I believe it was.

THE COURT: When did this exist -- come into effect?

MR. SULLIVAN: I know there was a 90-day bar on action. It was at some point prior to that. I -- I don't know exactly, Judge, but I organized it, I forget when. But I'm pretty sure it was at the -- prior to that time of the complaint.

THE COURT: You're pretty sure?

MR. SULLIVAN: Yes. The nexus between the action of

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the City Council in failing to adequately notify the public of this particular ordinance affected every member of the plaintiff. And the complaining party to the plaintiff -- I mean to the Attorney General's Office is admittedly not the plaintiff, but it's a member of the plaintiff.

THE COURT: But how was the Action Committee aggrieved by this legislation?

MR. SULLIVAN: Judge, I don't believe --

THE COURT: The committee itself.

MR. SULLIVAN: Yeah. I don't believe -- first of all, it's my -- the plaintiff's position that we don't have to prove that we're aggrieved. In fact, I think the statute says the burden shifts to the City to prove that it was compliant with the open meetings --

THE COURT: As I read 42-46-8, "Any citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general." Would you agree with me that that is the operative section?

MR. SULLIVAN: I think that lends itself to standing. Yes. But the aggrieved --

THE COURT: But I'm not -- I don't know how the Action Committee was aggrieved.

MR. SULLIVAN: It was aggrieved because the action

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that was omitted from the agenda started a series of events that ended up taking their COLAs.

THE COURT: Thank you.

MR. DOLAN: Your Honor, we're going to present on the Open Meetings Act violation first.

THE COURT: Okay.

MR. WRAY: Your Honor, so there's two procedural steps in an alleged open meetings violation. The first is a complaint filed with the Attorney General, and there's no question that the statute says that an aggrieved citizen or entity can file a complaint with the Attorney General.

However, the next section of the ordinance -- I'm sorry, the statute addresses the ability to file suit, and the ability to file suit is the one that's limited to individuals only.

THE COURT: That's Subsection (b).

MR. WRAY: That's correct.

THE COURT: Is that Subsection (b)?

MR. WRAY: Right.

THE COURT: And I was quoting (a).

MR. WRAY: That's correct. And as the Court noted, the individual -- no individual is a plaintiff in this

matter. It's a tactical choice that the plaintiff made. We in fact attempted to join individuals at the outset of

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the case, and the plaintiff specifically opposed that motion.

The second standing issue here is not only that of the plaintiff, but that they have failed to actually join the body that's allegedly in violation of the Open Meetings Act. The Attorney General complaint and letter addressed the Cranston City Council, which is a body that is distinct from the City of Cranston itself, and the City of Cranston is not subject to the Open Meetings Act because it's not a subdivision of a municipal government. And the definition is included in 42-46-2, which defines a public body as any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government. And there's case law which we've cited in our memorandum that makes clear that this is indeed aimed at divisions rather than municipal governments itself.

The second question is, even if they had a proper plaintiff and a proper defendant, they don't have facts showing that -- and this is a matter of law -- whether business was discussed at this March 25th, 2013, meeting.

Now, bear in mind this is not the meeting in which these ordinances were passed. That didn't happen for almost a month. And this is not the meeting at which the ordinances were debated and discussed, which was at the

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April 11, 2013, meeting of the Finance Committee. All that happened -- and we had Mr. Sullivan give his personal recollection -- was that the city clerk read the name of the ordinance and where they were assigned. Now, this is the city clerk taking an action at a City Council meeting, but all the clerk was doing was providing notice of what would later happen at the April 11, 2013, meeting.

And the Attorney General in concluding -- I'm sorry, the Special Assistant Attorney General in concluding that this may be a violation of the Open Meetings Act relied on a case that we think is completely distinguishable on the facts in which the agenda item that was in that case, *Anolik,* involved a really substantive action that was taken. In that case the zoning board, I believe it was, stated that somebody can continue construction on a building for two years -- for two years more, which to any of the neighbors is an important substantive action that they wanted to be heard on. Here, no substantive action was taken. All that was done was providing additional and entirely superfluous notice of what would take place at the April 11, 2013, meeting.

And to point out the -- the significance of this complaint, an individual that was a retired member of the Cranston Police Department was there on March 25th, 2013,

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and spoke at length concerning the issues of this case, suggesting that if there was error -- and we deny there was -- it was entirely harmless, which appears also to have been the conclusion of the Special Assistant Attorney General. Thank you.

THE COURT: I think that concludes the motions.

MR. DOLAN: I'm sorry, Your Honor?

THE COURT: That concludes the motions.

MR. DOLAN: Well, no, it doesn't.

THE COURT: The issue with beyond a reasonable doubt.

MR. DOLAN: Well, the only thing that's left is the res judicata argument about the 2005 Procaccini decision which Mr. Sullivan addressed. I'd like to be heard on that.

THE COURT: Yes.

MR. DOLAN: Thank you, Your Honor. I have two points. First, examination of the subsequent precedent following Justice Procaccini's decision makes clear that modification of retiree benefits is most definitely not a subject of collective bargaining. That's number one. And I'll explain the support for that in a moment.

Number two, the transactional analysis that applies in a res judicata claim that Your Honor referred to also makes plain that nothing about that decision is res

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judicata in this case. And the Court may already be painfully aware of this, but I need for purposes of the record to go through it, however briefly.

The decision of Judge Procaccini in the 2005 case concerned a 2003 -- two 2003 ordinances of the City of Cranston. Unlike -- unlike the limited remedy that was effectuated by the ordinance at issue in this case, the ordinances in those cases completely eliminated the pension benefits across the board. I say that because I want to distinguish that case from this case. But the holding of Judge Procaccini in that case was really limited. Consequently, the last two sentences of his decision are the most operative. And there wasn't a standing issue in that case. There was in the subsequent cases that I'll get to in a minute, and I'll elucidate that for the Court.

But the last two sentences he writes, "Consequently, this Court is constrained to find that the arbitrator's decisions, both of which declare the City's repeal of retiree benefits violative of the respective collective bargaining agreements, are rational and draw their essence from the agreements between the parties."

In other words, there was sufficient evidence to uphold the arbitrator's decision. That's all he found.

But he goes on to say at the end -- and we're human

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beings. I think we like to complete our thoughts. He said, "Accordingly, any modification of retirees' benefits must be accomplished through collective bargaining." Classic dicta, obiter dictum, after the holding.

Assuming, however, that's the holding of the case, the subsequent decisions in *Arena,* which I know the Court has probably read more than I have, the *City of Newport* case, which is not mentioned often, and more recently the *Providence School Board* case all make plain that if that was Judge Procaccini's holding, that's not the law anymore.

Arena. In *Arena* the Court held -- the Supreme Court held that the Firefighters' Arbitration Act does not apply to a lawsuit brought by retirees in Superior Court and that the Superior Court, not an arbitrator, had jurisdiction to decide a case concerning the modification of retirees' benefits.

Now, interestingly, in Judge Procaccini's decision he relied specifically on the *Westerly Lodge* case, a prior Supreme Court decision. Justice Williams in *Arena* went to pains to point out that *Westerly* was completely different from *Arena* and didn't apply. Here's what he said and why *Westerly,* which said yes, you can have an arbitration that modifies retirees' benefits, why that

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was wrong. He points out that Arena's totally different. There, in *Westerly,* the panel issued a pension escalator to be awarded to those employees retiring while the CBA was in effect. It was about current employees, not

about retirees. By contrast, he pointed out in *Arena* the only issue for an arbitration panel to decide in this case concerns already retired firefighters.

So in *Arena* the Court found that the Superior Court, not the arbitrator, had the authority to deal with that issue, thus making clear, I think at the outset, that Judge Procaccini's decision, though well-founded on the authority of the arbitrators, was no longer the law in the State of Rhode Island. So you don't even get to a res judicata analysis if you go there.

The next case on this issue, *City of Newport,* cited at 54 A.3d 976 -- and these are all in our papers, Your Honor, and we filed an objection on this. I don't know if the Court has that. I want to make sure that it does because I got the impression you were reading from our pretrial memo, and I want to make sure the Court has our objection on this. And if not, what we'll do is we'll -- we'll submit it again to the Court following the hearing.

But in the *City of Newport* case, there the City proposed to change health coverage for both active and retired firefighters. The Court's a little familiar with

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health care coverage issues.

THE COURT: I do have your objection.

MR. DOLAN: Good.

THE COURT: I might have been looking at --

MR. DOLAN: Thank you. The union -- the union in that case in response to that action by the City of

Newport -- we're going to change your health care benefits -- filed grievances and sought arbitration. The City filed a complaint in the Superior Court asking for a declaration that the grievances were not arbitrable, that the Superior Court had the exclusive jurisdiction to deal with modification of retirees' benefits. The trial court agreed and so did the Supreme Court on appeal. And in it Mr. Justice Indeglia really expanded on the *Arena* analysis of when it is and how a court versus an arbitrable panel has the authority to adjudicate retirees' benefits. He says there's two things. In this case the Firefighters' Arbitration Act -- and we know from *Arena* that a retiree is not embraced by the Firefighters' Retirement Act [sic]. He said but also we get to look to the contract, right, because the CBA, which draws its authority from the Firefighters' Act, could theoretically embrace the ability of the City and the union to, by contract, agree to subject a retiree to an arbitrable forum. And he found -- the Court found

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there that the contracts didn't so provide. And there's no evidence in this case that any of the collective bargaining agreements reach the people who are currently retired.

The other concern which existed in *Arena* and which was, in part, the basis for the Court's decision there was that the Court was concerned that if the union could on its own, without the presence of the retirees, collectively bargain over the retirees' benefits, they could sell the retirees out for their own benefit. And Mr. Justice Williams said that would be completely inappropriate.

If there was any doubt about this question, any doubt whatsoever, it was conclusively dispatched again in June of 2013 in the *Providence School Board* case, 68 A.3d 505. There, the City proposed to make changes in the way in which retirees' working rights were established. The Court may remember from the Providence Medicare case that what retirees pay is a function of the calculated working rates for their claim experience, and it changes from year to year. And it -- Providence had determined in this particular case that, not surprisingly, retirees had a higher use of benefits -- they're older people. They go to the doctor more. I'm finding that out myself recently -- and proposed to make unilateral changes in

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the working rates. The union sought arbitration. It got arbitration. The arbitrator ruled that the resulting grievance was arbitrable and that it was a violation of the collective bargaining agreement. The trial court and the Supreme Court both disagreed. The CBA did not say that retirees' benefits would be arbitrable, and we know that the case law, *Arena* and the prior cases I've mentioned, make clear that the modification of retirees' benefits is not the subject of arbitration. It's for you to decide.

Even if the 2005 Procaccini decision was still alive, still had vitality, nobody demanded arbitration. As we -- as we make clear in our papers, they filed suit, so we're here. That argument, if it exists at all -- and I don't believe it does for the reasons I've articulated -- it's been waived.

On the transactional analysis, there are really three points as to why res judicata does not appear here. First, res judicata is -- is much misunderstood by people. It's got two facets. One is claim preclusion. The other is issue preclusion, commonly referred to as collateral estoppel. Claim preclusion relates to judgments. If there's a judgment in the first case, you can't re-litigate that claim in a second case.

The cause of action in Judge Procaccini's decision

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in 2005 was whether the arbitrator's ruling had merit. There's no arbitration at issue here. There's no issue of that, no claim of that that's been presented. So the requirement that the cause of action be the same is completely missing here.

Res judicata also requires mutuality of parties. There's no mutuality here. The plaintiff was not even a party to the 2003 case, and the unions that were are not a party to this case. So there's no mutuality of parties.

Res judicata requires an identity of issues, that is, the claims and issues presented have to be the same. The 2003 case was an affirmation of an arbitration award. Here, the question is one that was not even presented, frankly has never actually been tried and decided before a court in a trial, was whether the contracts were lawfully impaired under the Contract Clause. That's an issue and a claim that's never been presented, wasn't presented in 2005 and is only presented in this case.

So on -- setting aside whether Judge Procaccini's decision is even valid anymore, the elements required under a transactional analysis for res judicata are not present across the board.

THE COURT: Thank you. Response?

MR. SULLIVAN: I believe I addressed those issues in

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my initial argument. Thank you.

THE COURT: I think the final motion is the motion in limine, Contract Clause.

MR. DOLAN: Actually, Your Honor, my associate and I had a conversation about this over the weekend. Because when I read the letter -- when I looked at the letter that you looked at, and you saw the same thing I did, which is, is there a motion in limine on the Contract Clause? We've already argued that, which is the evidentiary standard.

THE COURT: Right. That's what I was going to say.

MR. DOLAN: That' s done. In the letter we also said we moved for summary judgment on the Contracts Clause analysis, and I think that's what the Court is alluding to now. In fact, we did only insofar as the takings claim is concerned because in the plaintiff's complaint they're kind of melded together.

But we also argued in the takings that there's no protectable property interest. That was the argument that -- that Mr. Wray made I think this morning and

which we advanced in our papers. So it does go to what I think is Count II, which is the breach of contract claim, because we're arguing not only is there no takings because there's no protectable property interest, we're arguing that there's no breach of contract because

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there's no protected property interest. So I think the Court has heard all of that already. I don't know if the Court needs additional supplementary argument on that.

THE COURT: I don't.

MR. SULLIVAN: Judge, I received the takings paperwork, the motion for summary judgment. I -- and I saw the allusion or the alluding to blending. I didn't realize there was a summary judgment motion on the breach of contract claim.

THE COURT: Let me see.

MR. DOLAN: I think, Your Honor, to be fair, to be fair --

MR. SULLIVAN: There was not.

MR. DOLAN: To be fair, there's no formal motion on that count. We argued, though, the substance of it in the takings argument. And if Mr. Sullivan wishes to be heard, I obviously have no objection to that. I just wanted to alert the Court that although there was no formal motion, we argued that legal point in our takings memorandum.

MR. SULLIVAN: So there is no motion for summary judgment on the breach of contract?

MR. DOLAN: I think that's correct, Your Honor.

MR. SULLIVAN: Okay.

THE COURT: Do you want to be heard?

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MR. SULLIVAN: I've already been heard on that, Judge. Thank you.

THE COURT: Okay. Just give me a minute. I'm going to take a break. Before I take a break, I've heard all the motions, correct?

MR. DOLAN: Yes, you have, Your Honor.

THE COURT: I thought I had, but I want my record to be clear. Thank you.

(RECESS)

THE COURT: I am going to read two bench decisions in this Cranston Police Retirees Action Committee v. The City of Cranston, KC/2013-1059. I am reserving until later this week on the plaintiff's motion for summary judgment regarding the Open Meetings Act. I think there was a cross-motion on that.

MR. DOLAN: Yes.

THE COURT: I am going to give the decision on the issue of res judicata. I'll give the decision on the Takings Clause. With respect to the motion in limine,

burden of proof, you'll get that later in the week, hopefully by Wednesday.

MR. DOLAN: Very well, Your Honor. Thank you.

THE COURT: But we're not going to put it down for Wednesday. Brian will let you know.

MR. DOLAN: We won't give you a deadline, Your

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Honor.

THE COURT: But it will be a bench decision.

MR. DOLAN: Very well.

MR. SULLIVAN: Thank you.

THE COURT: First before the Court is the defendants' motion for summary judgment on the plaintiff's takings claim pursuant to Superior Court Rule of Civil Procedure Rule 56. I'm not going to review the facts of this case, and I'm also not going to review the standard of review for a motion of summary judgment. I've done that earlier. I understand it, and I will stand by it.

Article I, Section 16 of the Rhode Island Constitution provides that "Private property shall not be taken for public uses, without just compensation." Article I, Section 16. Also the United States Constitution provides for that.

The Rhode Island Supreme Court has described the Takings Clause's purpose as follows: "When the government interferes with an individual's property rights, a point may be reached when the governmental

interference amounts to a taking and the government must then compensate the individual for that interference." *Brunelle v. Town of South Kingstown,* 700 A.2d 1075 at 1081 (R.I. 1997).

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As a threshold matter, the claimant must have a property interest protected by the constitution. Such property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as Rhode Island law. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, quoting *Webb's Fabulous Pharmacies,* 449 U.S. 155 (1980).

Accordingly, this Court must determine whether the 3 percent COLA benefit constitutes a property right afforded protection under the constitution. The Rhode Island Supreme Court faced a related question in the *Arena* case, and the case's holding is somewhat applicable here. *Arena,* 919 A.2d 379.

There, the City of Providence applied new, less generous COLA calculations to police and fire department employees who had retired before the effective dates of the ordinances providing the new calculations. Our Supreme Court considered whether the COLA benefits were vested pension benefits or a gratuitous benefit separate from the pension. In *Arena* the Court held that the plaintiff had a vested interest in the COLA provided by the ordinance. The Supreme Court adhered to the plain language of the ordinance, noting that it was a municipality's duty to carefully craft an ordinance granting a pension benefit so that it is clear whether

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the benefit is gratuitous or vested. In looking at the applicable ordinance, the Supreme Court found particularly relevant the definition of pension as an annual payment for life as well as the language describing a COLA as due for the lifetime of the retiree or the beneficiary. Ultimately, based on the federal case law as well as the language and context of the ordinance, including the COLA's collective bargaining origins, the Court held that "the council did not have the authority to reduce plaintiffs' COLA benefit by subsequent ordinance." Id., quote at page 395.

The *Arena* Court's analysis is instructive in this case. In order to determine whether the plaintiffs have a vested property interest in the COLA, the Court must look to the ordinance and examine whether the 3 percent COLA has vested. The City of Cranston ordinance that addresses retirement benefits of retired police officers is 2.20.050, and the ordinance that addresses retired benefits for the retired firefighters is 2.20.050. The firefighters' ordinance states that "the member so retired shall be entitled to the respective benefits as follows." The police ordinance specifies that a retiree "shall be paid annually for the remainder of his or her life." This lifetime language reappears several times in the ordinance at A(9) (b), A(10) (a) and A(10) (d). The

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section of the ordinance dealing with COLAs does not use the precise lifetime language, instead states "the pension cost-of-living adjustment (COLA) paid to such

offer or member shall be fixed at three percent per annum."

Defendants contend that this Court should read the COLA section of the ordinance as separate from the base pension payment sections of the ordinance, essentially arguing that without specific lifetime language, the COLA sections grant only a gratuitous benefit.

However, this Court must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of the other. *Mendes v. Factor,* 41 A.3d 994 at 1002 (R.I. 2012). The Court also recognizes that "the word shall is ordinarily the language of command." *Alabama v. Bozeman,* 533 U.S. 146, quoting the *Anderson* case, 329 U.S. 482. The Court also notes that the "pension statutes must be construed liberally and in favor of the intended beneficiaries." *Trifari v. Employees' Retirement System of Providence,* 485 A. 2d 100.

Therefore, irrespective of the inclusion or deletion of lifetime language, when the ordinances are read in their entirety, it is plain that the ordinances mandate

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the payment of COLA every year. The very fact that the lifetime language is so pervasive in the ordinance speaks to the retiree or beneficiary's reasonable expectation that a COLA benefit is -- that a COLA is a vested benefit. We refuse to add language to the ordinance to classify it as gratuitous simply because such classifications were added to subsequent revisions

of the ordinance. See the *Arena* case. This Court is therefore satisfied that the subject ordinances confer a vested benefit to retired employees. Accordingly, the plaintiff's COLA benefits, as vested pension benefits, are property rights for the purpose of the Takings Clause. See *Copeland v. Copeland,* 575 P. 2d 99.

The Court's inquiry will now turn to whether the government's actions rose to the level of a compensable taking. As an initial matter, the Court recognizes two species of takings: physical takings and regulatory takings. *Buffalo Teachers Union* -- strike that. *Buffalo Teachers Federation v. Tobe,* 464 F. 3d 362. The Second Circuit has explained the distinction between these two types of takings as follows:

Physical takings or takings -- strike that. Physical takings or physical invasion or appropriation cases occur when the government physically takes possession of an interest in property for some public

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purpose. The fact of a taking is fairly obvious in physical takings cases: for example, the government might occupy or take over a leasehold interest for its own purpose or the government might take over a part of a rooftop of an apartment building so that cable access may be brought to residences within. But when the government acts in a regulatory capacity, the question of whether a taking has occurred is more complex. The gravamen of a regulatory taking is that a state regulation goes too far and in essence effects a taking. That's a quote from *Buffalo Teachers.*

Here, the City's ordinances do not present the classic taking in which a government directly appropriates private property for its own use. *Eastern Enterprises v. Apfel,* 524 U.S. 498 at 522. Rather, the interference with the plaintiffs' COLA benefits "arises from a public program adjusting the benefits and burdens of economic life to promote the common good." *Buffalo Teachers* at 740 -- strike that -- that's 374, quoting *Penn Central Transportation v. City of New York,* 438 U.S. 104 at 124 (1978). As such, the changes to the plaintiff's COLA benefits are regulatory takings rather than per se takings. See Gavin Reinke, R-E-I-N-K-E, When a Promise Isn't a Promise: Public Employers' Ability to Alter Pension Plans of Retired Employees,

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64 Vanderbilt Law Review 1673 at 1693 (2011).

In determining whether a regulatory taking has occurred, the Court avoids any set formula and instead conducts an ad hoc inquiry. *Alegria v. Keeney,* 687 A. 2d 1249 at 1252, quoting *Penn Central* at 124. The inquiry consists of three factors: one, the economic impact of the regulation on the claimant; two, the extent to which the regulation has interfered with distinct investment-backed expectations; and three, the character of governmental action. That's a quote from *Penn Central* at 124.

With respect to the first two factors, the Court is mindful that in a wide variety of contexts the government may execute laws or programs that adversely affect recognized economic values. *Penn*

Central at 124. Indeed, it is well-established that mere diminution in value of property, however serious, is insufficient to demonstrate a taking. *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern California,* 508 U.S. 602 at 645. As the Rhode Island Supreme Court has recognized, the mere fact that the plaintiff may not have received the anticipated return on his investment does not render null the remaining value of the property.

Here, there is no genuine issue of material fact

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that the ordinances affect the COLAs for a period of ten years and are therefore temporary. Thus, the entirety of the plaintiff's vested pension benefits is not affected. Indeed, plaintiffs shall maintain any COLAs granted prior to the passage of the 2013 ordinance. Further, plaintiffs retain any payment of -- payments or health benefits even after the ordinance. The instant matter is analogous to the Second Circuit's decision in the case of *Buffalo Teachers v. Tobe,* which I cited earlier. There, the Court recognized that a wage freeze for public employees did not constitute an illegal taking because "the wage freeze is temporary and operates only during a control period." At Page 375. The Court also noted that "this is not a case in which a law abrogates an entire contract. The freeze affects only a small increase in wages." Here too, this Court is satisfied that the economic impact on the plaintiff as well as the extent to which the regulation interfered with distinct investment-backed expectations do not rise to the level -- or do not constitute an illegal taking. This finding accords with the United States Supreme

Court's statement that "the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. at 224.

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The Court's finding is further bolstered by the character of the government action. Here, the City's changes to the COLA benefits are uncharacteristic of a regulatory taking in that these changes are a "negative restriction rather than an affirmative exploitation by the state." *Buffalo Teachers* at 375. Furthermore, the government action was spurred by the genuine interest in keeping the pension plan sustainable as evidenced by nine legislative findings that preceded the ordinance. The findings indicate a large unfunded pension liability, show that city -- strike that -- show that Cranston was listed as a "distressed community," signifying that the community, and I'm quoting, "has a high property tax burden relative to the wealth of our taxpayers" and states that "it is in the best interests of all residents to maintain a viable and sustainable local police and fire pension plan." See the ordinance, Findings 2, 3 and 9. As the U.S. Supreme Court has stated, "Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever the legislation requires one person to use his or her assets for the benefit of another." *Connolly* at 223.

Consequently, this Court finds that the changes to the plaintiff's COLA benefits do not constitute an

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illegal taking. As such, the Court grants the defendants' motion for summary judgment on the plaintiff's takings claims in Count II of the complaint. To the extent Count III touches on takings, the Court is ruling in the defendants' favor. Because the Court found that the benefit constitutes a protected property right, to the extent the issue was argued in the Contracts Clause claim, that motion for summary judgment on Contracts Clause is denied. This decision relates to the Takings Clause claims only.

Counsel please prepare the appropriate order.

MR. DOLAN: We will do so, Your Honor. Thank you.

THE COURT: You're welcome. Now with respect to res judicata. And again, I'm reserving on the Open Meetings Law, which was included in the same motion.

This motion for summary is brought pursuant to Rule 56 of the Rhode Island Superior Court Rules of Civil Procedure. Plaintiffs seek a ruling that res judicata prevents this Court from re litigating a 2005 Superior Court judgment on similar facts and a ruling that the City of Cranston violated the Open Meetings Law. As I said earlier, I'm going to hold off on the Open Meetings Law. And again, I'm not going to recite the facts. I am mindful of the standard of review.

The doctrine of res judicata bars the re-litigation

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of all issues that were tried or might have been tried in an earlier action. *Huntley v. State,* 63 A.3d 526. The preclusion doctrine operates as a bar to a second cause of action where there exists: one, identity of parties; two, identity of issues; and three, finality of judgment in the earlier case. *Torrado v.* -- strike that. *Torrado Architects v. Rhode Island Department of Human Services,* 102 A.3d 655 at 658. It is unnecessary for me to at this point consider factors one and three as the Court finds that factor two, identity of issues, is not met in this action.

The Rhode Island Supreme Court has adopted the transactional rule set forth in Section 24 of the Restatement of Judgments to determine if factor two, identity of issues, is met. The transactional rule provides that all rights of plaintiffs to remedies against the defendant are extinguished with respect to all or any part of the transaction, or series of connecting transactions, out of which the original action arose. Restatement of Judgments, Section 24(1). In determining whether a claim arose out of the same transaction, the Court will consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties'

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expectations or business understanding or usage.

Here, there are no genuine issues of material fact in existence. The 2005 decision was decided with respect to a 2003 ordinance. This case involves a 2013

ordinance. Clearly, the ordinances are different. The 2005 decision was not based on the same transaction as the instant case. While the facts of the scenarios and the contents of the various ordinances may be similar, there's no indication that the 2003 and 2013 ordinances are any way identical. Any similarity between the ordinances does not change the fact that the 2005 decision was based on 2003 ordinances whereas this decision involves a 2013 ordinance. The Court is therefore satisfied that the 2005 decision and the present case are not related in time or origin. It is inconceivable that the City would have reasonably foreseen that the 2005 decision would operate as res judicata on any subsequent ordinance passed by the City that bore some relationship to the pension benefits.

Moreover, the issues decided in the 2005 decision are not the same issues before the Court today. The 2005 decision centered in large part on whether or not the unions had standing to represent the retirees. There's no standing concerns here. Further, the ordinances at issue in 2005 repealed a set of earlier ordinances and

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did not provide for generous benefit packages -- strike that -- did not provide for the generous pension benefits contained in earlier ordinances. I'm quoting that decision at 5. Therefore, the present case is easily distinguishable. The ordinance at -- strike that. The ordinances at issue here, which were passed a full eight years after the 2005 decision, did not repeal any earlier ordinances. There is nothing that connects these two

cases. And the Court will also note, with respect to identity of the parties, which I said I was not going to rule on, there is absolutely no identity of the parties that would fulfill the requirements necessary to establish that element of res judicata in the transactional sense. Therefore, plaintiffs cannot take refuge under the doctrine of res judicata.

The plaintiff's motion for summary judgment is denied. Defendants' cross-motion is granted. Thank you.

MR. DOLAN: Thank you, Your Honor.

MR. SULLIVAN: Thank you, Judge.

(A D J O U R N E D)

APPENDIX D

CONSTITUTION

U.S. Const. Art. 1, § 10, cl. 1 Section 10.

No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

3-13-04

THE CITY OF CRANSTON

ORDINANCE OF THE CITY COUNCIL IN AMENDMENT OF TITLE 2.20.050 OF THE CODE OF THE CITY OF CRANSTON, 2005, ENTITLED "POLICE PENSION FUND - RETIREMENT FROM SERVICE" (Officers or Members Hired Prior to July 1, 1995)

No. 2013-5

******Scrivener's error line 411 Corrected June 30, 2013 to July 1, 2013*

Passed:	/s/John Lanni
April 22, 2013	***John Lanni, Council President***
Approved:	/s/Allan W. Fung
April 23, 2013	***Allan W. Fung, Mayor***

Purpose

The purpose of this ordinance is to provide retirement security to current and retired officers or members of the city's permanent police department who have been in active service with such department and are members of the local police and fire pension plan that is severely underfunded by codifying a

reasonable alternative funding improvement plan in accordance with the mandates of Rhode Island General Laws section 45-65-1 et seq.

Legislative Findings

It is the intention of the City of Cranston, by and through its City Council, upon the recommendation of the Mayor, to begin the process of ensuring the sustainability of the City of Cranston's locally administered police and fire pension plan and to advance and maintain the long-term stability of said plan. We find and declare that:

1. The City of Cranston administers a local pension plan for police and fire members who were hired prior to 1995 ("plan"). As of the city's actuarial report of December 2012, there were 483 plan participants, of which only 48 were active employees. At that time, the total accrued liability was $312.9 million and our unfunded liability was $290.2 million. Our annually required contribution for FY 2013-2014 will be $28.5 million. Our plan is only funded at approximately 16%.

2. For the FY 2012-13 budget year, the City of Cranston could only afford to fund approximately $22 million of its $25.7 million annually required contribution, which is approximately 85.5% of its obligation. While this was an increase over prior years, the City of Cranston has had a long and troubling history of underfunding its annually required contributions.

3. According to a September 2011 report by the Office of the Auditor General entitled *Pension and OPEB Plans Administered by Rhode Island Municipalities* ("Auditor General report"): "Many municipal pension plans are severely underfunded which presents the risk that sufficient funds will not be available to meet promised benefits to retirees. It also undermines the overall fiscal health of the plan's sponsor."

4. The Auditor General report specifically noted as an example that the "assets available within the City of Cranston Police and Fire Employees Retirement System are only sufficient to make pension benefit payments to retirees for approximately two years."

5. In 2012, the State of Rhode Island, pursuant to Rhode Island General Law section 45-13-12, designated the City of Cranston a "Distressed Community" which indicates our community has a high property tax burden relative to the wealth of our taxpayers. In 2013, the Governor's proposed budget introduced to the General Assembly continued to designate the City of Cranston as "Distressed Community."

6. In accordance with Rhode Island General Law section 45-65-6, the city hired Buck Consultants, our actuary, to perform an initial actuarial experience study ("study"). That study made several recommendations to our assumptions for our actuarial valuation of our local police and fire pension plan. The city's Board of Investment Commissioners, which is authorized by our city

charter to manage the assets of the pension fund, accepted those recommendations for use in the next actuarial valuation of the plan.

7. Based upon the experience study results, our plan actuary certified in April 2012 that our plan was in "critical status" as defined by Rhode Island General Law section 45-65-6.

8. Following said certification, Mayor Fung provided the mandated notice of "critical status" determination to all plan participants and required statutory entities.

9. We find that it is in the best interests of all residents, individual employees, retirees and beneficiaries of the City of Cranston to maintain a viable and sustainable local police and fire pension plan and to develop a reasonable alternative funding improvement plan to emerge from "critical status" as required by Rhode Island General Laws section 45-65-6.

It is ordained by the City Council of the City of Cranston as follows:

SECTION 1. Title 2.20.050 of the Code of the City of Cranston, 2005, entitled "Police Pension Fund -- Retirement from Service" Section A only pertaining to Officers or Members Hired Prior to July 1, 1995 is hereby amended by adding the following:

2.20.050 - Retirement from service.

Any officer or member of the permanent police department who has been in active service in such

department may retire pursuant to this section upon his or her written application to either the Cranston city council if said member is a member of the police pension fund of the city of Cranston as hereinafter described in subsection (A) of this section or to the state of Rhode Island retirement board if said member is a member of the state of Rhode Island's optional twenty (20) year on service allowance Rhode Island General Laws Section 45-21.2-22, as modified, and hereafter defined in subsections (B) and (C) of this section. Upon said member qualifying for a pension either under subsections (A), (B), or (C) of this section, the city council by a majority vote or the state of retirement board shall approve said pension and the member so retired shall be entitled to the respective benefits as follows:

A. Police Pension Fund of the City of Cranston (Officers or Members Hired Prior to July 1, 1995).

1. Any officer or member of the permanent police department who has been in active service in such department for twenty (20) years or more may apply in writing to the city council to be placed on the pension list and the city council shall thereupon place such officer or member so applying on the pension list and such officer or member so retired shall then become entitled to the following benefits to be paid from the police pension fund:

> a. If such officer or member so retired has attained the age of fifty-five (55) years, he or she shall be paid annually for the remainder of his or her life in equal monthly installments, a sum

equal to fifty-five (55) percent of his or her annual salary, except as noted below.

b. If such officer or member so retired has not attained the age of fifty-five (55) years, he or she shall be paid annually until his or her fifty-fifth (55th) birthday in equal monthly installments a sum equal to one-half of his or her annual salary, and upon attaining his or her fifty-fifth (55th) birthday for the remainder of his or her life, in equal monthly installments a sum equal to fifty-five (55) percent of his or her annual salary, except as noted below.

2. Any officer or member of the permanent police department who has been in active service in said department for a period of at least fifteen (15) full years, but less than twenty (20) full years, may apply in writing to the city council to be placed on the pension list; however, said member will not be eligible to receive any pension benefits until the date which would represent his or her twentieth (20th) anniversary on the police department. Such member so retiring shall receive two percent of his or her annual pay for each full year of service, such officer shall not be entitled to the escalator clause nor shall he or she be entitled to an additional five percent of his or her annual salary upon attaining the age of fifty-five (55). The pension benefit paid under this section will always be figured on the pay the officer was receiving when he or she terminated and said officer shall receive no other benefits in addition to the said two percent for each full year of service.

3. With respect to officers or members who retire on or before August 31, 2006, the term "annual salary" shall mean the prevailing annual salary of active officers or members of the permanent police department at the rank which corresponds to the rank which such retired officer or member held on the date of his or her retirement. If no corresponding rank exists in the permanent police department, the mayor and finance director shall, with the approval of the city council, determine an annual salary at the prevailing salary scale which is equivalent to the rank which such retired officer or member held on the date of his or her retirement.

With respect to officers or members who retire on or after September 1, 2006, the term "annual salary" as used in this section shall mean the prevailing annual salary of active officers or members of the permanent police department at the rank which corresponds to the rank which such retired officer or member held on the date of his or her retirement. If no corresponding rank exists in the permanent police department, the mayor and finance director shall, with the approval of the city council, determine an annual salary at the prevailing salary scale which is equivalent to the rank which such retired officer or member held on the date of his or her retirement. Notwithstanding the foregoing, the pension cost-of-living adjustment (COLA) paid to such offer or member shall be fixed at three percent per annum, compounded, without any escalation based on raises granted to active employees.

4. The provisions of this section with respect to the definition of "annual salary" and the payment of

pension benefits prior and subsequent to the attainment of fifty-five (55) years of age shall apply to all officers or members of the permanent police department who remain in the police pension fund of the city of Cranston.

5. Any officer or member of the permanent police department who has been in active service in such department for more than twenty (20) full years shall be entitled to receive a pension in an amount equal to two percent of his or her annual salary for each full year of service up to and including thirty (30) full years. No pension credit shall be awarded any member of the police department for any partial years of service when computing the pension benefits. All members who have attained thirty (30) years of service and choose to continue in service shall not be entitled to receive an additional two percent for years served beyond thirty (30) full years of service but shall be required to continue to make the contributions to the pension fund required by this section.

6. In addition to the above pension benefits, a member shall receive the retirees' longevity benefit as presently being paid. The foregoing shall not apply to those employees retiring prior to July 1, 1978.

7. During the period of July 1, 1982 to June 30, 1983, no member who retires shall receive any other pension benefits other than those set forth in subsections (A)(1)(a) and (b) of this section.

8 a. Commencing July 1, 1983, any officer or member with thirty (30) full years of service or more shall be able to retire with an increased

pension benefit of two percent of his or her annual salary for each full year of service in excess of twenty (20) years up to and including thirty (30) full years of service (maximum of an additional twenty (20) percent).

b. Commencing July 1, 1985, any officer or member of the police department who shall have twenty-five (25) full years of service or more shall receive an additional pension benefit of one percent of his or her annual salary for every full year in excess of twenty (20) years.

c. Commencing July 1, 1985, any officer or member of the police department shall be able to retire with an increased benefit of two percent for every full year of service above twenty (20) full years up to thirty (30) full years of service (maximum of an additional twenty (20) percent).

d. Benefits paid under this section shall be in addition to those benefits set forth in subsections (A)(1)(a) and (b) of this section.

9 a. Whenever an officer or member of the permanent police department who has not attained fifty-five (55) years of age shall become unfit to perform active duty by reason of physical infirmity or other causes, such officer or member, upon recommendation in writing of the mayor, based upon the medical decision of the board of three physicians, shall be retired from active service and placed on the pension list by the city council, and so retired he or she shall be paid annually from the police pension fund a

sum equal to one-half of his or her annual salary as defined in subsection (A)(3) of this section.

b. Upon attaining fifty-five (55) years of age, such officer or member so retired shall be paid annually for the remainder of his or her life in equal monthly installments, a sum equal to fifty-five (55) percent of his or her annual salary. No officer or member of the permanent police department shall be placed upon the pension list unless and until that officer or member has been examined by a board of three physicians certified in, or specializing in, the area of medicine that deals with the alleged infirmity and after said physical examination the officer or member has obtained a majority vote of the board of three physicians that the physical infirmity incapacitates the officer or member from performing his or her duties as a police officer. The examining board of physicians shall consist of one physician selected by the union, one physician selected by the city and the third selected by the above-mentioned physicians.

10 a. Whenever an officer or member of the permanent police department shall become unfit to perform active duty by reason of age, such officer or member, upon the recommendation in writing of the mayor, shall be retired from active service and placed on the pension list by the city council, and when so retired he or she shall be paid annually during the remainder of his or her life from the police pension fund in equal monthly payments, a sum equal to fifty-five (55)

percent of his or her annual salary as hereinbefore defined.

b. For the purpose of this section, retirement by reason of age shall mean the attainment of the age of fifty-five (55) years by an officer or member, provided, however, that any such officer or member who is fifty-five (55) years of age or older as of the date of the adoption of the ordinance codified in this chapter, and thereafter, any other officer or member within not more than ninety (90) days nor less than seventy (70) days prior to attaining fifty-five (55) years of age, may request in writing of the mayor that he or she be continued in active service for one year. Any such officer or member shall be continued in active service upon the recommendation of the mayor with the advice and consent of the city council, if prior to the mayor making such recommendation for continuation in active service of such on officer or member, the officer or member shall undergo and satisfactorily complete a comprehensive medical examination that includes, but is not limited to, cardiovascular, neurological, urinalysis, blood tests, chest x-rays, and vision/hearing, and in addition thereto, the officer or member shall pass a physical stress test which shall be commensurate with his or her job responsibilities as established by the chief of police or the personnel director. This examination must take place not more than ninety (90) days nor less than seventy (70) days

prior to the officer or member attaining the age of fifty-five (55) years.

c. The results of the examination shall be forwarded to the mayor and the city council by the physician or physicians, person or persons, administering such tests certifying that the officer or member is capable of performing his or her prescribed duties.

d. Further annual extensions up to sixty-five (65) years of age may be granted from year to year in the same manner as set forth above, provided, however, that every officer or member of the permanent police department who has attained sixty-five (65) years of age as of the date of the adoption of the ordinance codified in this chapter, or thereafter, shall be placed on the pension list by the city council, and such officer or member so retired shall be paid annually during the remainder of his or her life from the police pension fund in equal monthly payments, a sum equal to fifty-five (55) percent of his or her annual salary as defined in subsection (A)(3) of this section.

11. In computing the length of time spent in active service in the police department there shall be included any period of time spent in active service (herein called "nonpermanent service"), as a probationary officer, a member of the reserve police list, a special police officer regularly employed. a civilian employee attached to the department and periods of time served in the Armed Forces of the United States, subject, however to the provisions of subsection (A)(15) of this section,

subsequent to service in any of the foregoing categories or service as a member of the police department on January 28, 1952, unless such person shall on or before March 1, 1952 file in the office of the city treasurer written notice that he or she accepts the provisions of this sentence and either (a) pays therewith to the city treasurer the amount which would have been deductible from his or her compensation pursuant to Section 2.20.020 and the corresponding provisions of prior ordinances, had he or she been a member of the police department during the period of his or her nonpermanent service, or (b) authorizes the city treasurer to deduct such amounts in equal installments from the compensation payable to him or her over a period of one year from the date of filing of such notice, and provided, further, that in the case of any person who shall become a member of the police department after January 28, 1952, there shall be deducted in equal installments from the compensation payable to him or her over a period of one year from the effective date of his or her appointment to the department, the amount which would have been deductible from his or her compensation pursuant to Section 2.20.020 had he or she been a member of the police department during the period of his or her nonpermanent service. Any officer or member who shall resign, or who is discharged from the police department, shall forfeit all claims upon the police pension fund, except that he or she shall be entitled to receive, and the custodian is authorized to pay to him or her from the fund, the total amount of the deductions made from his or her salary pursuant to the provisions of this chapter. In the event of the death of any officer or member of the police department on or after January 1, 1951, the persons

referred to below shall be entitled to receive, and the custodian is authorized to pay to them from the fund, as a death benefit an amount equal to the total amount of the deductions made from the salary of the deceased pursuant to the provisions of this chapter, provided, however, that if such deceased officer or member shall have been placed upon the pension list prior to his or her death, the amount payable to such persons shall be limited to the excess, if any, of the total amount of such deductions over the total amount which the deceased shall have received as benefits from the pension fund during his or her lifetime, the persons above referred to being the widow or widower of the deceased, or if there is no such widow or widower then the minor child or children of the deceased in equal shares, or if there is no such widow or widower or minor child then the dependent father of the deceased, then the dependent mother of the deceased, if any.

12. No officer or member of the police department shall be required to make any payment to the police pension fund after the date when his or her name was placed upon the pension list.

13. The benefits payable hereunder to any officer or member placed upon the police pension list shall not be transferable nor subject to attachment.

14. Disability Pension: Job-Related.

a. Whenever an officer or member of the permanent police department shall become unfit to perform active duty, by reason of a job-related physical and/or psychological infirmity, such officer or member upon the recommendation in

writing of the mayor, based on the medical decision of the board of three physicians, shall be retired from active service and placed on the disability pension list by the city council, and when so retired, he or she shall be paid annually from the police pension fund in equal monthly payments a sum equal to sixty-six and two-thirds (66 2/3) percent of his or her annual salary as defined in subsection (A)(3) of this section.

b. No officer or member of the permanent police department shall be placed upon the pension list unless and until that officer or member has been examined by a board of three physicians certified in, or specializing in, the area of medicine that deals with the alleged infirmity and after said physical examination the officer or member has attained a majority vote of the board of three physicians that the physical infirmity is job related and further that the physical infirmity incapacitates the officer or member from performing his or her duties as a police officer. The examining board of physicians shall consist of one physician selected by the union, one physician selected by the city and a third selected by the above-mentioned physicians.

c. Pension benefits relating to longevity, holiday pay and medical insurance for retirees as defined in the collective bargaining agreement with the city of Cranston shall apply to employees retiring under this section.

d. Any officer who becomes disabled from duty and retires pursuant to this section shall be paid an additional two percent of his or her annual salary per year for each year of service in excess of twenty-five (25) years, up to a maximum of seventy (70) percent.

15, Pension Credit for Military and Municipal Service.

a. As of July, 1986, any officer or member of the bargaining unit who has served in the armed forces, a reserve unit, a national guard unit or has prior municipal city time with the city of Cranston shall be allowed to buy back said time from the city of Cranston. Said time shall be bought back at the rate of ten (10) percent of his or her annual salary in his or her first year of service with the city of Cranston multiplied by the number of years in said armed forces, reserve unit, guard unit or prior municipal service up to a maximum of four years. Upon such payment being made to the city of Cranston by the officer or member, the number of years purchased shall be added to the member's service time within the department immediately. The crediting of said time shall be for pension purposes only and shall not affect a member's seniority or benefits in any other way while an active member. A member's seniority, longevity and vacation entitlements would not be affected by the purchase of said time prior to retirement. At the time of retirement

a member will receive credit for all years worked and purchased and will be entitled to benefits accordingly.

b. Any officer or member who was a member of the active armed forces shall be allowed to purchase back the amount of time spent in the active service up to a maximum of four years. Any officer or member who was a member of a reserve unit or guard unit shall be allowed to purchase back an amount of time equal to the amount of active duty points accumulated by the member while serving in the unit. Any officer or member who has prior full-time municipal time with the city of Cranston shall be allowed to purchase back said time up to a maximum of four years. It is clearly understood that the maximum amount of time whether military, municipal, or a combination of both will be four years maximum.

c. When submitting a request to purchase said time, proof of said time shall also be submitted. For example: a DD-214, reserve or guard duty certificate or prior city records for municipal time.

16. Widow's and Widower's Benefit.

a. Minimum One Year of Service. The city of Cranston agrees to pay a death benefit to the widow or widower of an officer or member with at least one credited year of service in the department and a death benefit payment of thirty-three and one-third (33 1/3) percent of the

member's salary which shall be fully escalated from year to year. This benefit shall be paid to a widow or widower until his or her death or until he or she remarries. A credited year of service for these members will he any year with over six months completed.

b. Twenty (20) Years or More of Service. The city of Cranston agrees to pay (per 1989 agreement), widow or widower of deceased Cranston police officers the following benefit in addition to any other benefits to which they have been entitled:

i. Longevity and holiday pay shall be included in the widow or widower pension base for those widows or widowers, whose husbands or wives, were entitled to longevity and holiday pay in their pensions.

ii. Effective July 1, 1990, each widow or widower will receive a pension increase based upon sixty-seven and one-half (67 ½) percent of what the decedent's percentage increase would have been.

iii. In the event the city and union negotiate across-the-board increase in any given year, the widows or widowers shall receive sixty-seven and one-half (67 ½) percent of the percentage increases represented by said across-the-board increase.

17. Officers or members who have completed over twenty (20) credited years of service between July 1, 1995 and June 30, 1996, and retire during said period July 1, 1995 through June 30, 1996 shall have the

option of buying additional credited years of service as defined in subsection (A)(17)(a) of this section or being paid for said additional credited years of service as defined in subsection (A)(17)(b), or a combination of same as defined in subsection (A)(17)(c) as follows:

> a. Officers or members who have completed over twenty (20) credited years of service between July 1, 1995 and June 30, 1996 and retire during said period July 1, 1995 through June 30, 1996 can purchase the number of credited years of service over (20) credited years as of July 1, 1995 and June 30, 1996 up to a maximum of ten (10) years. A credited year of service for these members will be any year of service with over six months completed. The purchase rate for all credited years of service will be five of the weekly salary rates in effect for the corresponding credited years of service. Each credited year of service purchased will increase the pension payment received at retirement by two percent up to a maximum of twenty (20) percent for ten (10) years. These additional pension payments will be added to the fifty (50) percent pension payment after the completion of twenty (20) credited years of service to a maximum of seventy (70) percent pension payment. These members' pension payments will be escalated by the same method as found in the above listed subsection (A)(1)(b) (reaching age fifty-five (55)) and subsection (A)(20) (escalation) of this section.

b. Officers or members who have completed over twenty (20) credited years of service between July 1, 1995 and June 30, 1996, and retire during said period July 1, 1995 through June 30, 1996, can be paid at retirement for the number of credited years of service over twenty (20) at the rate of one thousand two hundred dollars ($1,200.00) per year to a maximum of twelve thousand dollars ($12,000.00) for all credited years of service over twenty (20) credited years to a maximum of thirty (30) credited years of service. A credited year of service for these members will be any year of service with over six months completed.

c. Officers or members who have completed over twenty (20) credited years of service between July 1, 1995 and June 30, 1996, and retire during said period July 1, 1995 through June 30, 1996 shall have the option of either buying additional credited years of service or being paid for said additional credited years of service. Said members shall have the option of buying back all or a portion of their credited years of service or being paid for all or a portion of their credited years of service or receive a combination of both of the above for said additional credited years of service over twenty (20). Under no circumstance shall the number of credited years bought back by the member, or paid to the member on retirement, exceed the total number of credited years of service a member has served over twenty (20) years as determined between July 1, 1995 and June 30, 1996.

18. Officers or members who have or will have completed twenty (20) credited years of service and retire between July 1, 1995 through June 30, 1996 shall, upon retirement, receive a severance payment of five hundred dollars ($500.00) for each credited year of service up to a maximum of thirty (30) credited years of service. These members shall retire under the present pension plan with no additional accrual of pension payments or benefits. This severance payment shall be paid at the time of the member's retirement. For these members, their credited years of service will be determined as of July 1, 1995. A credited year of service for these members will be any year of service with over six months completed.

19. Officers or members who have completed over five credited years of service between July 1, 1995 and June 30, 1996 shall receive upon placement on service retirement (at least twenty (20) credited years of service), placement on occupational disability retirement, placement on non-occupational retirement, or in case of death, their widow or children (up to age twenty-one (21) years) a payment of five hundred dollars ($500.00) per year for each credited year of service up to a maximum of twenty (20) years effective June 30, 1997.

20. With respect to officers or members who retire on or before August 31, 2006 only, retired members' pension payments will automatically escalate in an amount equal to all contractual increases received by active duty members of similar rank or position and similar credited years with regard to annual salary. In any contractual year in which the annual salary for

active members with over three years of service does not increase by three percent, then said retired members shall receive a three percent escalation of said pension payment on June 30th of that year.

With respect to officers or members who retire on or after September 1, 2006, retired members' pension payments will automatically escalate in an amount fixed at three percent per annum, compounded, without any escalation based on raises granted to active employees.

21. Effective July 1, 1995, all members shall contribute an amount equal to eight percent of their annual salary, earned or accruing to said member, to the pension fund.

22. Notwithstanding any language in Chapter 2.20 entitled Policeman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, for any officer or member of the permanent police department who was hired prior to July 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan, any automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary in accordance with these sections shall be suspended for a period of ten (10) years beginning *~~June 30, 2013~~, ***July 1, 2013***

23. Notwithstanding any language in Chapter 2.20 entitled Policeman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, upon the expiration of the ten year period provided for above, for any officer or member of the permanent police department who was hired prior to July 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan the automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary shall automatically escalate in an amount fixed at three percent per annum, compounded, without any further escalation based on raises granted to active employees.

24. The determination of the employer contribution rate for fiscal year 2014 and thereafter shall include a re-amortization of the Unfunded Actuarial Accrued Liability over a twenty-six (26) year period.

Section 2. This Ordinance shall take effect upon its final adoption.

Positive Endorsement

/s/Christopher Rawson 4/22/13
Christopher Rawson, City Solicitor Date

Negative Endorsement (attach reasons)

_____

Christopher Rawson, City Solicitor Date

Sponsored by: Mayor Fung

Referred to Finance Committee April 11, 2013

U/Ordinance/Police_Retirees_Pension_2013

APPENDIX F

3-13-05

THE CITY OF CRANSTON

ORDINANCE OF THE CITY COUNCIL IN AMENDMENT OF TITLE 2.28.050 OF THE CODE OF THE CITY OF CRANSTON, 2005, ENTITLED "FIREMEN'S PENSION FUND - RETIREMENT FROM SERVICE" (Members Hired Prior to July 1, 1995)

No. 2013-6

**Scrivener's error line 131 Corrected June 30, 2013 to July 1, 2013*

Passed: /s/John Lanni
April 22, 2013 ***John Lanni, Jr., Council President***

Approved: /s/Allan W. Fung
April 23, 2013 ***Allan W. Fung, Mayor***

Purpose – The purpose of this ordinance is to provide retirement security to current and retired officers or members of the city's permanent fire department who have been in active service with such department and are members of the local police and fire pension plan that is severely underfunded by codifying a reasonable alternative funding improvement plan in accordance with the mandates of Rhode Island General Laws section 45-65-1 et *seq*.

Legislature Findings – It is the intention of the City of Cranston, by and through its City Council, upon the recommendation of the Mayor, to begin the process of ensuring the sustainability of the City of Cranston's locally administered police and fire pension plan and to advance and maintain the long-term stability of said plan. We find and declare that:

1. The City of Cranston administers a local pension plan for police and fire members who were hired prior to 1995 ("plan"). As of the city's actuarial report of December 2012, there were 483 plan participants, of which only 48 were active employees. At that time, the total accrued liability was $312.9 million and our unfunded liability was $290.2 million. Our annually required contribution for FY 2013-2014 will be $28.5 million. Our plan is only funded at approximately 16%.

2. For the FY 2012-13 budget year, the City of Cranston could only afford to fund approximately $22 million of its $25.7 million annually required contribution, which is approximately 85.5% of its obligation. While this is an increase over prior years, the City of Cranston has had a long and troubling history of underfunding its annually required contributions.

3. According to a September 2011 report by the Office of the Auditor General entitled Pension and OPEB Plans Administered by Rhode Island Municipalities ("Auditor General report"): "Many municipal pension plans are severely

underfunded which presents the risk that sufficient funds will not be available to meet promised benefits to retirees. It also undermines the overall fiscal health of the plan's sponsor."

4. The Auditor General report specifically noted as an example that the "assets available within the City of Cranston Police and Fire Employees Retirement System are only sufficient to make pension benefit payments to retirees for approximately two years."

5. In 2012, the State of Rhode Island, pursuant to Rhode Island General Law section 45-13-12, designated the City of Cranston a "Distressed Community" which indicates our community has a high property tax burden relative to the wealth of our taxpayers.

6. In accordance with Rhode Island General Law section 45-65-6, the city hired Buck Consultants, our actuary, to perform an initial actuarial experience study ("study"). That study made several recommendations to our assumptions for our actuarial valuation of our local police and fire pension plan. The city's Board of Investment Commissioners, which is authorized by our city charter to manage the assets or the pension fund, accepted those recommendations for use in the next actuarial valuation of the plan.

7. Based upon the experience study results, our plan actuary certified in April 2012 that our plan was in "critical status" as defined by Rhode Island General Law section 45-65-6.

8. Following said certification, Mayor Fung provided the mandated notice of "critical status" determination to all plan participants and required statutory entities.

9. It is in the best interests of residents, individual employees, retirees and beneficiaries of the City of Cranston to maintain a viable and sustainable local police and fire pension plan and to develop a reasonable alternative funding improvement plan to emerge from "critical status" as required by Rhode Island General Laws section 45-65-6.

It is ordained by the City Council of the City of Cranston as follows:

Section 1. Title 2.28.050 entitled "Firemen's Pension Fund – Retirement from Service" Section A only pertaining to Members Hired Prior to July 1, 1995 is hereby amended by adding thee following:

2.28.050 - Retirement from service.

Any officer or sworn member of the permanent fire department who has been in active service in such department may retire pursuant to this section upon his or her written application to either the Cranston city council if said member is a member of the city of Cranston firefighter's pension as hereinafter defined in subsection (A) of this section or to the state of Rhode Island retirement board if said member is a member of the state of Rhode Island's optional twenty (20) year on service allowance Rhode Island General Laws Section 45-21.2-22, as modified, and hereafter defined in subsections (B) and (C) of this section. Upon said member qualifying for a pension either under

subsections (A), (B) or (C), the city council by a majority vote or the state of retirement board shall approve said pension and the member so retired shall be entitled to the respective benefits as follows:

A. City of Cranston Firefighters' Pension (Members Hired Prior to July 1, 1995).

1. The pension contributed to and received by all members hired prior to July 1, 1995, shall be paid from the city of Cranston firefighters' pension. All members will accrue a pension in an amount equal to two and one-half percent of their salary per credited year of service. Upon the completion of twenty (20) credited years of service a member who has attained the age of fifty-five (55) years may retire a pension payment of fifty-five (55) percent of the member's weekly salary at the time of the member's retirement. A member who has not attained the age of fifty-five (55) years may retire with a pension payment of fifty (50) percent of the member's weekly salary at the time of the member's retirement.

2. Members will be able to accrue an additional two percent per year in pension payments to a maximum of twenty (20) percent for a maximum of thirty (30) credited years of service, subject io the provisions of subsections (A)(3)(a), (b) and (c). These additional pension payments will be added to the fifty (50) percent pension payment if the member retires prior to age fifty-five (55), or the fifty-five (55) percent pension payment if the member retires after reaching age fifty-five (55), after the completion of twenty (20) credited years of service to a maximum pension payment of

seventy (70) percent of the member's weekly salary at the time of the member's retirement.

3. Members who have completed over twenty (20) credited years of service as of July 1, 1995, shall have the option of buying additional credited years of service as defined in subsection (A)(3)(a) or being paid for said additional credited years of service as defined in subsection (A)(3)(b), or a combination of same as defined in subsection (A)(3)(c) as follows:

a. Members who have completed over twenty (20) credited years of service as of July 1, 1995, can purchase the number of credited years of service over twenty (20) credited years as of July 1, 1995. up to a maximum of ten (10) years. The purchase rate for all credited years of service will be five percent of the weekly salary rates in effect for the corresponding credited years of service. Each credited year of service purchased will increase the pension payment received at retirement by two percent up to a maximum of twenty (20) percent for ten (10) years. These additional pension payments will be added to the fifty (50) percent pension payment if the member retires prior to age fifty-five (55), or the fifty-five (55) percent pension payment if the member retires after reaching age fifty-five (55), after the completion of twenty (20) credited years of service to a maximum pension payment of seventy (70) percent of the member's weekly salary at the time of the member's retirement.

b. Members who have completed over twenty (20) credited years of service is or July 1, 1995, can be paid at retirement for the number of credited

years of service, over twenty (20) at the rate of one thousand two hundred dollars ($1,200.00) for all credited years of service over twenty (20) credited years to a maximum of thirty (30) credited years of service.

c. Members who have completed over twenty (20) credited years of service as of July 1, 1995, shall have the option of either buying additional credited years of service or being paid for said additional credited years of service. Said members shall have the option of buying back all or a portion of their credited years of service or being paid for all or a portion of their credited years of service or receive a combination of both of the above for said additional credited years of service over twenty (20). Under no circumstance shall the number of credited years bought back by the member, or paid to the member on retirement succeed the total number of credited years of service a member has served over twenty (20) years, as determined on July 1, 1995.

4. Members who have served in the Armed Forces of the United States, in an active duty capacity will be eligible to purchase up to a maximum four years of military service at the rate of five percent of the weekly salary of six hundred fifty-four dollars and forty cents ($654.40) effective July 1, 1995. The purchase price for each credited year purchased shall be one thousand seven hundred one dollars and forty-four cents ($1,701.44). These purchased active military service years will be in addition to a member's credited years of service for pension payment up to a maximum of thirty (30) credited years of service. However, these

purchased military service years shall only be applied for pension purposes after the member has completed twenty (20) years of service. Purchased active military service years shall only be added after any and all other optional purchased credited years of service have been applied.

5. Members who have served in the Armed Forces Reserve of the United States, will be eligible to purchase up to a maximum four years of military service at the rate of five percent of the weekly salary of six hundred fifty-four dollars and forty cents ($654.40) effective July 1, 1995. The purchase price for each credited year purchased shall be one thousand seven hundred one dollars and forty-four cents ($1,701.44). For the purposes of this section, four years of service as a reservist in the Armed Forces of the United States shall equal one year of military service (one credited year). These purchased reserve military service years will be added to a member's credited years of service for a pension payment up to a maximum of thirty (30) credited years of service. However, these purchased reserve military service years shall only be applied for pension purposes after the member has completed twenty (20) credited years of service. Purchased reserve military service years shall be used for pension purposes only. Credit for military service years shall only be added after any and all optional purchased credited years of service have been applied.

6. Effective July 1, 2002, members shall contribute an amount equal to nine and one-half percent of the weekly salary, earned or accruing, to said member.

Effective July 1, 2003, members shall contribute an amount equal to ten (10) percent of the weekly salary, earned or accruing, to said member. Effective July 1, 2004, members shall contribute an amount equal to ten and one-half (10 ½) percent of the weekly salary, earned or accruing, to said member.

7. Notwithstanding any language in Chapter 2.28 entitled Fireman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, for any officer or member of the permanent fire department who was hired prior to July 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan any automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary in accordance with these sections shall be suspended for a period of ten (10) years beginning *~~June 30, 2013~~, ***July 1, 2013.***

8. Notwithstanding any language in Chapter 2.28 entitled Fireman's Pension fund or any other law or statute or ordinance or memorandum of agreement or settlement agreement or binding arbitration award or collective bargaining agreement provision or any other statutory or contractual provision or legislative enactment to the contrary, upon the expiration of the ten year period provided for above for any officer or

member of the permanent fire department who was hired prior to July 1, 1995 and in said plan who is still an active employee and for any such member so retired and for any beneficiaries receiving any retirement, disability or widow/widower benefit or any other benefit of any kind in said plan the automatic annual escalation or pension cost-of-living adjustment (COLA) of the pension payment of the member or beneficiary shall automatically escalate in an amount fixed at three percent per annum, compounded, without any further escalation based on raises granted to active employees.

9. The determination of the employer contribution rate for fiscal year 2014 and thereafter shall include a re-amortization of the Unfunded Actuarial Accrued Liability over a twenty-six (26) year period.

Section 2. This Ordinance shall take effect upon its final adoption.

Positive Endorsement

/s/Christopher Rawson 4/22/13
Christopher Rawson, City Solicitor Date

Negative Endorsement (attach reasons)

_____
Christopher Rawson, City Solicitor Date

Sponsored by: Mayor Fung

Referred to Finance Committee April 11, 2013

U/Ordinance/Fire_Retirees_Pension_2013

Certified TRUE COPY of Original
Record on File in this Office

Date: NOV - 4 2015 Attest: Maria M. Wall
Cranston City Clerk