IN THE SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT
STATE OF GEORGIA

STEPHEN BORDERS, DON COLE, JAMES SCERENSCKO, SANDRA GRIFFIN, WILLIAM CLARK, QUINTON MITCHELL, and CAROLINE TANKSLEY, individually and on behalf of classes of all others similarly situated, Plaintiffs,	)	
v.	)	Civil Action No. 2013CV239021
CITY OF ATLANTA, KASIM REED, in his capacity as Mayor of the City of Atlanta; CEASAR MITCHELL, in his capacity as President of the City Council; and CARLA SMITH, KWANZA HALL, IVORY LEE YOUNG, JR., CLETA WINSLOW, NATALYN MOSBY ARCHIBONG, ALEX WAN, HOWARD SHOOK, YOLANDA ADREAN, FELICIA MOORE, C.T. MARTIN, KEISHA LANCE BOTTOMS, JOYCE SHEPHERD, MICHAEL BOND, AARON WATSON, H. LAMAR WILLIS, in their capacities as members of the Atlanta City Council, Defendants.	)	

FINAL ORDER GRANTING DEFENDANTS SUMMARY JUDGMENT

The above styled matter comes before the Court on *Defendants' Motion To Dismiss, Or In The Alternative Motion For Summary Judgmen*t ("Defendants' Motion") and *Plaintiffs' Motion For Partial Summary Judgment* ("Plaintiffs' Motion"). The parties came before the Court for a hearing on these motions on May 15, 2014 and have subsequently appeared at status conferences regarding this matter on Sept. 8, 2014 and Sept. 24, 2014.

Having considered the record in this case, including the parties' motions and briefs in support and in opposition thereto as well as supplemental memoranda filed after the May 15, 2014 hearing before this Court, the Court HEREBY FINDS as follows:

SUMMARY OF FACTS

This action challenges the City of Atlanta's (the "City") 2011 amendment (the "2011 Amendment" or "Amendment") to its three Defined Benefit Pension Plans.[1] The material facts of this action are not disputed. The case involves a class action filed on behalf of City employees who participated in the City's Firefighters Pension Plan[2], Police Officers Pension Plan[3], and General Employees Pension Plan[4] (collectively the "Plans" or "Pension Plans") prior to Nov. 1, 2011 and were subject to the 2011 Amendment.

Pursuant to the terms of the ordinances that established and governed the Plans prior to Nov. 1, 2011, participants in the Plans were required to contribute seven percent (7%) of their annual compensation to their Plan if they did not have a designated beneficiary or eight percent (8%) of their annual compensation if they had a designated beneficiary.[5]

On Jun. 29, 2011, Defendants enacted a new ordinance, Ordinance No. 11-O-0672 (the "Ordinance") that increased the percentage of the annual compensation that the Plaintiffs and the members of the classes they represent (hereinafter collectively "Plaintiffs") would be required to

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[1] Each of the Plans is a Defined Benefit ("DB") pension plan. As such, the Plans provide each of its vested eligible members with a specified monthly income or "benefit" upon retirement (or to a member's surviving eligible dependent if applicable) calculated using a pre-determined formula rather than depending directly on individual investment returns. (Compl., ¶17; Defendants' Motion, 3). The terms of the City's Plans are set forth in the Related Laws division of the Atlanta City Code; specifically in Atlanta City Code Part I [Charter and Related Laws], Subpart B [Related Laws Division], Chapter 6 [Pensions] (hereinafter "Related Laws"). A certified copy of Related Laws §6-2, which addresses Retirement Benefits under the Pension Plans, is attached to Defendants' Motion as Exhibit A. *See* Police Benev. Ass'n of Savannah v. Brown, 268 Ga. 26, 27 (1997) ("The superior and appellate courts of this state do not take judicial notice of a municipal ordinance . . . The proper method of proving a city ordinance is by production of the original or of a properly certified copy").

[2] The City's Firefighters Pension Plan is an employee benefit plan that was established by law to provide retirement and disability benefits to eligible firefighters employed by the City. (Compl., ¶14, Answer, ¶14).The Firefighters Pension Plan is set forth in Related Laws §§6-366 through 6-482.

[3] The City's Police Officers Pension Plan is an employee benefit plan that was established by law to provide retirement and disability benefits to eligible police officers employed by the City. (Compl., ¶16, Answer, ¶16). The Police Officers Pension Plan is set forth in Related Laws §§ 6-221 through 6-333.

[4] The City's General Employees Pension Plan is an employee benefit plan that was established by law to provide retirement and disability benefits to eligible, general employees of the City. (Compl., ¶15, Answer, ¶15). The General Employees Pension Plan is set forth in Related Laws §§ 6-36 through 6-186.

[5] Compl., ¶18; Defendants' Motion , 4.

contribute towards their pensions by five percent (5%).[6] The Ordinance provides in relevant part:

> Beginning on November 1, 2011, each DB Plan Participant hired prior to that date shall contribute 12% of her/his Compensation to the applicable DB Plan if s/he does not have a designated beneficiary, and shall contribute 13% of her/his Compensation to the applicable DB Plan if s/he does have a designated beneficiary, except that DB Plan Participants who choose to participate in the DB Hybrid Option[7] shall make the contributions and receive the benefits described in Section 6-2(g) below.[8]

The contribution increases implemented pursuant to the Ordinance began on Nov. 1, 2011 and were not retroactive.[9] Plaintiffs contend that by increasing the amounts they are required to contribute towards their pensions from seven or eight percent (7% or 8%) of their annual compensation to twelve or thirteen percent (12% or 13%), the Ordinance requires them to pay over fifty percent (50%) more to purchase the same amount of retirement benefits that they already were entitled to prior to the enactment of the Ordinance.[10]

Additionally, Section 9 of the Ordinance provides that the contributions required of Plaintiffs may be increased by another five percent (5%)—up to seventeen percent (17%) or eighteen percent (18%) of their annual compensation (depending on whether they have a designated beneficiary)—in the event that the City's Actual Required Contribution ("ARC") to the Pension Plans exceeds thirty-five percent (35%) of the City's total payroll.[11] However, the

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6 Compl., ¶¶ 20, 22-25; Defendants' Motion , 5. A certified copy of Ordinance No. 11-O-0672 is attached to Defendants' Motion as Exhibit E.

7 The "DB Hybrid Option," which is not at issue in this litigation, is a new plan option the City offered under the 2011 Amendment. Eligible plan participants were given the choice of remaining in their current Pension Plan as amended (requiring a prospective increase in their employee contributions) or switching to the DB Hybrid plan. *See* Ordinance No. 11-O-0672, § 8; Related Laws §6-2(g).

8 Ordinance 11-O-0672, § 5; Related Laws §6-2(d)(2).

9 Id.

10 Compl., ¶22.

11 *See* Ordinance 11-O-0672, § 9; Related Laws §6-2 (h)(1). This potential additional contribution would be part of a "Cost Recovery Plan," which would be initiated in the event an annual actuarial valuation anticipates that the City's ARC for the next fiscal year will exceed thirty-five percent (35%) of the City's total payroll (the "Cap"). The first fiscal year that the ARC exceeds the Cap, the City would pay the full amount of the difference (the "Overage"). Thereafter and in the event the City fails to enact legislation directing how the Overage would be funded during the second and/or future years in which the Cap is exceeded, the cost of the Overage would be shared

Ordinance did not change the benefits formula or the calculation of pension benefits for the Plaintiffs; *i.e.* although the Amendment increased Plaintiffs' required annual contribution to the Plans, it did not alter the amount of retirement benefits to which participants already were entitled to prior to the Amendment's passage.[12]

Plaintiffs assert that they performed services for the City prior to Nov. 1, 2011 and have made contributions to the Plans in the percentages and amounts required by the terms of the statutes and ordinances that governed the Plans prior to that date.[13] Further, Plaintiffs assert that since the 2011 Amendment took effect, they have had to contribute and have contributed five percent (5%) more of their annual compensation to their respective Plan than each was previously required to contribute to the Plan prior to the Amendment.[14]

Plaintiffs argue Defendants violated the Impairment Clause of the State's Constitution (the "Impairment Clause")[15] when they passed that portion of Ordinance 11-O-0672 that purports to increase the amounts Plaintiffs are required to contribute to the Pension Plans to purchase the same amount of retirement benefits to which they already were entitled. Plaintiffs allege the mandated increased contribution breaches their employment contracts and is invalid insofar as it unconstitutionally impairs said contracts.[16] Plaintiffs seek to recover the increased amounts they have contributed to their pensions as a result of the passage of the Ordinance. They also seek declaratory and injunctive relief declaring the Ordinance's increased contribution requirements to be unconstitutional and enjoining enforcement of the requirements going forward.[17]

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equally by the City and the DB Plan participants, with the latter paying an additional contribution (up to five percent (5%)) in addition to the participant's contribution as set forth in Related Laws § 6-2(d)(2), as amended.

12 Compl., ¶21; Defendants' Motion, 5.

13 Compl., ¶19.

14 Compl., ¶¶ 24-25.

15 *See* Ga. Const. art. I, § 1, ¶ X.

16 Compl., ¶¶ 26-33.

17 Compl., ¶¶ 34-42. In their Complaint, Plaintiffs also sought class action certification. On Apr. 3, 2014, the Court entered a Consent Order Certifying A Class Action in which the Court found this action is maintainable as a

STANDARD ON MOTION FOR SUMMARY JUDGMENT

Before the Court are Defendants' Motion (styled as a Motion To Dismiss, Or In the Alternative Motion For Summary Judgment) and Plaintiffs' Motion For Partial Summary Judgment. In considering the instant motions, the Court has considered matters and documents not included in the pleadings, including the parties' memoranda and the attachments thereto and affidavits referenced therein. Accordingly, the Court will consider Defendants' Motion to be one for summary judgment. *See* Thompson v. Avion Sys., Inc., 284 Ga. 15, 16 (2008) (where a party moves to dismiss, or in the alternative, for summary judgment and relies upon materials beyond the pleadings which the court considers when ruling, the motion is properly treated as one for summary judgment under O.C.G.A. §9-11-12(b) and disposed of as provided in O.C.G.A. §9-11-56). In so doing, the Court finds that the issues raised in the parties' cross motions have been fully and exhaustively briefed and the motions are ripe for ruling.[18]

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hybrid-class action with a bifurcated proceeding pursuant to O.C.G.A. §§ 9-11-23(a), (b)(2) and (b)(3). Under this bifurcation, Stage One of the proceeding would involve a determination of the issue of liability only and Stage Two (which would occur only if the Court finds Defendants liable on one or more of Plaintiffs' causes of action) will address the damages and any other relief owed to each class member. The class is limited to employees who worked for the City and contributed to the Plans prior to the enactment of the Ordinance. *See* Consent Order Certifying A Class Action (Apr. 3, 2014), 2-3.

[18] A review of the record shows that Defendants' Motion was filed on Jan. 2, 2014 and Plaintiffs filed a response on Feb. 25, 2014. On Mar. 20, 2014, Plaintiffs filed their motion seeking partial summary judgment. On Mar. 26, 2014, Defendants filed a reply brief in support of Defendants' Motion and then on Apr. 18, 2014 filed their response to Plaintiffs' Motion. On May 13, 2014, Plaintiffs filed a reply brief in further support of their motion. Following the May 15, 2014 hearing, Plaintiffs filed a Supplemental Brief and Second Supplemental Brief (along with various affidavits) and subsequently requested the Court's leave to so supplement the record ("Plaintiffs' Motion To Supplement"). Defendants objected and moved to strike the supplemental briefs as well as the affidavits referenced therein ("Defendants' Motion To Strike"). Responses to those motions were subsequently filed. Via order entered Sept. 8, 2014, the Court granted Plaintiffs leave to supplement the record as requested, ordered Plaintiffs to file the originals of the affidavits referenced in the supplemental briefs, and granted Defendants an additional thirty-five (35) days in which to file its own supplemental brief. On Sept. 19, 2014, Defendants notified the Court via email that they declined the opportunity to file a supplement and that, absent further filings by Plaintiffs or requests of the Court, Defendants would not present any additional supplementary documents or briefs. Additionally, at the Court's instruction the parties selected an independent actuary that assessed the impact of the 2011 Amendment on the City's Pension Plan funds and provided the Plans' actuarial statuses as well as a long-term projection of the cost differential if the challenged portion of the Ordinance (the increase in employees' required annual contributions to the Plans) were to be found invalid. This was requested in order for the parties to reach a common understanding of the Amendment's actuarial impact, and while the parties each submitted a letter brief addressing the findings of the independent actuary it does not appear that the parties dispute the actuary's analysis. The letter briefs and actuarial

Pursuant to O.C.G.A. §9-11-56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. §9-11-56. *See also* Home Builders Ass'n of Savannah, Inc. v. Chatham Cnty., 276 Ga. 243, 244 (2003) ("To prevail at summary judgment under [O.C.G.A.] § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law") (citing Lau's Corp. v. Haskins, 261 Ga. 491, (1991)); All Tech Co. v. Laimer Unicon, LLC, 281 Ga. App. 579, 582 (2006) (on cross motions for summary judgment, the applicable standards are the same as those announced in Lau's Corp. v. Haskins, 261 Ga. 491 (1991), and facts must be viewed in the light most favorable to the non-moving party).

DISCUSSION

In their motion Defendants assert that the legislation establishing the Pension Plans authorizes the City to amend the terms of the Plans and that, under Georgia law, where the terms of a pension plan allow for amendment, amending the plan does not constitute a breach of the employment contract or a violation of the State's Impairment Clause. Additionally, Defendants argue that both the City of Atlanta Charter and the Georgia Constitution authorize Plan modifications. Further, Defendants contend that, even if the City did not have the explicit right to modify its Plans, the 2011 Amendment still would not constitute a breach of contract or an unconstitutional impairment because the Amendment does not alter the pension benefits calculation or reduce the pension benefits payable to Plaintiffs.

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reports have been filed on the record by the Court. In short, the Court is convinced the issues in this case have been exhaustively briefed and are ripe for summary judgment.

Plaintiffs, in turn, assert that the Ordinance's requirement that they contribute more to their pensions without a corresponding increased pension benefit breaches their employment contracts and unconstitutionally impairs those contracts. Plaintiffs contend that an enrollment provision under which Defendants' purport to have reserved the right to amend the Plans does not constitute a valid reservation of rights clause. Because the City did not reserve unto itself the right to so amend and impair the Plans, the 2011 Amendment requiring them to contribute more breaches their employment contracts and constitutes an impermissible contractual impairment insofar as it substantially impairs and reduces the overall value of their retirement benefits.

The record reflects that the parties in this case agree on certain key issues. First, the parties agree that the Pension Plans as established in the City's Related Laws are part of Plaintiffs' employment contracts.[19] *See* DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 642 (2012) ("It is well-established that 'a statute or ordinance establishing a retirement plan for government employees becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits he is to receive, and if the employee performs services while the law is in effect . . .'") (quoting Withers v. Register, 246 Ga. 158, 159(1) (1980)).

The parties also agree that public employees do not acquire a constitutionally protected contractual interest in the benefits provided under their pension plans ***if*** the plan expressly reserves unto the employer the right to amend the plan in the future.[20] *See* Pritchard v. Bd. of Comm'rs of Peace Officers Annuity & Ben. Fund of Ga., 211 Ga. 57, 59 (1954); Pulliam v. Georgia Firemen's Pension Fund, 262 Ga. 411, 412 (1992); Murray Cnty. Sch. Dist. v. Adams,

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[19] Plaintiffs' Memorandum In Support Of Plaintiffs' Motion For Partial Summary Judgment (Mar. 20, 2014), 5-8; Defendants' Response To Plaintiffs' Motion For Partial Summary Judgment (Apr. 18, 2014), 4.

218 Ga. App. 220, 222 (1995); City of E. Point v. Seagraves, 240 Ga. App. 852, 855 (1999); DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633, 642-43 (2012).

Thus, the central disputed issue in this case is whether the City was authorized under the governing laws to unilaterally amend the Pension Plans as it did in 2011. If the Court finds the City was so authorized, the 2011 Amendment would be a valid legislative act and the only remaining question would be the Amendment's applicability to Plaintiffs that were already vested at the time the Amendment took effect.[21] If the Court finds the City was not authorized to unilaterally amend the Plans, the Court must consider whether the 2011 Amendment, which did not alter the pension benefits Plaintiffs were to receive upon retirement, constitutes an unconstitutional impairment of Plaintiffs' employment contracts.

A. Authorization to Amend the Pension Plans

1. Constitutional and statutory authority authorizing establishment, maintenance and modification of City's Pension Plans.

Having reviewed the record and applicable laws and case law, the Court finds Defendants were authorized to amend Plaintiffs' Pension Plans as they did in 2011. In assessing the validity of the Amendment the Court starts with a review of the applicable laws and ordinances, because as the Supreme Court of Georgia noted in Porter v. City of Atlanta:

> Determining the validity of a city ordinance is generally a two-step process. First, the court must determine whether the local government possessed the power to enact the ordinance. If the power exists, the court must then determine whether the exercise of power is clearly reasonable. Municipal corporations are creations of the state and possess only those powers that have been expressly or impliedly granted to them. The source of their power is the delegation of power from the state, manifested in the

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[20] Plaintiffs' Response To Defendants' Motion To Dismiss, Or In The Alternative Motion For Summary Judgment (Feb. 25, 2014), 11-15; Defendants' Reply Brief Supporting Motion To Dismiss, Or In The Alternative Motion For Summary Judgment (Mar. 26, 2014), 1-8.

[21] It appears that this particular issue was raised for the first time in Plaintiffs' Supplemental Brief (Jun. 20, 2014) and will be addressed in Part B, *infra*.

> constitution, state laws, and the municipal charter. Allocations of power from the state to local governments are strictly construed.

Porter v. City of Atlanta, 259 Ga. 526, 526-27 (1989) (internal citations omitted).

Notably, the State Constitution, as amended in 1983, expressly confers upon the City the power to maintain and modify its Pension Plans:

> In addition to and supplementary of all powers possessed by or conferred upon any county, municipality, or any combination thereof, any county, municipality, or any combination thereof may exercise the following powers and provide the following services: . . . (14) The ***power to maintain and modify heretofore existing retirement or pension systems***, including such systems heretofore created by general laws of local application by population classification, and to continue in effect or modify other benefits heretofore provided as a part of or in addition to such retirement or pension systems and the power to create and maintain retirement or pension systems for any elected or appointed public officers and employees whose compensation is paid in whole or in part from county or municipal funds and for the beneficiaries of such officers and employees.

Ga. Const. art. IX, § 2, ¶ III(a)(14) (1983) (emphasis added).

Additionally, the Georgia General Assembly has passed legislation authorizing municipalities to establish retirement systems. O.C.G.A. §36-34-2 provides in relevant part:

> ***In addition to the other powers which it may have***, the governing body of any municipal corporation shall have the following powers, under this chapter, relating to the administration of municipal government: . . . (4) ***The power to establish*** merit systems, ***retirement systems***, and insurance plans for all municipal employees and to establish insurance plans for school employees of independent municipal systems ***and to provide the method or methods of financing such systems and plans***. . .

O.C.G.A. § 36-34-2(4) (emphasis added).

Further, O.C.G.A. §36-35-4(a) provides in relevant part: "The governing authority of each municipal corporation ***is authorized to*** . . . provide insurance, ***retirement, and pension***

benefits." O.C.G.A. § 36-35-4(a) (emphasis added). Subsection (d) of §36-35-4 also provides an instructive definition of the terms "retirement" and "pension":

> As used in subsection (a) of this Code section, the words "retirement" and "pension" shall mean termination from municipal service with the right to receive a benefit based upon all or part of such municipal service ***in accordance with the terms of the ordinance or contract pursuant to which the municipality provides for payment of such benefits.***

O.C.G.A. § 36-35-4(d) (emphasis added). Thus, the legislative authorization under §§ 36-34-2 and 36-35-4 for the City's provision of benefits under its Pension Plans must be read in light of the terms of the local ordinances establishing and governing those Plans and any modifications thereto. *See* Duty Free Air & Ship Supply Co./Franklin Wilson Airport Concession v. City of Atlanta, 282 Ga. 173, 174 (2007) (where a statute "explicitly contemplates the joint application of its terms with local law and ordinances," the legislature "clearly intended for the [statute] to be supplemented by local law such as that contained in the [City Code] and [City Charter]").

The terms of the City's Pension Plans are set forth in and governed under the Related Laws.[22] Further, the City of Atlanta Charter dictates the specific procedural requirements for enacting an amendment to the Pension Plans:

> ***As authorized by the provisions of the Constitution of the State of Georgia of 1983, Article IX, Section II, Paragraph III(a)(14) . . . providing for pensions for officials and employees of cities*** having a population of 300,000 or more according to the United States Census of 1920 or any subsequent census thereof, ***shall be modified, insofar as they appertain to employees and officials of the City of Atlanta . . . in accordance with the following rules and procedures***: (1) Any other provisions in the Charter notwithstanding, ***any pension law modification shall be effected only by ordinance adopted by at least two-thirds of the total membership of the council and duly approved by the mayor.***

Atlanta, Ga., City of Atlanta Related Laws, Subpart A, Ch. 5, § 3-507 (emphasis added).[23]

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[22] *See* note 1, *supra*.

Additionally, the legislation establishing each of the City's Pension Plans expressly provides for their modification. The City's General Employees Pension Plan was established by law to provide retirement and disability benefits to eligible, non-uniformed officers and employees of the City. The General Employees Pension Plan is set forth in Related Laws §§ 6-36 through 6-186. Related Laws §6-39 provides: "The receipt of an applicant's executed enrollment or application card by the commissioner of finance or his agent ***shall constitute the irrevocable consent of the applicant to participate under the provisions of this Act, as amended, or as may hereafter be amended***."

The City's Police Officers Pension Fund was established by law to provide retirement and disability benefits to eligible police officers employed by the City. The Police Officers Pension Plan is set forth in Related Laws §§ 6-221 through 6-333. Related Law §6-223 provides: "The receipt of an applicant's executed enrollment or application card by the commissioner of finance or his agent ***shall constitute the irrevocable consent of the applicant to participate under the provisions of this act, as amended, or as may hereinafter be amended***."

The City's Firefighters Pension Fund was established by law to provide retirement and disability benefits to firefighters employed by the City. The Firefighters Pension Plan is set forth in Related Laws §§ 6-366 through 6-482. Related Law §6-368 similarly provides: "The receipt of an applicant's executed enrollment or application card by the commissioner of finance or his

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[23] A certified copy of §3-507 is attached to Defendants' Motion as Exhibit F. Section 3-507, which is titled "Modification of pension plans," expressly provides that any ordinance modifying the Plans shall be considered for final action by the City Council ***only after*** (1) an investigation by an independent actuary of the proposed modification evidenced by a written report that includes the actuary's opinion as to the propriety of the modification and conformity with applicable state laws governing the funding requirements for modifications to such pension plans, and (2) a written communication to the board of trustees of each of the respective pension funds affected by the modification to provide notice of the proposed modification and to request their non-binding recommendation in favor or against the proposed modification within forty-five (45) days from the date of introduction of the legislation. Atlanta, Ga., City of Atlanta Related Laws, Subpart A, Ch. 5, §3-507(2)(a)-(b). In this action, Plaintiffs have not alleged that these procedures were not followed or that they are unconstitutional or otherwise unreasonable or inadequate.

agent ***shall constitute the irrevocable consent of the applicant to participate under the provisions of this act, as amended, or as may hereinafter be amended.***"

With the exception of a couple of minor differences,[24] the enrollment provisions quoted above (hereinafter the "Enrollment Provision" or "Enrollment Provisions") are virtually identical and they expressly provide that a participant who enrolls in the City's Pension Plans does so agreeing to participate pursuant to the applicable legislation governing the Plan, as it had been amended and it may thereafter be amended.[25]

2. *Case law holding that a pension plan which by its own terms is subject to amendment may be so amended without constituting a breach of contract or violating the Impairment Clause.*

Plaintiffs in their briefs argue extensively that pensions are generally protected from amendment by the Impairment Clause.[26] Plaintiffs' cited case law on this point is well taken. As Plaintiffs highlight, one of the most cited cases on this point is Withers v. Register, *supra*:

> Long before the rule was recognized generally by the courts of the several states, it was the law of this state that a statute or ordinance establishing a retirement plan for government employees becomes a part of an employee's contract of employment if the employee contributes at any time any amount toward the benefits he is to receive, and if the employee performs services while the law is in effect; and that the impairment clause of our constitution (Art. I, Sec. I, Par. VII, Constitution of Georgia of 1976; Code Ann. s 2-107) precludes the application of an amendatory statute or ordinance in the calculation of the employee's retirement benefits if the effect of the amendment is to reduce rather than increase the benefits payable. It is not necessary for an application of this rule

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[24] The word "Act" is capitalized in §6-39 but not in §§ 6-223or 6-368. Also, §6-39 indicates agreement to participate in the Plan as amended or as "hereafter" amended whereas §§ 6-223 and 6-368 use the synonym "hereinafter." (*See* note 36, *infra*). Of course these minor differences do not impact the Court's analysis of the substantive import of these provisions. Certified copies of Related Laws §§ 6-39, 6-223 and 6-368 are attached to Defendants' Motion as Exhibit D.

[25] Plaintiffs nowhere dispute that they executed and submitted an enrollment or application card pursuant to the Enrollment Provisions. A copy of the executed enrollment card of each Plaintiff other than Stephen Borders is attached to Defendants' Motion as Exhibit C along with a certification by the City's Custodian of Records pursuant to O.C.G.A. §24-8-803(6).

[26] Plaintiffs' Response To Defendants' Motion To Dismiss, Or In The Alternative Motion For Summary Judgment (Feb. 25, 2014), 8-11; Plaintiffs' Motion (Mar. 20, 2014), 5-8.

> that the rights of the employee shall have become vested under the terms of the retirement plan while the amendment is in effect. Rather, if the employee performs services during the effective dates of the legislation, the benefits are constitutionally vested, precluding their legislative repeal as to the employee, regardless of whether or not the employee would be able to retire on any basis under the plan.

Withers, 246 Ga. at 159 (1980). *See also* Trotzier v. McElroy, 182 Ga. 719 (1936) (finding pensions are not "mere gratuities" because "the better view of the subject is to treat the city's agreement to pay a pension as a contract based on considerations flowing from both parties, and giving the plaintiff . . . a vested right which . . . cannot be impaired"); Bender v. Anglin, 207 Ga. 108, 112-13 (1950) (finding that amendment to pension was void insofar as it impaired plaintiff's employment contract because, although he was not eligible to retire at the time the amendment was passed, the contribution of a portion of his salary together with his services constituted consideration which gave him a vested right that was protected from impairment by the State and Federal Constitutions); Malcolm v. Newton Cnty., 244 Ga. App. 464, 467–468 (2000) (finding that the fact appellant made no contribution to the county-funded pension plan did not render the pension a gratuity which the county could terminate at will; the performance of services by appellant was consideration giving him a vested right in receiving benefits); Arneson v. Bd. of Trustees of Employees' Ret. Sys. of Georgia, 257 Ga. 579, 581 (1987) ("The payment of retirement benefits in compliance with our statutes is not a gratuity, but is an incidence of employment"); Saleem v. Bd. of Trustees of Firemen's Pension Fund of Atlanta, 180 Ga. App. 790, 791(1986) ("[P]ension statutes, being remedial in nature, are to be liberally construed in favor of the employee").

Nevertheless, as Plaintiffs' own briefs reveal, that is not the end of the analysis and the cases above do not paint the full picture on this issue. Georgia courts have consistently found

that where the legislation establishing a pension plan itself provides that the plan may be subject to modification or amendment, the participant does not acquire a vested contractual right in an unchanged plan and the plan may be amended without breaching employment contracts or violating the Impairment Clause. *See, e.g.* Pritchard v. Bd. of Comm'rs of Peace Officers Annuity & Ben. Fund of Ga., 211 Ga. 57 (1954); Pulliam v. Georgia Firemen's Pension Fund, 262 Ga. 411 (1992); Murray Cnty. Sch. Dist. v. Adams, 218 Ga. App. 220 (1995); City of E. Point v. Seagraves, 240 Ga. App. 852 (1999); DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633 (2012).

In Pritchard v. Bd. of Comm'rs of Peace Officers Annuity & Ben. Fund of Ga., 211 Ga. 57, 57 (1954), the plaintiff challenged the legality of a pension plan amendment that eliminated the plan's disability pension benefits. Section 18 of the act that established the plan provided: "***All rights and benefits provided herein shall be subject to future legislative change or revision and no beneficiary herein provided for shall be deemed to have any vested right to any annuities or benefits provided herein***." Id. at 58 (emphasis added). The Supreme Court of Georgia upheld the constitutionality of the plan's amendment:

> The plaintiff in error qualified under the act of 1950 and paid his money into the fund with the act providing that it was subject to legislative change and that he should not have any vested right to annuities or benefits in the fund. There was no contract that the plan of annuities and benefits should never be changed. On the contrary, it was recognized that the legislature might find it necessary to make changes; and even if he had vested rights, which the act specifically provided against, there was no vested right to a continuation of the original plan, which experience might demonstrate would result disastrously to the fund and its members.

Id. at 59 (citing Wright v. Minnesota Mutual Life Ins. Co., 193 U.S. 657, 24 S.Ct. 549, 48 L.Ed. 832 (1904)).

This principal was reiterated in Pulliam v. Georgia Firemen's Pension Fund, 262 Ga. 411 (1992). In Pulliam, the legislature had passed an amendment to Georgia's Firefighters' Pension Fund in 1989 that terminated payment of a disability pension if the pensioner is employed at least half-time in any capacity. Id. The amendment resulted in the suspension of plaintiff's disability pension, which he had been receiving for almost twenty years. Id. As with the pension plan in Pritchard, the plan in Pulliam contained a provision that expressly allowed for future legislative changes. Specifically, the plan was subject to the following statutory provision: "***Benefits under this chapter shall be subject to future legislative change and revision and no member of this fund or any other persons shall be deemed to have any vested right to any benefits. . .***"[27] Id. (emphasis added). Although plaintiff contested the legality of the amendment, the Supreme Court again relied on the plan's amendment provision in holding the modification to be valid:

> The basis for the constitutional vesting of rights in pensions is that the pension rights are property and cannot be taken. However, they are property because they become part of the contract of employment, and as this court pointed out in *Pritchard, **the provision for subsequent amendment was part of the contract when appellant entered into it. We find*** **Pritchard** ***controlling***. The trial court did not err in upholding appellee's suspension of appellant's disability pension benefits.

Id. at 412 (emphasis added).

Likewise in Murray Cnty. Sch. Dist. v. Adams, 218 Ga. App. 220 (1995), the Georgia Court of Appeals applied the reasoning in Pritchard and Pulliam to uphold the Murray County School Board's amendment to its employees' retirement plan. The amendment terminated the board's matching of employees' voluntary contributions to their retirement plan. Id. The class action plaintiffs challenged the amendment as an unconstitutional impairment of their contractual

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[27] *See* O.C.G.A. §47-7-121.

right to the terminated contributions. Id. However, the court looked to the pension plan package adopted by the Board, which clearly provided that the employer "***shall have full authority to control and manage the operation and administration of the Plan and to amend or terminate the Plan at any time***." Id. at 222. Relying on this language, the appellate court upheld the school board's modification to the plan:

> The Supreme Court pointed out in *Pulliam* that "[t]he basis for the constitutional vesting of rights in pensions is that the pension rights are property and cannot be taken. ***However, they are property because they become part of the contract of employment***" . . . ***Where, as in* Pritchard *and* Pulliam, *the contract terms themselves provide for subsequent amendment—modification or termination—the employee never obtained a property right in unchanged benefits***.

Id. (emphasis added). *See also* Hartsfield v. Mitchell, 210 Ga. 197, 197 (1953) (where Atlanta School System employee signed a written statement wherein he agreed to participate in the system's pension plan "***as amended***" he, "[b]y such statements and for the consideration of additional benefits and changed contributions . . . irrevocably consented to the law as changed by amendment and surrendered any right to claim the amount of retirement pay as originally provided bt [sic] the pension law") (emphasis added); Webb v. Whitley, 114 Ga. App. 153 (1966) (where City of Atlanta employee signed a statement by which he authorized deductions from his wages for the express purpose of participating in the City's pension benefits provided by the pension law "***as amended***," he irrevocably consented to the law as changed by amendment and surrendered any right to claim benefits under the original provisions of the pension law) (emphasis added); City of E. Point v. Seagraves, 240 Ga. App. 852 (1999) (an employee does not have a vested right in retirement plan benefits where the city's retirement plan, set forth in the city's charter, states that "***the employer expects the plan to be continued indefinitely but, of necessity, reserves the right to terminate the plan and contributions***

thereunder at any time by action of the governing authority" (emphasis added); DeKalb Cnty. Sch. Dist. v. Gold, 318 Ga. App. 633 (2012) (in action challenging the district's suspension of its contributions to a tax-sheltered annuity plan, noting that when the plan provides that "***it may be amended or terminated by the Employer at any time***" there is no contract that the plan of benefits should never be changed; however, holding that plaintiffs stated a claim for breach of contract because the district did not follow its two-year notice policy before reducing funding) (emphasis added).

The cases summarized above make abundantly clear that where the terms of a government pension plan provide that they may be subject to modification or amendment, the participant does not acquire a vested right to an unchanged plan. It follows that such plans can then be amended without breaching participants' employment contracts or violating the Impairment Clause.

3. Sufficiency of the City's Enrollment Provisions.

While Plaintiffs admit that a municipality may expressly reserve the right to amend or terminate a pension plan, they argue that the City did not do so here. Plaintiffs contend that "if a government desires to preclude its employees from acquiring vested contractual rights to their pension benefits, the government must say so clearly and explicitly."[28] Plaintiffs' position is that the City's Enrollment Provision does not constitute a "valid reservation of rights clause" for various reasons; *e.g.* "[it] does not even purport to be a reservation of rights clause" but rather is titled "Consent by applicant to participate in the system"[29]; "it does not contain the type of clear and express langauge that is necessary to alert employees that their benefits would not vest and

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[28] Plaintiffs' Response to Defendants' Motion To Dismiss, Or In The Alternative Motion For Summary Judgment (Feb. 25, 2014), 13.

[29] Id.

could be impaired at any time"[30]; and it is an "inconspicuous plan provision"[31]. Plaintiffs further argue that the "as may be amended" language in the Enrollment Provisions, when read in context, has a different meaning than that which Defendants purport to place on it. Moreover, Defendants' past practice on at least some occasions when amending the Plans of having employees elect whether to participate in the amendment allegedly demonstrates that the City did not in fact reserve the right to amend or impair participants' pension benefits unilaterally.

Having found that the Pension Plans and the Enrollment Provisions at issue form part of Plaintiffs' employment contracts, the issues of this case are resolved by merely construing the "contract." In Georgia, the construction of a contract involves three steps:

> At least initially, construction is a matter of law for the court.[32] First, the trial court must decide whether the contract language is clear and unambiguous. If it is, the trial court simply enforces the contract according to its clear terms; the contract alone is looked to for meaning. Next, if the contract is ambiguous in some respect, the court must apply the rules of contract construction to resolve the ambiguity.[33] Finally, if the ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury.

McKinley v. Coliseum Health Grp., LLC, 308 Ga. App. 768, 770 (2011).

Thus, the Court must first determine if the Enrollment Provisions clearly and unambiguously authorize the City to amend its Pension Plans. If so, the Court's inquiry ends as the Court must simply enforce the Plans' clear terms. *See* Carroll v. Bd. of Regents of Univ. Sys. of Georgia, 324 Ga. App. 598, 600 (2013) ("[N]o construction is even permitted when the language employed by the parties in the contract is plain, unambiguous, and capable of only one reasonable interpretation"); Payne v. Twiggs Cnty. Sch. Dist., 269 Ga. 361, 363 (1998) (noting

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30 Id. at 14.

31 Id.

32 *See* O.C.G.A. § 13-2-1 ("The construction of a contract is a question of law for the court . . .").

33 *See* O.C.G.A. §13-2-2 (providing statutory rules of contract construction).

that in any contract unambiguous terms require no construction and their plain meaning must be given full effect regardless of whom they benefit); Shaw v. Musgrove, 175 Ga. 806, 806 (1932) ("[W]here a contract is in writing and there is no claim that the contract as it appears in the writing was the result of any fraud, accident, or mistake, and is free from ambiguity, the parties must stand or fall by the terms of the instrument"). *See also* Collier v. State Farm Mut. Auto. Ins. Co., 249 Ga. App. 865, 867 (2001) ("An ambiguity is duplicity, indistinctness, an uncertainty of meaning or expression . . . Thus, a word or phrase is ambiguous when it is of uncertain meaning and may be fairly understood in more ways than one") (citations and punctuation omitted); Kreimer v. Kreimer, 274 Ga. 359, 361 (2001) ('[T]he terms and phrases contained in a contract must be given their ordinary meaning . . . A construction of a contract that renders any portion of it meaningless ought to be avoided whenever possible"); Unified Gov't of Athens-Clarke Cnty. v. McCrary, 280 Ga. 901, 903-04 (2006) (holding that under "the plain and unambiguous language of [plaintiffs'] contracts of employment", the precise source of their medical coverage upon retirement was not guaranteed and overturning trial court which "failed to apply [the] cardinal rules of [contract construction]" that contractual terms and phrases should be given their ordinary meaning and no construction is permissible when the language at issue is "plain, unambiguous, and capable of only one reasonable interpretation"); Ayers v. Pub. Sch. Employees Ret. Sys. Of Georgia, 294 Ga. 827, 831 (2014) (reiterating that "a statute or ordinance establishing a retirement plan for a government employee becomes a part of her contract of employment" and noting that "[a] court cannot, under the guise of statutory construction, either revise or enlarge upon those clear provisions of the [pension plan]") (citing Strickland v. City of Albany, 270 Ga. 31, 31-32 (1998)).

Given the Constitutional provision as well as state and local legislation underpinning Defendants' authority to amend its Pension Plans, the Court notes that rules of statutory construction likewise generally require the Court to give words their ordinary meaning and to construe statutes as a whole so as to give effect to all of its parts. *See* O.C.G.A. § 1-3-1 provides:

> (a) In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy. . .
> (b) In all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter.

O.C.G.A. § 1-3-1(a) and (b). *See also* Atlanta Indep. Sch. Sys. v. Atlanta Neighborhood Charter Sch., Inc., 293 Ga. 629, 631 (2013) ("We begin our analysis of [a] statute by recognizing that fundamental rules of statutory construction require us to construe a statute according to its terms, to give words their plain and ordinary meaning, and to look diligently for the intention of the General Assembly"); Bibb Cnty. v. Hancock, 211 Ga. 429, 440 (1955) ("[T]he words of a statute are always to be construed in connection with their context, and the intention of the legislature is to be gathered from the statute as a whole so as to give effect to all of its parts, if possible"); Drake v. Drewry, 109 Ga. 399 (1899) ("Every part of a statute must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not presumed that the legislature intended any part of a statute to be without meaning").

The court finds that the City's Enrollment Provisions are not ambiguous and that they clearly authorize the City to amend its Pension Plans. Giving their words their literal meaning, the Enrollment Provisions make clear two points central to the issues of this case: (1) upon enrolling in one of the Pension Plans each Plaintiff gave his or her "irrevocable consent" to

participate in the Plan, and (2) each Plaintiff agreed to participate pursuant to the legislation establishing and governing the Plan "***as amended, or as may hereafter be amended***,"[34] *i.e.* as the governing legislation had been amended and as it may be amended in the future.[35] The Court discerns nothing unclear or ambiguous about this language. Absent ambiguity, the Court must simply enforce the contract according to its clear terms looking only to the contract, *i.e.* the legislation establishing and governing the Plan, for meaning.

Further, although pension statutes are considered "remedial in nature" such that they are to be "liberally construed in favor of the employee" (Saleem, 180 Ga. App. at 791), that principal is among the rules of construction applied in pension cases when the court perceives an ambiguity. *See* Malcolm, 244 Ga. App. at 467 (resolving ambiguity regarding the definition of "effective date" in a pension plan by applying various rules of contract construction, including construing the contract as a whole, ascertaining the intent of the parties, and lastly applying a liberal construction in favor of pensioner). However, as noted above, no such construction is permitted when the language at issue is plain, unambiguous, and capable of only one reasonable interpretation. *See* Payne, *supra*; Unified Gov't of Athens-Clarke Cnty., *supra*.

Although Plaintiffs maintain that the terms of the City's Pension Plan can only be amended in a way that impairs Plaintiffs' employment contracts if they include certain "necessary" language by which the City reserves the right to so amend and impair the Plans,

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[34] *See* note 24, *supra*.

[35] The Court notes that Black's Law Dictionary defines "amendment" as follows: "**1.** A formal revision or addition proposed or made to a statute, constitution, pleading, order, or other instrument; specif., a change made by addition, deletion, or correction; esp., an alteration in wording . . . **2.** The process of making such a revision. AMENDMENT, Black's Law Dictionary (9th ed. 2009). In the context of a pension plan, an amendment can then of course encompass an infinite number of possible changes—changes which may enhance or diminish benefits and which may favor some while burdening others. Black's Law defines the verb "amend" as follows: "**1.** To make right; to correct or rectify . . . **2.** To change the wording of; specif., to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or substituting words . . ." AMEND, Black's Law Dictionary (9th ed. 2009). Black's Law Dictionary considers the terms "hereafter" and "hereinafter" to be synonymous, defining "hereafter" as follows:

Plaintiffs have cited no case law (and the Court has found none) dictating any such requisite language. Instead, Plaintiffs prescribe the "necessary" language by referencing language used in the pension plans of other Georgia jurisdictions (citing Pritchard, *supra;* Pulliam, *supra*; Murray Cnty. Sch. Dist., *supra*; City of E. Point, *supra*; and DeKalb Cnty. Sch. Dist., *supra*).[36] The Court has reviewed the cases cited. The courts in each of those cases evaluated a different pension plan and, importantly, the wording of each plan is unique. No "necessary" language is referenced and the Court finds nothing in those decisions suggesting that the holding was based on the exact language of the amendment provisions at issue. Further, the Court notes that in each of those cases (as in the case at bar) the provision authorizing the pension modification being challenged was contained in the governing legislation and none was found to be "inconspicuous"[37] or not "prominent"[38] for being so placed. *See also* O.C.G.A. §1-3-6 ("After they take effect, the laws of this state are obligatory upon all the inhabitants thereof. Ignorance of the law excuses no one"); City Council of St. Mary's v. Crump, 251 Ga. 594, 595 (1983) (noting that O.C.G.A. §1-3-6 is a "principal of law [that] has been applied to municipal ordinances").

Additionally, the Court notes that while the challenged legislation in Pritchard, *supra*, and Pulliam, *supra*, both contained language expressly indicating that participants would not be deemed to have "any vested right" to benefits, that language was not found in Murray Cnty. Sch. Dist., *supra*, City of E. Point, *supra*, DeKalb Cnty. Sch. Dist., *supra*, Hartsfield, *supra*, or Webb, *supra*. Further, the courts in both Hartsfield and Webb upheld application of plan amendments to those challenging the changes based on the fact that the employee in each of those cases had

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"**1.** From now on; henceforth . . . **2.** At some future time . . . **3.** Hereinafter." HEREAFTER, Black's Law Dictionary (9th ed. 2009).

[36] Plaintiffs' Response to Defendants' Motion To Dismiss, Or In The Alternative Motion For Summary Judgment (Feb. 25, 2014), 11-13.

[37] Id. at 14.

[38] Id. at 13.

agreed to participate in the plan "as amended." Despite the phrase's succinctness, neither the Hartsfield nor Webb court had any trouble applying the plain and literal meaning of "as amended" to the pension plans at issue in those cases; indeed, no ambiguity was even suggested. Given the lack of uniformity in the amendment language of the cases cited above, the Court is not inclined to graft any mandatory language requirement onto the holdings of those cases so as to hold the City's Enrollment Provisions inadequate or insufficient. When the words of the Enrollment Provisions are given their literal meaning, they clearly provide that participants agree to enroll in the Plans as amended and as they may be amended in the future. "[W]here a statute *itself* provides that it is subject to legislative change it *may* be amended, because no 'vested right' to unchanged benefits was created." Murray Cnty. Sch. Dist., 218 Ga. App. at 222. Thus, under the "as amended, or as may hereafter be amended" language of the Enrollment Provisions, the City reserved the right to amend the Plans and no vested right to unchanged benefits was created.

Plaintiffs argue that, when read in context, the "as may be amended" language in the Enrollment Provisions has a different meaning than that placed on it by Defendants:

> Under the terms of the enrollment provisions, employees who elect to be covered by the Plans agree that they cannot withdraw from participation except by leaving employment . . . The "as may be amended" language in the enrollment provisions makes it clear than an employee cannot claim a right to leave the plan and withdraw contributions because his plan has been amended.[39]

The Court concurs with the first sentence above insofar as employees, by enrolling in a Pension Plan, thereby give their irrevocable consent to participate in the Plan during their employment with the City. However, even considering the text, structure and title of the

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[39] Plaintiffs' Supplemental Brief (Jun. 20, 2014), 4-5.

Enrollment Provisions as enacted in 1980 as Plaintiffs urge,[40] the Court finds Plaintiffs' construction of the "as may be amended" language to be a strained reading at best. The portion of the legislation that speaks to future amendments is with regards to participants giving their irrevocable consent to participate in the plans as they had been amended and as they may be amended in the future—that is what they were agreeing to when they submitted their executed enrollment or application cards; the amendment language was not included in Section 2, which addresses the general prohibition against refunds of pension contributions except in limited circumstances.[41] When the language is clear, the Court cannot entertain a strained reading merely to force an alternative interpretation or to create an ambiguity where none appears to exist.

Plaintiffs also urge that the proper course of action would have been for the City to give affected employees the option to decide whether or not to participate in the amended plan. Indeed, Plaintiffs argue that the City's past practice of requiring employees who desire to be covered by amendments to affirmatively agree in writing to accept the benefits and obligations of the amendments is "convincing proof" that the Enrollment Provisions were not intended to operate as a reservation of rights clause.[42] Plaintiffs of course are correct in highlighting that "[t]he construction placed upon a contract by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them." McKinley, 308 Ga. App. at 771, quoting Scruggs v. Purvis, 218 Ga. 40, 42 (1962). However, the court in McKinley only applied this principal after finding the disputed contractual terms ("general accounting policies and procedures" and "bad debts") to be ambiguous, requiring application of the rules of construction and consideration of the parties' intent as gleaned from their course of conduct. Id.

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[40] Plaintiffs' Reply In Further Support Of Their Motion For Partial Summary Judgment (May 13, 2014), 3-7. Uncertified copies of the 1980 Act under which the Enrollment Provisions were adopted are attached to Plaintiffs' May 13, 2014 reply brief as Exhibit A.

[41] Id.

at 770-71. Again, absent any ambiguity in the Enrollment Provisions, the City's previous practice does not dictate the parameters of the "contract" and is of no legal bearing.

However, because the parties addressed these previous amendments to some extent in their supplemental filings, the Court addresses them here. Even if the Court considers, *arguendo*, the City's previous procedures when amending its Pension Plans, it does not appear from the record that the City's course of conduct yields definitively in favor of either party's argument. Plaintiffs argue in their Supplemental Brief that "[t]he Plans were amended several times prior to the amendment at issue in this case" and that "[s]ignificantly, unlike the amendment at issue in this case, the prior amendments were not imposed unilaterally on employees" but "[i]nstead, employees were allowed to choose whether to be covered by the amendments."[43] Plaintiffs subsequently argued that only amendments that diminished rather than enhanced Plan participants' contractual rights required their written consent.[44]

Defendants in turn argue that in the past they have given Plan participants the option of whether or not to come under an amendment where the amendment included a "claw back," *i.e.* where the new provision would reduce the pension benefits already accrued through the years of service provided prior to the amendment's adoption.[45] Additionally, Defendants' assert that, possessing the authority granted by the State to modify the City's Pension Plans, the City is authorized to decide how to implement or exercise that authority[46]—ostensibly such that the City's decision in the past to give participants an election of whether or not to fall under an

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42 Plaintiffs' Supplemental Brief (Jun. 20, 2014), 4.

43 Id. at 2.

44 Plaintiffs' Response To Defendants' Motion To Strike (Aug. 20, 2014), 4-5.

45 Defendants' Motion To Strike (Jul. 18, 2014), 4-8.

46 Defendants' Response to Plaintiffs' Motion For Leave To Supplement Record And Plaintiffs' Second Supplemental Brief (Aug. 28, 2014), 3-5.

amendment is not dispositive nor does it act to constrain the powers already granted to the municipality to maintain and modify its Plans.

According to the parties' briefs, the City's Plans have been amended on multiple occasions; specifically, the parties discuss amendments adopted in 1978, 1986, and 2005.[47] Under the 1978 Pension Act, which amended the pre-existing Plans, any officer or employee coming under the terms of the act and employed by the City prior to the amendment's effective date was required to elect whether to come under the provisions of the act's amendments by "making written application to the board of trustees."[48] However, it is unclear from the record precisely how the 1978 Pension Act differed substantively from the Plan provisions in effect prior to the act's passage, so it is unclear how or if these changes "enhanced", "diminished" or "clawed back" rights previously granted.

Subsequently, certain amendments were adopted effective Jan. 1, 1986 "relating to beneficiary and disability benefits."[49] Plaintiffs assert that the changes effectuated under the 1986 amendment are "described in Section 6-2(a)(20) and (31) and (e) and Section 6-22(f)(1) and (g) of the Plans."[50] Again, the Court has no context for how these amendments altered beneficiary and disability benefits under the Plans as they existed prior to the amendment.

Finally, the parties discussed at length amendments to the Plans adopted in 2005. Among the changes were a ten (10) year vesting provision, an increase in the "multiplier" used in the formula to calculate retirement benefits, the adoption of a "30 and out" provision (allowed

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47 It appears the Plans were also amended in 1980 and that the Enrollment Provisions at issue in this case were enacted as part of that amendment. (Defendants' Motion, Exhibit D; Plaintiffs' Reply Brief In Further Support Of Their Motion For Partial Summary Judgment (May 13, 2014), Exhibit A). Additionally, the Plans were amended in 2010. (Defendants' Motion, 9 at fn. 14). However, the referenced ordinances effectuating the 2010 amendments are not part of the record.

48 Related Laws §§ 6-37(b), 6-222(b), and 6-367(b) (attached to Defendants' Motion as Exhibit B).

49 Plaintiffs' Response To Defendants' Motion To Strike (Aug. 20, 2014), Exhibit A—"Re-enrollment Card – Pension Acts as Amended In 1986" of Marion Battle and Onnie Sherrer.

50 Plaintiffs' Second Supplemental Brief (Aug. 5, 2014), 2 at fn. 1.

employees with thirty (30) years of service or more to retire with no age penalty or age adjustment), and an eighty percent (80%) "cap" on the pension calculation.[51] However, all of the foregoing changes were not applied to all Plans. The 80% cap apparently applied to the Firefighters Pension Plan and the General Employees Pension Plan but not to the Police Officers Pension Plan. [52] All plans were subject to the ten (10) year vesting provision.

The parties agree that participants of the Firefighters Plan and the General Employees Plan had the option to decide whether or not to come under the 2005 amendments and that participants of the Police Officers Plan were not given that option. The parties disagree, however, as to the rationale and legal significance of that distinction. Defendants contend firefighters and general employees were given an election because the 80% cap constituted a retroactive "claw back," citing to Hartsfield, *supra*, and Webb, *supra* (cases which also involved so called claw backs and in which pensioners affirmatively elected to come under the pensions "as amended"). [53] Defendants contend police officers were not given an option in 2005 because all amendments applicable to their Plan were prospective in nature.[54] Plaintiffs counter that the "retroactive/prospective dichotomy pressed by Defendants has no basis in law or fact"; instead, participants in the Police Officers' Plan were not required to give their consent because the vesting period amendment (which apparently reduced the applicable vesting period) enhanced rather than diminished police officers' contract rights such that no consent was required.[55]

The parties each provide plausible, retrospective explanations for why Plan participants were treated differently following adoption of the 2005 amendments such that attempting to

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51 The 2005 amendments were adopted via ordinance, which is attached to Defendants' Motion as Exhibit G. *See also* Plaintiffs' Supplemental Brief (Jun. 20, 2014), Exhibit A—"Enrollment Form For Pension Act As Amended in 2005" of Donald C. Cole.

52 Plaintiffs' Supplemental Brief (Jun. 20, 2014), 3; Defendants' Motion to Strike (Jul. 18, 2014), 6-7.

53 Defendants' Motion to Strike (Jul. 18, 2014), 5-8.

54 Id.

55 Plaintiffs' Response To Defendants' Motion To Strike (Aug. 20, 2014), 4-5.

ascertain the intent and legal force of the Enrollment Provisions at issue through the lens of that isolated conduct is akin to attempting to read tea leaves. Further, the Court is compelled to concur with Defendants in that the law distinguishes between possessing power and implementing power. As the Supreme Court noted in City of Atlanta v. McKinney:

> [S]tate law grants cities power related to the administration of municipal government. See [O.C.G.A.] § 36–34–2. This grant of authority does "not define the means by which the cities would and could manage their affairs" or "prohibit municipal governing authorities from choosing how such powers shall be exercised." Included among those powers is authority for cities "to define, regulate, and alter the powers, duties, qualifications, compensation, and tenure of all municipal . . . employees." [O.C.G.A.] § 36–34–2(2).

City of Atlanta v. McKinney, 265 Ga. 161, 165 (1995) (internal citations omitted). While the City may have previously allowed Plan participants to elect whether or not to come under a particular amendment, that decision as to how to exercise its power to maintain and modify its Pension Plans does not act to extinguish such powers which were conferred upon the City under the Constitution and state law and reserved by it under an unambiguous Enrollment Provision.

Having found that the Constitutional and statutory provisions referenced in Part A.1, *supra*, authorizes the City to establish, maintain and modify its Pension Plans pursuant to the local governing legislation, and having found in Parts A.2 and A.3, *supra*, that Plaintiffs clearly and unambiguously agreed to participate in those Plans as they had been amended or as they may thereafter be amended, the Court finds that the City's 2011 Amendment is valid and neither breaches Plaintiffs' employment contracts nor violates the Impairment Clause. Given the City appears to have followed the requisite procedures mandated under local law for so amending its Plans,[56] the Court finds the Ordinance reasonable and enforceable.[57]

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[56] *See* note 23, *supra*.

B. Impact of the Court's Ruling on Vested Employees

In Plaintiffs' Supplemental Brief, they assert that "any attempt to reserve the right to modify employees' retirement benefits would be ineffective as to employees whose rights vested prior to the amendment."[58] Plaintiffs argue that "even if the Court . . . were to conclude that the [E]nrollment [P]rovisions were intended to function as reservation of rights clauses, those provisions would be ineffective as to most of the named plaintiffs and many members of the class" who worked for the City for more than ten years and thereby obtained a vested right to their retirement benefits.[59] Plaintiffs cite to a First Circuit court case in support of this argument—McGrath v. Rhode Island Retirement Bd., 88 F.3d 12 (1st Cir.1996).

In McGrath, a former municipal employee brought an action against the Rhode Island Retirement Board to challenge its denial of his right to a pension based on his purchase of additional credits for military service. Id. Ultimately, the First Circuit affirmed the appellate court, which upheld an amendment to the municipal employees' pension plan that required actual time in service for pension benefits to vest without regard to time purchased as "pension credits" based on some form of alternate service, e.g. active duty military service. Id. at 20.

Interestingly, the First Circuit based its ruling on what it termed an "escape clause" (*i.e.* R.I. Gen. Laws § 45-21-47) in the plan that expressly authorized the state to amend the plan:

> From its very inception, the statute that paved the way for municipal employees to enter the state retirement system included a provision reserving the state's power to amend the terms of the municipal members' participation . . . Under [the escape clause], the state reserves the authority to make changes to the pension plan, up to and including the termination of municipal participation

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57 The Court's ruling applies only to that portion of the Ordinance that increased the percentage of annual compensation Plaintiffs would be required to contribute towards their pensions as no other aspect of the 2011 Amendment has been challenged in this action.

58 Plaintiffs' Supplemental Brief (Jun. 20, 2014), 6.

59 Id. at 7.

> and the elimination of the pension rights of all employees (except those who have already retired).

Id. at 14. The court opined that it believed "that the architecture of the [municipal employees' pension plan] at most extends an offer of a unilateral contract to employees of participating municipalities, ***subject, however, to the reserved powers contained in [the escape clause]***." Id. at 20. The court ultimately held that because plaintiff was not vested at the time the amendment was enacted (*i.e.* he did not meet the age and service requirements established in the plan for vesting), he was indubitably subject to the amendment, which the court held "pass[ed] constitutional muster under the [federal] Contracts Clause." Id.

Although Plaintiffs suggest that McGrath stands for the "majority rule" that pension plan amendments are inapplicable to vested participants,[60] the First Circuit by no means held that to be an established principal:

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[60] Id. The McGrath court in fact merely noted "an emergent common-law rule" to the effect that "once an employee fulfills the service requirements entitling him or her to retirement benefits under a pension plan, the employee acquires a contractual right to those benefits, and the employer cannot abridge that right despite its aboriginal reservation of a power to effect unilateral amendments or to terminate the plan outright." McGrath, 88 F.3d at 18-19. Further, the court qualified its inclusion of this "emergent" rule considerably and noted:

> There is significant disagreement about when contractually enforceable rights accrue under [state and municipal pension] plans. *See, e.g., Nevada Employees Ass'n, Inc. v. Keating,* 903 F.2d 1223, 1227 (9th Cir.) (suggesting that nonvested employees have contractual rights subject only to "reasonable modification"), *cert. denied,* 498 U.S. 999, 111 S.Ct. 558, 112 L.Ed.2d 565 (1990); *Betts v. Board of Admin. of the Pub. Employees' Ret. Sys.,* 21 Cal.3d 859, 148 Cal.Rptr. 158, 161, 582 P.2d 614, 617 (1978) (en banc) (stating that the right to a "substantial" or "reasonable" pension accrues on first day of employment); *Petras v. State Bd. of Pension Trustees,* 464 A.2d 894, 896 (Del.1983) (explaining that rights accrue when vesting occurs); *Singer v. City of Topeka,* 227 Kan. 356, 607 P.2d 467, 475 (1980) (similar to *Petras,* but adding that rights remain subject to "reasonable modification"); *Sylvestre v. State,* 298 Minn. 142, 214 N.W.2d 658, 666–67 (1973) (taking the position that an employee's rights accrue on first day of employment); *Baker v. Oklahoma Firefighters Pension & Ret. Sys.,* 718 P.2d 348, 353 (Okla.1986) (holding that rights accrue only when an employee vests); *Leonard v. City of Seattle,* 81 Wash.2d 479, 503 P.2d 741, 746 (1972) (en banc) (similar to *Baker*). And, moreover, some courts cling to the notion that a state-sponsored retirement plan for public employees creates no enforceable contractual rights whatever. *See, e.g., Pineman v. Oechslin,* 195 Conn. 405, 488 A.2d 803, 809–10 (1985); *Spiller v. State,* 627 A.2d 513, 516 (Me.1993).

> ***Assuming, for argument's sake, that such a contract has significance for purposes of the Contracts Clause—a matter on which we take no view***—it nonetheless is clear that, under the contract terms, a member's rights to a retirement annuity are not secure until he or she has met the age and service requirements established in the plan (and, therefore, has become vested). Until such time, [the escape clause] permits the state to make modifications to, or even terminate, members' rights under the plan without offending the Contracts Clause . . . In terms of this case, then, the appellant's purchase of surrogate credits may have conferred certain rights on him, but it did so only against the backdrop of the state's reserved authority to modify those rights up to the point of vesting ***(if not beyond).*** And since McGrath was not vested when the Rhode Island General Assembly revised the MEP, his claim founders.

Id. (emphasis added)

This Court is not persuaded by McGrath. First, the First Circuit was clearly very careful in qualifying its wording, finding that—under the escape clause—the state was authorized to modify pension benefits up to the point of vesting ***if not beyond***. Further, the court "hasten[ed] to add a caveat" to its ruling:

> To our knowledge, all of the cases that have cabined the effect of an explicitly reserved power to amend involve private-sector retirement plans. It is unclear whether the same limitations apply *ex proprio vigore* to public-sector retirement plans. On one hand, principles of fairness argue for comparability of treatment. On the other hand, the very nature of a republican form of government and that government's unique duty to represent the public interest combine to create a special employment environment. Lawmakers pay homage to this reality in many ways . . . and there are sound policy reasons to recognize this difference in terms of maximizing the states' flexibility vis-à-vis the retirement benefits that it offers to public employees. Indeed, such concerns underlie the recognized presumption that statutory enactments do not create contractual obligations in the absence of an "unmistakable" intent

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Id. at 17. *See also* Davis v. Mayor & Alderman of City of Annapolis, 98 Md. App. 707, 714, 635 A.2d 36, 40 (1994) (identifying three competing views on public pension plans: (1) the "majority view" that pension plans are contractual in nature though subject to modification under appropriate circumstances, (2) a "strict contract" approach under which plans are not "unilaterally modifiable" by the government under any circumstance, and (3) an approach which "considers pension benefits to be mere gratuities from the government to the employee, alterable by the government at any time").

> on the legislature's part to do so. *See United States v. Winstar,* 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).

Id. at 19. Additionally, the court's holding in McGrath was ultimately predicated upon the fact the court found the escape clause to be effective as to McGrath who was ***not*** vested. Thus, the court's discussion of the potential impact of the clause on vested employees, although thoughtful, is nevertheless dicta. *See also* Taylor v. City of Gadsden, 767 F.3d 1124, 1134 (11th Cir. 2014) (rejecting plaintiffs' proposition that city firefighters who have over ten years of creditable service and are thus "vested in the rights of the pension program" have a "vested" right to a static employee contribution rate immune from legislative increase).

More importantly, this Court need not look to opinions of other jurisdictions when Georgia cases are instructive on this point. The holdings in Pritchard and its progeny—binding precedent upon this Court—plainly indicate that where a statute ***itself*** provides that it is subject to legislative change it ***may*** be amended and ***no "vested right" to unchanged benefits is ever created***. As previous noted, in Pritchard the Supreme Court of Georgia expressly held: "There was no contract that the plan of annuities and benefits should never be changed. On the contrary, it was recognized that the legislature might find it necessary to make changes; and ***even if he had vested rights . . . there was no vested right to a continuation of the original plan***, which experience might demonstrate would result disastrously to the fund and its members." Pritchard, 211 Ga. at 59. *See also* Merchants' Bank v. Garrard, 158 Ga. 867, 871 (1924) ("To be vested, in its accurate legal sense, a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent. A divestible right is never, in a strict sense, a vested right").

Notably, our Supreme Court in Pritchard upheld an amendment that eliminated pension disability benefits to a pensioner who was already receiving disability benefits. Pritchard, 211 Ga. at 58. Similarly, in Pulliam our Supreme Court found Pritchard controlling and upheld an amendment that terminated the disability pension benefits of a pensioner who had been receiving a disability pension from the Georgia Firemen's Pension Fund for almost twenty years. Pulliam, 262 Ga. at 411. Further, the Court notes that both Murray Cnty. Sch. Dist., *supra*, and DeKalb Cnty. Sch. Dist., *supra*, involved class action lawsuits brought by employees of those school districts—classes which this Court can only assume must have included employees whose pension benefits were already vested but who had not yet retired. Nevertheless, it appears those courts had no trouble applying the principals highlighted above to those classes *in toto*.

In light of the above and that Plaintiffs have not pointed the Court to any binding or even persuasive non-binding authority holding that vested government employees should be immune from an otherwise effectual legislative amendment to a pension plan, the Court finds the City's 2011 Amendment is effective upon all Plan participants hired prior to the Amendment's effective date pursuant to the provisions of Ordinance 11-O-0672.

CONCLUSION

Relying on the decisions in Pritchard and its progeny, Georgia courts have repeatedly held that government employees and their beneficiaries have no vested right in unchanged benefits where the pension or retirement plan at issue unambiguously provides for subsequent modification or amendment. Finding no ambiguity in the City's Enrollment Provisions and that they clearly authorize the City to amend its Pension Plans without breaching Plaintiffs' employment contracts or violating the Impairment Clause, the Court HEREBY GRANTS Defendants summary judgment and DENIES Plaintiffs' Motion For Partial Summary Judgment.

SO ORDERED this 10 day of November, 2014.

JUDGE JOHN J. GOGER
Fulton County Superior Court
Atlanta Judicial Circuit

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