COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2007-SC-0000294-DG

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
ACTION NO. 2000-CI-3636 AND
COURT OF APPEALS NOS.
2006-CA-000124 AND 2006-CA-000191

NORMAN JOHNSON,
CHARLES V. ROBINSON, AND JOHN L. GUMM

APPELLEES

BRIEF FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of this brief were mailed, first-class, postage prepaid, on this 9th day of June, 2008, to Everett Hoffman, Esquire, Priddy Cutler Miller & Meade, PLLC, 800 Republic Building, 429 West Muhammad Ali Boulevard, Louisville, KY 40202-2346; John Frith Stewart, Esquire, Stewart, Roelandt, Stoess, Craigmyule & Emery, PLLC, 6506 West Highway 22, P. O. Box 307, Crestwood, KY 40014; Judge Kimberly Bunnell, Ninth Division, Fayette Circuit Court, Fayette County Courthouse, 120 North Limestone Street, Lexington, Kentucky 40507; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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INTRODUCTION

After LFUCG enacted two separate ordinances to effectuate the intent to pay health insurance premiums for current and future retirees that had not opted out of the existing insurance plan, the Fayette Circuit Court erroneously held -- without reference to clear legislative history -- that the first ordinance required payment of premiums for all retirees (even those that had opted out), but then correctly held that the second ordinance ended the obligation by clearly expressing the Urban County Council's intent to exclude those that had opted out. The Court of Appeals departed from well-established constitutional precedent to erroneously hold -- for the first time -- that a governmental body was required to establish a new and separate rational basis for the second attempt to effectuate the same legislative distinction. Reversal is required to uphold LFUCG's clear legislative intent, and the inherent authority of legislative bodies to clarify, amend or revoke prior enactments.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant Lexington-Fayette Urban County Government desires oral argument and believes that oral argument would lead this Court to reject the faulty reasoning adopted by the Court of Appeals in reversing the trial court's holding that an ordinance duly enacted by an urban county legislative body did not violate equal protection mandates and was, therefore, constitutional.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Nature of the Proceeding

Appellees, Norman Johnson, Charles V. Robinson, and John L. Gumm are firefighters retired from Appellant Lexington-Fayette Urban County Government ["LFUCG"], who seek to take advantage of two ordinances to obtain publicly-funded health insurance benefits [the "Plan"] that Urban County Council ("UCC") did not intend to grant them. The two ordinances established a healthcare benefit program for retired LFUCG police and firefighters, but limited participation in the Plan to retirees who had, at their own expense, maintained participation in the plan after retirement. Appellees elected after retirement not to participate in the Plan. The first, Ordinance No. 217-99, [Appendix, Exhibit 4] (R. 146-148) (hereinafter the "1999 Ordinance") should be read not to include the Appellees in its coverage. The second, Ordinance No. 366-2000, [Appendix, Exhibit 4] (R. 149-152) (hereinafter the "2000 Ordinance") further clarified LFUCG's intent not to extend coverage to Appellees. The legislative classification recognized the distinction between two existing groups of retirees. The classification had a rational basis that met and exceeded the minimal requirements of equal protection standards under both the state and the federal constitutions.

Statement of Facts

LFUCG's longstanding policy regarding an employee's separation from the Plan.

Before enactment of the 1999 Ordinance, LFUCG had not paid health insurance premium benefits for retirees, although they were permitted to

participate in the Plan at their own expense. At a temporary injunction hearing, Wally Skiba, LFUCG Director of Human Resources, testified that it was the Plan's long-standing policy that if a retiree opted not to stay in the Plan at his own expense, he could not later re-enroll in the Plan (Video Record of temporary injunction hearing, 02/09/01, 22/2/01 VCR/003, Tape B, at 13:10:18-13:12:22). This existing policy was described in a memorandum dated October 24, 1988 from David R. Cooke of the Division of Personnel to Connie Stephens of the Police & Fire Pension Fund which provided "Life, health and dental insurance coverage cannot be dropped at the time an employee retires and then picked up at some later date." (R. 135; Video Record 22/2/01 VCR/003, Tape B, at 13:12:22-13:13:45). Appellees presented no evidence that a contrary interpretation of the policy was ever in effect, i.e., that a retiree who opted out of the Plan could later opt back in.

Appellees' exit from the Plan.

According to the Complaint (R. 2-3), Norman Johnson retired July 15, 1983, and discontinued participation in the Plan on June 2, 1988. John Lewis Gumm retired January 4, 1980, and discontinued participation in the Plan in 1988. Charles V. Robinson retired January 1, 1991, and discontinued participation in the Plan at that time.

Mr. Johnson dropped out of the Plan because a subsequent employer offered better and cheaper coverage (Johnson depo., 31:16-24) (R. 959). Mr. Gumm dropped the Plan for the same reason; he was covered under a Humana plan, and later by Medicare (Gumm depo., 16:15-25) (R. 939). Mr. Robinson

exited the Plan upon retirement, as he was eligible for Medicare and less expensive supplemental insurance (Robinson depo., 18:8-19:12) (R. 948). Mr. Robinson signed a "Waiver of Health Insurance Coverage" dated January 28, 1991, which provided:

> "It is my understanding that once I drop my health insurance coverage and begin drawing a retirement check, I can not obtain coverage through the group plan at some later date, unless I am re-employed in a full time Civil Service or Non Civil Service position by the Urban County Government."

Appellees elected to leave the Plan.

Each Appellee specifically elected to leave the Plan, and thereby stop paying premiums, at the time of or subsequent to his retirement. For each Appellee, there was a gap of approximately 10 to 12 years between the time he left the Plan and the commencement of this lawsuit. Each Appellee had the opportunity to maintain coverage by continuing to pay premiums.

The Plan risk pool.

The Plan has always consisted of a group of participants that includes active employees, certain retirees, and the dependents of both active and retired employees. There is not, and never has been, a separate risk pool for retirees (Skiba depo., 40:16-17) (R. 635). LFUCG pays a premium benefit only for the active employee or, upon enactment of the ordinances at issue in this case, the designated retirees. As an additional benefit, dependents are eligible for coverage purchased by the employee or retiree. Because all participants are in

the same pool, the claims experience of the Plan affects the premium costs for all participants, be they active employees, retirees, or dependents.

Legislative History

In 1998, in response to a widespread desire to provide health insurance benefits for retired police and firefighters, the UCC took up the issue. To review the available options, LFUCG created an Ad Hoc Committee consisting of council members, staff, and several retired and active police officers and firefighters. The Ad Hoc Committee held five lengthy and substantively detailed meetings. The transcripts of these meetings form an important part of the legislative history of the ordinances. Upon completion of its review, the Ad Hoc Committee made its report to the Council's Budget and Finance Committee on October 22, 1998, which provided in part:

> Should this benefit be extended to all Urban County retired employees or just those who have elected to continue in the health plans of the Government? **Because of technical reasons related to the group plan and it's coverage and the possible adverse effect of new enrollees whose health status could adversely effect the health pool; the committee voted with one dissent and one abstention to not extend the benefit and to cover only those current retirees and future retirees who elect to continue with the LFUCG plan**. Mr. Mitchell moved that "*This enhanced benefit be provided to only those retirees from the Police and Fire Divisions and the City Employees' Pension Fund; be included only if they have opted to maintain the health benefit that is provided by the Lexington Fayette Urban County Government.*"

(R. 136-141) (Emphasis added; italics in original).

The Budget and Finance Committee unanimously passed a motion "[T]hat the UCC provide health insurance at the single benefit level to all the Police and Fire and City Employees Pension Fund (current and future) **retirees who have continued their coverage** under the government's health insurance plan" (emphasis added). (Budget and Finance Committee Minutes, R. 142-145). The minutes further reflect that "Dr. Stevens stated that if they admit anybody who wants to, it would adversely affect the risk management of the plan and add significantly to the cost." (Id. at 143)

Two weeks later, at its Work Session of November 10, 1998, the UCC voted 12-0 that, pending resolution of certain issues, the benefits be provided to "**retirees who have continued their coverage** under the government's health insurance plan;" (R. 416) (emphasis added). Thus, the record clearly reflects that the UCC, the legislative body that ultimately enacted the 1999 Ordinance, expressly voted to limit application of the benefits to those retirees who had not opted out of the Plan.

The Ordinances

On August 19, 1999, the Council enacted the 1999 Ordinance (R. 146-148) (Appendix, Exhibit 4). Section 2(b) of the Ordinance states:

> "The Urban County Government shall provide, on behalf of all members of the Policemen's and Firefighter's Retirement Fund who retired prior to July 1, 1999 and who were participants in the group health insurance plan coverage provided to Urban County Government employees and retirees prior to July 1, 1999, the following benefits". . .

Section 2(c) provides: "No benefits shall be available under this section to retired members of the Policemen's and Firefighter's Retirement Fund who were

not, prior to July 1, 1999, participants in the group health insurance plan coverage provided to Urban County Government employees and retirees." The foregoing language is consistent with the intent expressed by the Ad Hoc Committee, Budget and Finance Committee, and the UCC, and with the Plan's longstanding practice of not permitting re-enrollment by retirees who had elected to discontinue coverage.

After the passage of the 1999 Ordinance, but before passage of the 2000 Ordinance, the LFUCG received multiple requests from retirees to re-enroll in the Plan. Mr. Skiba testified that he contacted members of the Council to confirm the intent of the Ordinance. After that consultation, he advised such retirees that they were not eligible to re-enroll in the Plan, and that the Ordinance was intended as an enhanced benefit to those retirees who had continued participating in the Plan at retirement (Video Record 22/2/01 VCR/003, Tape B, at 13:47:26-13:48:47).

Appellees filed this action, asserting that the phrase "prior to July 1, 1999," meant "at any time prior to said date" and that they were therefore entitled to coverage and premium benefits under the 1999 Ordinance. (R. 3)

On December 5, 2000, the UCC enacted the 2000 Ordinance (R. 149-152) (Appendix, Exhibit 5). The stated purpose of that Ordinance "is to clarify the intent of the Council in passing the 1999 Ordinance and is not intended to change in any way the manner in which the Ordinance has been interpreted and applied." Further, the Ordinance states:

> [T]he intent of the Council in passing Ordinance No. 217-99 was that health care insurance plan premium

> *benefits be made available only to those members of* the City Employees' Pension Fund and the Policemen's and Firefighter's Retirement Fund who retired prior to July 1, 1999 and who maintained their participation in the group health insurance plan at their own expense up to that date.

Id.

The 2000 Ordinance is structured similarly to the 1999 Ordinance. Section 2(a) clarifies that "prior to July 1, 1999" refers to retirees who "did not terminate their participation in the group health insurance plan provided by the Urban County Government before that date." Section 2(b) includes the word "immediately" before the phrase "prior to July 1, 1999." Section 2(c) includes the word "immediately" before the phrase "prior to July 1, 1999."

Appellees subsequently amended their Complaint to add equal protection claims related to the 2000 Ordinance under the Fourteenth Amendment to the U.S. Constitution and Sections 2 and 3 of the Kentucky Constitution (R. 029-38). These claims implicated the rational basis test, requiring only that the statutory classification rationally further a legitimate state interest. Commonwealth v. Howard, 969 S.W.2d 700, 703 (Ky. 1998).

Procedural History in the Circuit Court

The Appellees made a motion for summary judgment on November 8, 2002 (R. 111). After briefing and a hearing, Fayette Circuit Judge Gary Payne denied the motion. (R. 163). The case was then reassigned from Division Two to Division Five of the Fayette Circuit Court. The Appellees then filed a renewed motion for summary judgment, which was essentially identical to the previous

motion (R. 197-215), even though, in the interim, no new facts or law had emerged.

Nevertheless, on June 1, 2004, the Fayette Circuit Court Judge Mary Noble granted in part and denied in part the Appellees' renewed motion (R. 280-289) (Appendix, Exhibit 2). The lower court addressed four key issues. First, the Court held that the plain language of the 1999 Ordinance extended health insurance eligibility and premium benefits to the Appellees, subject to the terms and conditions of the Plan. The lower court therefore granted summary judgment in Appellees' favor for the period from July 1, 1999, the effective date of The 1999 Ordinance, to December 5, 2000, the date of enactment of the 2000 Ordinance. The Court made limited rulings as to the damages it would assess for that period of time.

Second, the Court held that the 1999 Ordinance created no contractual obligations, vested rights, or property interests and accordingly LFUCG was free to modify, or even terminate, the benefits established thereunder. These holdings affirmed LFUCG's power to enact the 2000 Ordinance.

Third, the lower court held that the plain language of the 2000 Ordinance excluded Appellees from coverage and premium benefits.

The Court denied Appellees' motion for summary judgment on the fourth key issue: whether the distinction drawn in the 2000 Ordinance--between retirees who dropped out of the plan after retirement and those who stayed in the plan at their own expense after retirement--violated the Fourteenth Amendment to the U.S. Constitution and Sections 2 and 3 of the Kentucky Constitution. The

trial court directed the parties to take discovery to produce evidence of the basis for the distinction. Following a discovery period, the parties each filed motions for summary judgment on the remaining issues (R. 322-495; 496-532). During the briefing process, Appellees introduced new arguments based on Sections 59 and 60 of the Kentucky Constitution. On December 15, 2005, the Court effectively granted LFUCG's motion and overruled Appellees' motion:

> The [Urban County] Council acts in a legislative capacity, drawing lines and making classifications to protect the interest of good government. As long as the legislative body has a legitimate government interest—a rational basis—it may act in ways that treat members of the same class differently without violating equal protection mandates.
>
> On the whole, it appears from the record that the Council acted to protect a governmental interest. Certainly, its review of the legalities and effort to explain its reasons reflect that it acted in good faith, and not with a discriminatory motive. The discussions reveal that a primary concern was cost and program efficiency.
>
> * * * * *
>
> Another basis put forth by one councilman, Al Mitchell, is that giving the insurance to retirees who stayed in the group plan is an "enhancement" of the insurance option they chose at retirement. There is considerable logic in this view. Certainly, the terms and coverage of insurance is subject to change over the years, and it is foreseeable that coverage or the cost of it will change. Retirees choosing opt-out on retirement could reasonably be expected to understand this when they made their choice. For whatever reason, they made the choice they perceived as being in their interest at the time, even though they could reasonably be expected to realize that changes would occur in the plan they were rejecting. . . . It is rational for government to rely on choices made, in some cases years before, in future planning.

(R. 964-967) (Fayette Circuit Court Order entered December 13, 2005, Appendix, Exhibit 3)

The Opinion of the Court of Appeals

In its Opinion, the Court of Appeals affirmed the trial court's holding that, as to the 1999 Ordinance, "there is no ambiguity" [Court of Appeals Opinion, P.18; Appendix, Exhibit 1]. For that reason, the Court of Appeals declined to examine the legislative history in interpreting the 1999 Ordinance.

With respect to the 2000 Ordinance, the Court of Appeals held that, until LFUCG enacted the 1999 Ordinance, there were sufficient distinctions between the opt out retirees and the retirees who stayed in the Plan to support differing treatment: "We believe the circuit court's order regarding the constitutionality of Ordinance No. 366-2000 would be correct if LFUCG had not adopted the 1999 Ordinance permitting the opt out retirees to re-join the Plan." [Court of Appeals Opinion, p.21]. The Court of Appeals agreed that the reasonable and natural distinctions between the two groups justified disparate treatment by LFUCG under equal protection requirements and that LFUCG had a legitimate interest in controlling premiums for participants in the Plan [Court of Appeals Opinion, p.23]

Nonetheless, the Court of Appeals held that once LFUCG treated the two groups the same, it could no longer rely on those distinctions to treat the two groups differently:

> However, once the opt out retirees were permitted to re-join the Plan, LFUCG needed to put forth a rational basis for removing them from the Plan. Therefore, the rational basis analysis must proceed from there. With that as our starting point, we hold that LFUCG has not provided a rational basis for removing the opt out retirees from the coverage and premium benefits provided by Ordinance No. 217-99. Therefore, we must hold that Ordinance No. 366-2000 is

> unconstitutional, and that the circuit court erred in ruling otherwise.

[Court of Appeals Opinion, p. 21]. The Court went on to apply this novel approach to LFUCG's arguments that the 2000 Ordinance should be upheld as a constitutional exercise of the UCC's legislative power to make and change statutory classifications. In rejecting LFUCG's position on that issue the Court of Appeals states:

> [F]or LFUCG to remove the opt out retirees from the Plan once they have been admitted, LFUCG must show that there is some reasonable basis for treating the opt out retirees differently... This LFUCG has failed to do.... The opt out retirees do present an unknown risk.... However, LFUCG undertook that risk .... LFUCG extended health care benefits to the opt out retirees in Ordinance No. 217-99 knowing that the opt out retirees had not paid premiums. Having extended them, LFUCG cannot rationally support the withdrawal of those benefits based on facts known when the benefits were extended.

[Court of Appeals Opinion, p. 23-24]

The Issues Presented

The Opinion of the Court of Appeals and the dispositive orders entered by the Fayette Circuit Court present this Court with the following issues:

(1) Whether the Urban County Council may enact a second ordinance to clarify and/or amend a prior ordinance without establishing new and additional rational bases for any distinctions drawn in those ordinances?

(2) Whether the specific exclusionary language in the 1999 ordinance preventing the payment of premiums for those who are not members of

the plan prior to July 1, 1999 unambiguously excludes retirees that had previously opted out of the plan?

(3) Whether the legislative history of the 1999 ordinance demonstrates the UCC's clear intent to exclude those who had opted out of the plan?

Appellant urges the Court to answer each of the foregoing questions in the affirmative.

ARGUMENT

I. ADOPTION OF THE 1999 ORDINANCE DID NOT – AND COULD NOT – PRECLUDE THE COUNCIL FROM FURTHER CLARIFYING, ADOPTING OR CHANGING ANY CLASSIFICATIONS OR DEFINITIONS IN THE PLAN IN THE SUBSEQUENT 2000 ORDINANCE.

LFUCG contends that both the 1999 Ordinance and the 2000 Ordinance, based on their language and legislative history, clearly excluded payments of premiums for retirees that had previously opted out of the plan. But even if the Court of Appeals was correct that the 1999 Ordinance required payment of premiums for all retirees, the Court of Appeals erred in ruling that the Council could not subsequently enact the 2000 Ordinance[1]. The latter ordinance made the Council's intent in passing the 1999 Ordinance absolutely clear: retirees who had opted out of the Plan could not re-enroll and have LFUCG – and the taxpayers – pay their health insurance premiums.

In upholding the 2000 Ordinance as constitutional, Judge Noble noted that "As long as the legislative body has a legitimate government interest - a rational

[1] Since construction and application of statutes is a matter of law, the standard of review is *de novo*. Lexington-Fayette Urban County Government v. Lloyd, 115 S.W.3d 343, 347 (Ky.App. 2003).

basis - it may act in ways that treat members of the same class differently without violating equal protection mandates." [Fayette Circuit Court Order; Appendix Exhibit 3] (R. 965). Based on the evidence presented, the trial court determined that the UCC had acted in good faith to protect a legitimate governmental interest and that the 2000 Ordinance was a constitutional exercise of the council's legislative power:

> Participating in a group insurance plan is not a fundamental right, but rather is a legitimately regulated privilege. Government must balance its duty to govern wisely with the individual retiree's right to equal protection under the law. If a governmental decision reflects a rational governmental basis, it is not discriminatory. The courts are not to judge "the wisdom, fairness or logic of the legislative choices," only whether there is a legitimate governmental interest. F.C.C. v. Beach Communications, Inc. 508 U.S. 307, 113 S. Ct. 2096, 12 L. Ed. 2d 211 (1993). Id.

In analyzing a constitutional challenge to a statute on equal protection grounds, the Kentucky courts rely on both federal and state case law for guidance. The equal protection standards for legislative classification under the state constitution are the same as those under the Fourteenth Amendment to the federal constitution and a single standard can be applied to both the state and federal constitutions. Commonwealth v. Howard, 969 S.W.2d 700, 703 (Ky. 1998) (constitutionality of juvenile DWI statute's 0.02 percent blood alcohol content standard). In deciding the Howard case under Sections 1, 2, 3, and 59 of the Kentucky Constitution, this Court relied heavily on two U.S. Supreme Court cases that construed federal classification standards: Heller v. Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L.Ed.2d 257 (1993) (constitutionality of Kentucky's

involuntary mental health commitment procedures) and F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S. Ct. 2096, 124 L.Ed.2d 211 (1993) (constitutionality of distinction in franchising requirements between multiple-subscriber cable TV facilities and single-building cable TV facilities).

Unless a classification requires some form of heightened review because it jeopardizes the exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, equal protection requires only that the classification rationally further a legitimate state interest. Howard, supra, at 703. No such fundamental right or suspect classification is involved here; the applicable standard of review is the rational basis test.

Under the rational basis test, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Howard, supra, at 703. Where there are "plausible reasons" for the legislature's action, "our inquiry is at an end." Beach, supra, at 313-14. Whether the posited reason for the challenged distinction actually motivated the legislature is "constitutionally irrelevant." Id. at 318. So long as the statute's generalization is rationally related to the achievement of a legitimate purpose, the statute is constitutional. Howard, supra, at 703-04.

Rational basis review "is a paradigm of judicial restraint." Beach, supra, at 314. Rational basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." Heller, supra, at 319. Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the

wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." Id.

A. The opinion of the Court of Appeals reveals a disposition to judge the logic of choices made by the UCC.

Here, the Court of Appeals apparently assumed "a license...to judge the wisdom, fairness or logic of choices" made by the UCC. Devoting over 5 pages of its Opinion, the lower appellate court summarized, in a critical fashion the testimony of all of the LFUCG witnesses offered in response to the Circuit Court's order to develop the record more fully on the constitutionality of the 2000 Ordinance. See, Heller, supra.

In its conclusion of the summary of the testimony, the Court of Appeals observes that the testimony demonstrated that the Committee members, and hence the UCC, "...did not have any specific information regarding the cost difference to the Plan for opt out retirees versus continuous retirees or of the claims experience for the opt out retirees." [Opinion of Court of Appeals, p.16]. Without giving any reason why its critical evaluation of the testimony had any significance, the Court of Appeals then discusses the ambiguity in the 1999 Ordinance which was raised by virtue of LFUCG's cross-appeal.

This critical evaluation by the Court of Appeals of the testimony reveals its inappropiate judgment of the legislative choices made by the UCC. This Court should reject this judicial-usurpation of legislative choice by the Court of Appeals.

No Government has an obligation to produce evidence to sustain the rationality of statutory classifications. Howard, supra, at 703. Legislative classification is not subject to a courtroom fact-finding process and "may be

based on rational speculation unsupported by evidence or empirical data." Merely because the statute may result in some practical inequity does not cause it to fail the rational basis test. Id. A legislature that creates categories need not "actually articulate at any time the purpose or rationale supporting its classification." Heller, supra, at 320. As held by the Beach Court:

> Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . Thus, the absence of " 'legislative facts' " explaining the distinction "[o]n the record" . . has no significance in rational-basis analysis.

Beach, supra at 315.

"The legislature has great freedom of classification and the presumption of validity can be overcome only by the most explicit demonstration that a classification is hostile and oppressive against particular persons and classes." Howard, supra, at 704. The legislative process of line-drawing is entitled to particular deference by the courts:

> These restraints on judicial review have added force "where the legislature must necessarily engage in a process of line-drawing."... Defining the class of persons subject to a regulatory requirement--much like classifying governmental beneficiaries--"inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."... Such scope-of-coverage provisions are unavoidable components of most economic or social legislation. In establishing the franchise requirement, Congress had to draw the line somewhere; it had to choose which facilities to

> franchise. This necessity renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.

Beach, supra, at 315-16.

The Court of Appeals did not exercise appropriate judicial restraint where, as in this case, the legislative body was engaged "in a process of line-drawing." Nor did the lower appellate court allow the UCC "leeway" to correct any mistakes the Council may have made in adopting the language employed when it passed the 1999 Ordinance. While conceding that "LFUCG needed only to show some rational basis for excluding the opt out retirees" at the time the Council enacted the 1999 Ordinance, the Court of Appeals in its Opinion also recognized that the UCC had a rational basis to justify excluding the opt out retirees from rejoining the Plan before it passed the 1999 Ordinance. [Opinion, pp.19, 20-21; Appendix Exhibit 1]. As stated in the lower appellate court's opinion, the Council's reasons for excluding the opt out retirees can be synthesized "to three primary ones - the increased cost associated with retiree health care, the unknown risk presented by the opt out retirees, and the perceived inequity to the continuous retirees." [Court of Appeals Opinion p. 21].

Nevertheless, the Court of Appeals in deciding this case goes on to invent and impose an unprecedented and unwarranted burden on the ability of a legislative body to either change its mind on the substantive issue or at least to clarify what was actually intended when the legislative body passed the original legislation. What the Court of Appeals has really done in holding the 2000

Ordinance unconstitutional can be laid bare by quoting the following paragraph appearing on page 21 of the Court's Opinion:

> We believe that the circuit court's order regarding the constitutionality of Ordinance No. 366-2000 would be correct if LFUCG had not adopted Ordinance No. 217-99 permitting the opt out retirees to re-join the Plan. However, once the opt out retirees were permitted to re-join the Plan, LFUCG needed to put forth a rational basis for removing them from the Plan. Therefore, the rational basis analysis must proceed from there. With that as our starting point, we hold that LFUCG has not provided a rational basis for removing the opt out retirees from the coverage and premium benefits provided by Ordinance No. 217-99. Therefore, we must hold that Ordinance No. 366-2000 is unconstitutional, and that the circuit court erred in ruling otherwise.
>
> Id.

The foregoing holding by the Court of Appeals is simply wrong because it fails to recognize that the reasons for making a distinction between the opt out retirees and the retirees who stayed in the Plan not only existed before the passage of the 1999 Ordinance but also continued to be valid after its passage. The lower appellate court places an undue burden on the UCC to advance new and different reasons for making a distinction between one class of retirees and a different class because the UCC inadvertently did not make the distinction in the first ordinance.

B. The lower appellate court has wrongly shifted the burden from those who are challenging the constitutionality of legislation and has placed the burden on legislative body.

Not only has the Court of Appeals placed an undue burden on the UCC, its rule requiring the UCC to state new and different reasons has actually shifted

the burden from persons challenging the constitutionality of the 2000 Ordinance to the legislative body which enacted the Ordinance. Requiring the legislative body to defend its passage of legislation by coming up with a wholly new rational basis for its action is palpable error. This requirement clearly shifts the burden from any person challenging the law and places the burden on the legislative body. The Court has held that such shifting of the burden is impermissible:

> A person challenging a law upon equal protection grounds under the rational basis test has a very difficult task because a law must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980).

Commonwealth, ex rel, Stumbo v. Crutchfield, 157 S.W.3d 621, 624 (2005).

By announcing a rule that shifts the burden from the challenger to the legislative body, the Court of Appeals has created a novel and unjustified extension of equal protection requirements. Fundamentally, the lower appellate court has held that once a legislative body has treated different classes on an equal or similar basis, it has deprived itself of the ability to pass legislation thereafter which would re-establish distinctions or classifications that it could have adopted when it enacted the earlier legislation. This newly created addition to equal protection law constitutes an unwise judicial invasion of legislative power by inappropriately impairing a legislative body's ability to make reasonable classifications and by depriving the legislative body of any chance to correct its perceived mistake in drafting the prior legislation. The Court of Appeals clearly erred when it invented a novel and unsupported proposition that equal protection requires a legislative body to have a new and different rational basis before it can

withdraw a benefit previously granted to a class not even mentioned or identified in the original legislation.

C. There is no legal precedent for the new rule invented by the Court of Appeals which represents an unwarranted judicial invasion of the legislative process.

The Court of Appeals does not cite any authority or case law supporting its creation of a rule which requires new and different reasons to justify withdrawal of payment of health insurance premiums from opt out retirees once that benefit has been extended to them by an ordinance that was inartfully drafted. The case of Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408 (Ky. 2005), cited by the Court of Appeals in its Opinion, contains no language that even remotely supports the assertion made by the lower appellate court that "LFUCG cannot rationally support the withdrawal of those benefits based on facts known when the benefits were extended." [Court of Appeals Opinion, p.24]. But what is constitutionally wrong with the UCC correcting a mistake in granting benefits or even changing its mind with respect to making the benefits available to retirees who had opted out of the Plan? The Court of Appeals has apparently held that the UCC's action in passing the 2000 Ordinance amounted to "arbitrary and irrational discrimination", but such a determination is patently absurd because it is tantamount to saying that the UCC was irrational when it decided to take benefits away from retirees who had voluntarily and irrevocably left the Plan and who had not paid insurance premiums.

The retirees who elected to stay in the Plan paid premiums into the Plan to retain the availability of health insurance for themselves and their dependents.

Those who opted out did not. It was rational for LFUCG to determine that this disparity created a greater equitable claim to the subsequent premium benefits on the part of those who remained in the Plan. The reasonable belief that the retirees who stayed in the Plan had a greater equitable claim to the benefits supports the distinction in the 2000 Ordinance. It has been argued that LFUCG lacked actuarial data to support the belief that the retirees who remained in the Plan provided a financial benefit to the Plan; however, it is a reasonable proposition that those who paid in their premium dollars at least contributed to the Plan, and those who opted out did not. Legislative classification may be "unsupported by evidence or empirical data" and still be constitutional. Howard, supra, at 703.

The United States Supreme Court's reasoning in United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 101 S. Ct. 453, 66 L.Ed. 2d 368 (1980) should be considered dispositive of the equal protection issues raised in the case at bar. The Fritz decision provides a striking example by the United States Supreme Court of judicial deference to legislative line-drawing. At issue in Fritz was the constitutionality of a distinction for eligibility for certain pension benefits based solely on whether an employee had a "current connection" with the railroad business as of 1974. The constitutional challenge to that provision of the Railroad Retirement Act of 1974 was that it was irrational for Congress to distinguish between employees who had more than 10 years but less than 25 years of railroad employment simply on the basis of whether they had a "current

connection" with the railroad industry as of the changeover date. Writing for the Court, Justice Rehnquist stated:

> Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had a greater equitable claim to those benefits than the members of appellee's class who were no longer in railroad employment when they became eligible for dual benefits.

Id. at 178, 101 S Ct. at 461.

In the present case, a consistent paraphrase of Justice Rehnquist's foregoing statements would be as follows: The UCC could properly conclude that retirees who had stayed in the Plan and paid their own premiums had a greater equitable claim to have their premiums paid by LFUCG than the members of the opt out retirees class who were no longer in the Plan when they became eligible for the benefits afforded by the 1999 Ordinance.

As a consequence, the UCC definitely had a plausible reason for withdrawing payment of premium benefits from opt out retirees when the UCC passed the 2000 Ordinance. As the Court held in Keith v. Hopple Plastics, 178 S.W. 3d 463 (Ky. 2005), "In a case involving social or economic legislation where no fundamental right is at stake and no suspect class is implicated, a statute will comply with the Fourteenth Amendment's right to equal protection if it furthers a legitimate state objective and **there is any conceivable rational basis for the classes it creates**." Id. at 466. (emphasis added.)

In Fritz, supra, the United States Supreme Court concluded:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this

> reasoning in fact underlay the legislative decision,' *Flemming v. Nestor*, 363 U.S., at 612, 80 S.Ct., at 1373, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The 'task of classifying persons for... benefits... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line,' *Mathews v. Diaz*, 426 U.S. 67, 83-84, 96 S.Ct. 1883,1893, 48 L.Ed. 2d 478 (1976), and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Id. at 179, 101 S. Ct. at 461.

Likewise, in this case, the line was drawn differently in the 1999 Ordinance than it was in the 2000 Ordinance. But the fact that the line was drawn differently when the UCC enacted the 2000 Ordinance should be a matter for legislative, rather than judicial, consideration. This Court should reject the novel and unprecedented rule announced by the Court of Appeals that the UCC had to advance new and different reasons for passing the 2000 Ordinance which did not exist and which were unknown to the UCC when it passed the first ordinance. The adoption of such an improvident rule would constitute an unwarranted judicial invasion aimed at destroying the normal legislative process. Rather, this Court should demonstrate judicial restraint by affirming the Circuit Court's determination that the 2000 Ordinance was constitutional and did not violate equal protection mandates.

II. THE LANGUAGE OF THE 1999 ORDINANCE DEMONSTRATES LFUCG'S INTENT TO PROVIDE BENEFITS ONLY FOR RETIREES WHO HAD NOT PREVIOUSLY "OPTED OUT" OF THE HEALTH INSURANCE PLAN.

The language of the 1999 Ordinance expresses the Urban County Council's clear intent to provide additional retirement benefits only to those retirees who had not opted out of the plan. Section 2(b) states "the Urban County Government shall provide, on behalf of all members of the Policemen's and Firefighter's Retirement Fund who retired prior to July 1, 1999 and who were participants in the group health insurance plan coverage provided to Urban County Government employees and retirees prior to July 1, 1999, the following benefits" ... . [Appendix Exhibit 4, p.2] (R. 147) Section 2(c) states "No benefits shall be available under this section to retired members of the Policemen's and Firefighter's Retirement Fund who were not, prior to July 1, 1999, participants in the group health insurance plan coverage provided to Urban County Government employees and retirees." [Appendix Exhibit 4, p. 3] (R. 148).

Prior to this ordinance, LFUCG did not provide any health insurance premium benefits to retirees; retirees were only permitted to continue to participate in the Plan after retirement at their own expense. There were – and are – no provisions permitting a retiree to opt back in, once the retiree had made the voluntary decision to opt out of the plan. Indeed, employees are informed at retirement that they cannot opt back in once they cease to be members. See, e.g., Waiver of Health Insurance Coverage signed by Charles Robinson. (R. 134) Thus, the only reasonable reading of the 1999 ordinance requires that its application be limited to those retirees who had not previously opted out of the plan. Both the trial court and the Court of Appeals erred in holding that the language of the 1999 Ordinance unambiguously expressed the exact opposite

intent.[2] Appellees' suggestion that this Ordinance intended to reverse LFUCG's long-standing policy, and intended – for the very first time – to create a mechanism to permit retirees belatedly to opt back in to get brand new benefits from the taxpayers is an unreasonable reading of the 1999 Ordinance. Such a reading would be inconsistent with long-standing and well-understood policies. The language itself, and basic canons of statutory construction, demonstrate the error of interpreting the 1999 Ordinance to unambiguously grant new insurance benefits to retirees who had previously left the Plan.

In construing statutes, significance and effect shall, if possible, be accorded to every part of an act. McElroy v. Taylor, 977 S.W.2d 929 (Ky. 1998). The Court's mandate is to construe a statute, if possible, so that no part of it is meaningless or ineffectual. Stevenson v. Anthem Casualty Ins. Group, 15 S.W.3d 720, 724 (Ky. 1999). Specific language, like that in Section 2(c), must take precedence over more general language. Thompson v. Thompson, 172 S.W.3d 379 (Ky. 2005).

The Court of Appeals' interpretation of the 1999 Ordinance – to permit retirees to belatedly opt back in for new benefits – renders Section 2(c) meaningless and superfluous. This Court must, if possible, interpret Section 2(c) to have some significance and meaning. Its meaning, in the context of LFUCG's existing practice, was to grant coverage only to those retirees who were current members of the plan as of July 1, 1999 – those who continued their participation in the plan after retirement. Its meaning cannot be reasonably expanded to

[2] Since construction and application of statutes is a matter of law, the standard of review is *de novo*. Lexington-Fayette Urban County Government v. Lloyd, 115 S.W.3d 343, 347 (Ky.App. 2003).

include anyone who was ever a member of the Plan at any point in time but made a subsequent to choice to opt out for their own personal reasons, including the choice of a better insurance purchase.

By holding that the 1999 ordinance unambiguously covered all retirees and therefore permitted retirees to opt back in, the Court of Appeals held that no other reading of the Ordinance is possible. That is simply incorrect. Reversal is required to correct the erroneous holding that the language of the 1999 Ordinance can only be interpreted to mean the exact opposite of the Urban County Council's expressed intent. At the very most, if there are varying interpretations, the Ordinance could be considered ambiguous and therefore require interpretation based on the legislative history. As discussed below, the legislative history leaves absolutely no doubt as to the intent of the Urban County Council.

III. AT A BARE MINIMUM, IF THE 1999 ORDINANCE IS CONSIDERED AMBIGUOUS, THE LEGISLATIVE HISTORY DEMONSTRATES THE COUNCIL'S CLEAR INTENT TO EXCLUDE THOSE WHO HAD PREVIOUSLY OPTED OUT OF THE PLAN.

Rather than reviewing the 1999 Ordinance as a whole – as Kentucky law requires -- the Court of Appeals erroneously reviewed only a single provision of the ordinance to determine that no ambiguity existed. If this Court does not hold that the 1999 Ordinance unambiguously excludes retirees that voluntarily opted out of health insurance coverage, then the only other possible conclusion is that the Ordinance, when read as a whole, is ambiguous. Any such ambiguity is resolved through the unusually well-documented legislative history of this

Ordinance, which demonstrates the Council's clear intent to exclude those who had previously opted out of the plan.

The salient portions of the 1999 Ordinance are:

> (a) All members of the Policemen's and Firefighters' Retirement Fund... who retired prior to July 1, 1999, shall be eligible to participate in a group health insurance plan... approved by the UCC for such retirees....
>
> (b) The urban county government shall provide, on behalf of all members of the Policemen's and Firefighters' Retirement Fund who retired prior to July 1, 1999 and who were participants in the group health insurance plan coverage provided to urban county government employees and retirees prior to July 1, 1999, the following benefits....
>
> (c) No benefits shall be available under this section to retired members of the Policemen's and Firefighters' Retirement Fund who were not, prior to July 1, 1999, participants in the group health insurance plan coverage provided to urban county government employees and retirees.
> [Court of Appeals Opinion, p.5-6; Appendix Exhibit 1]

Having reviewed the above language, the Court of Appeals held that there is no ambiguity. The lower appellate court says, in effect, that since it can tell what each of the foregoing provisions mean when read separately; there can be no ambiguity since the language of each provision by itself is clear. The problem with not reading the provisions together as a whole is that this approach conflicts with the well-settled rule of construction that 'in expounding a statute, [the court] must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole and to its object and policy.' Democratic Party of Kentucky v. Graham, 976 S.W.2d 423, 429 (Ky. 1998). In that case, this Court

gave credit for the above statement of the rule to a Sixth Circuit case which was quoting a decision of the United States Supreme Court. Wathen v. General Electric Co., 115 F.3d 400, 405 (6th Cir. 1997) quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51, 107 S.Ct. 1549, 1555, 95 L.Ed 2d 39 (1987).

The Appellant respectfully submits that neither the Circuit Court nor the Court of Appeals looked to the provisions of the 1999 Ordinance as a whole or looked at its object and policy when it held that there was no ambiguity to be found in the 1999 Ordinance[3]. This is not to argue that there is a need to examine the legislative history of the 1999 Ordinance before determining that ambiguity exists when its provisions are read together as a whole. That would be putting the cart before the horse. Rather, the Appellant is suggesting that ambiguity can be found if the apparent object of each provision is carefully scrutinized, and then the plain language of each provision is given meaning and effect within the whole ordinance.

It is clear that the object of Section 2(a) is to grant health insurance benefits to all members of the Policemen's and Firefighters' Retirement Fund (the Fund) who were already retired. Section 2(b) identified the health insurance benefits which had been granted to all members of the Fund who had retired. The object of both Section 2(a) and Section 2(b) was to include all retired members of the Fund in the newly granted benefits and to spell out the benefits being granted. Thus, the language employed in both Sections was inclusionary, and the Sections did not have as their object the taking away of benefits from any

[3] Since construction and application of statutes is a matter of law, the standard of review is *de novo*. Lexington-Fayette Urban County Government v. Lloyd, 115 S.W.3d 343, 347 (Ky.App. 2003).

retired members of the Fund.

In contrast, the language employed in Section 2(c) is exclusionary because its object is clearly to take away benefits granted and specified in Sections 2(a) and 2(b). Unless the plain language of Section 2(c) is considered to exclude the Appellees, that section fails to achieve its apparent object of excluding someone from receiving the benefits granted in Section 2(a) and set out in Section 2(b). Instead, despite the undisguised attempt to deny some members of the Fund from receiving the benefits granted to all members in Section 2(a) and 2(b), "Section 2(c) simply reiterates the requirement that a person must have been a participant in the plan at some point before July 1, 1999, in order to qualify for any benefits." [Court of Appeals Opinion, p.10]

Reading Section 2(c) as a simple reiteration of eligibility requirements, however, results in denying any impact to the exclusionary language employed in Section 2(c). If the exclusionary language in Section 2(c) is totally ignored, doubt as to the object of Section 2(c) is immediately raised, and this doubt about what the exclusionary language was meant to accomplish leaves room for doubt as to the true meaning of Section 2(c). Such doubt constitutes an internal ambiguity within Section 2(c) which cannot be removed by saying that Section 2(c) should be construed as though it does not contain language of exclusion.

Whereas, Section 2(a) and 2(b) use inclusionary language in granting benefits, some reason must be advanced to explain why Section 2(c) employs language to deny benefits. If the language of Section 2(c) did not actually exclude some members of the Fund who had already been granted benefits by

the earlier provisions, what is its purpose, and why did the drafters of Ordinance No. 217-99 use the exclusionary language contained in Section 2(c)?

If it is impossible to tell from the language of Section 2(c) what members of the Fund it was seeking to exclude from participation in the group health insurance plan, the Ordinance is ambiguous. It is not possible to deny any import to the exclusionary language in Section 2(c) if the provisions of the Ordinance are read together, and the provisions are considered as a whole.

If the exclusionary language contained in Section 2(c) makes it inherently ambiguous, i.e. doubt exists as to what was meant to accomplish, this Court should attempt to construe the 1999 Ordinance in such a manner that "'...no part of it is meaningless or ineffectual.'" Brooks v. Meyers, 279 S.W.2d 764, 766 (Ky. 1955). Furthermore each Section should be construed in accord with the Ordinance as a whole. Commonwealth of Kentucky, Transportation Cabinet v. Tarter, 802 S.W.2d 944, 946 (Ky. App. 1990).

In interpreting the 1999 Ordinance, the Court "should ascertain from [its] terms, as contained in the entire enactment, the intent and purpose of the [legislative body], and to administer that intent and purpose." Seaboard Oil Co. v. Commonwealth, 193 Ky. 629, 237 S.W. 48, 49 (Ky. 1922). Finally, "[no] rule of statutory construction has been more definitely stated or more often repeated then the cardinal rule that significance and effect shall, if possible, be accorded to every part of the capital Act." Cosby v. Commonwealth, 147 S.W.3d 56, 58-59 (Ky. 2004). The Cosby Court also stated that "[t]he legislature's intention shall be effectuated, even at the expense of the letter of the law." Id., citing to

Commonwealth v. Rosenfield Bros. & Co., 118 Ky. 374, 80 S.W.1178, 1180 (Ky. 1904).

In the case at bar, the Court of Appeals refused to examine the legislative history of the 1999 Ordinance because by reading Section 2(c) alone, the Court could not find ambiguity in the entire ordinance. By limiting its analysis to the language in Section 2(c) without regard to how that section was related to the entire enactment, the Court of Appeals violated the cardinal rule that significance shall, if possible, be accorded to every part of the ordinance. Cosby v. Commonwealth, supra at 58-59. Rather, the lower appellate court limited its review of Section 2(c) to a cursory reading of that section and thereby deprived it of any significance or effect.

The legislative history clearly shows that the UCC intended to exclude retirees who had previously opted out of the Plan from receiving health insurance benefits paid by the taxpayers. Prior to the enactment of the 1999 Ordinance, it was a long-standing LFUCG policy that if a retiree opted not to participate in the Plan at his own expense, he could not at a later dater re-enroll in the Plan. (Video Record of temporary injunction hearing, 02/09/01, 22/2/01 VCR/003, Tape B, at 13:10:18-13:12:22). In 1989, the UCC created an Ad Hoc Committee to review the option of providing health insurance benefits for retired police and firefighters. After holding five lengthy and detailed meetings, the Ad Hoc Committee recommended to the UCC's Budget and Finance Committee to extend paid health insurance benefits to those retirees who had remained in the Plan after retirement. (October 22, 1998 Ad Hoc Committee Report; R. 137-

4 See Statement of Facts, infra, pp.1-7 for additional information

138) The Budget and Finance Committee unanimously passed a motion that LFUCG provide health insurance premiums to all police and fire retirees who had continued participation in the Plan. (Budget and Finance Committee Minutes; R. 142-145) On November 10, 1998, the UCC voted to provide health insurance benefits to "retirees who have continued their coverage under the government's health insurance plan." (Work Session Minutes; R. 416). The record clearly indicates that the UCC expressly voted to provide benefits only to those retirees who had remained in the Plan." [4]

It is error to adopt an interpretation of Section 2(c) that flies in the face of its clear object to make the benefits previously granted unavailable to some members of the Fund. By looking only at Section 2(c), the Court of Appeals did not recognize its intent and purpose, and as a consequence, the Court did not ascertain and administer the clear intent of the UCC to divest someone from entitlement to the benefits afforded by other sections of the 1999 Ordinance.

This Court should recognize the "object" or intent and purpose of Section 2(c), and having done so, should consult the unusually well-documented legislative history in this case in order to construe The 1999 Ordinance as carrying the out the intent of the UCC to exclude those retirees who had not paid premiums and had not remained in the Plan from participating in the Plan after July 1, 1999. This construction of the 1999 Ordinance would enable the Court to reject the broadened construction of the phrase "prior to July 1, 1999" for which the Appellees have contended. Instead of adding words to the phrase in order

4 See Statement of Facts, infra, pp.1-7 for additional information

to have it mean "*at any time* prior to said date," the Court could construe "prior to July 1, 1999" as meaning what the UCC intended for the phrase to mean. Namely, that "prior to July 1, 1999" meant that a retiree must have been a continuous member of the Plan up to the effective date of the 1999 Ordinance.

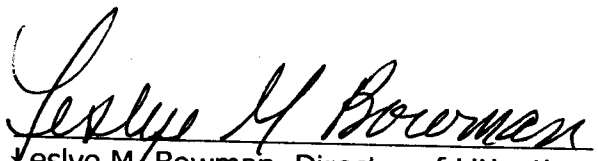
In addition to reaching the construction intended by the UCC based on the extant legislative history before passage of the 1999 Ordinance, this Court can and should look to the subsequently enacted the 2000 Ordinance to discover the legislative intent to be ascribed to the first ordinance. Parks v. Commonwealth, 192 S.W.3d 318, 325 (Ky. 2006). If the Court finds that the 2000 Ordinance clarifies the Council's intent in passing the 1999 Ordinance, the equal protection challenge to the 2000 Ordinance cannot be asserted and need not be addressed by the Court.

CONCLUSION

On the issue of whether the 1999 Ordinance actually conferred on retirees who had left the Plan the right to claim entitlement to the payment of health insurance premiums by LFUCG, this Court should look to the legislative history both before and after the effective date of the 1999 Ordinance. The Court should then hold that both Court of Appeals and the Circuit Court erred in refusing to refer through the legislative history to reach a construction of the original ordinance which effectively denied the opt out retirees the right to re-enroll in the Plan. In that event the Circuit Court should be directed to dismiss the claims originally brought by three retirees who had voluntarily and irrevocably elected to leave the Plan.

In the event that the opt out retirees are allowed to pose an equal protection challenge to the 2000 Ordinance, this Court should affirm the holding of the Circuit Court that the UCC had a legitimate government interest – a rational basis – to treat the retirees who stayed in the Plan and paid their health insurance premiums themselves differently from the retirees who had chosen to leave the Plan and not pay any premiums. The Court should preserve the ability of a legislative body to enact legislation clarifying its purpose and intent in adopting earlier legislation. The Court should reject the rule enunciated by the Court of Appeals which shifted the burden from the challengers of the Ordinance to the enacting legislative body by requiring the UCC to advance a new and different rational basis to support its passage of the 2000 Ordinance. The Court should then affirm the Order of the Fayette Circuit Court entered December 15, 2005, to the extent that the trial court ruled in its Order that the 2000 Ordinance did not violate equal protection mandates.

Respectfully submitted,



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