ROBERT F. CHERRY, JR., ET AL.	*	**IN THE**
Plaintiffs	*	**CIRCUIT COURT**
v.	*	**FOR**
MAYOR & CITY COUNCIL OF BALTIMORE CITY	*	**BALTIMORE CITY**
	*	
Defendant.	*	**Civil Case No.: 24-C-16-004670**

* * * * * * * * * * * * *

MEMORANDUM OPINION

This matter came before the court for oral argument on November 2, 2017, on the parties' cross motions filed pursuant to Rule 2-501.[1]

I. INTRODUCTION

Specifically, the parties filed the following papers, which the court has considered in their entirety: (1) Plaintiffs' Motion for Partial Summary Judgment on Count I of the Class Action Complaint, with Exhibits A through J[2] (filed May 4, 2017; Paper No. 20; hereinafter referred to as

[1] Plaintiffs' Motion also requests relief pursuant to Rule 2-502 (Motion at 1), but does not articulate a basis or argument for such relief. At oral argument, on inquiry of the court, Plaintiffs effectively abandoned their request for Rule 2-502 relief. As such, and for the reasons set forth on the record in open court on November 2, 2017, the court denies Plaintiffs' motion for relief pursuant to Rule 2-502.

[2] The Motion includes the following exhibits: Exhibit A – Letter of May 31, 1983, from then Mayor William Donald Schaefer to The Honorable Clarence H. "Du" Burns, [then] President[,] and Members of the City Council of Baltimore; Exhibit B – Second Trial Decision Re: Substantial Impairment, issued on September 6, 2011, by the Honorable Marvin J. Garbis, United States District Court for the District of Maryland; Exhibit C – First Trial Decision Re: Constitutional Claim, issued on March 16, 2011, by Judge Garbis; Exhibit D – Declaration of Joseph Esuchanko; Exhibit E – Class Certification Order, issued on September 6, 2011, by Judge Garbis; Exhibit F – Third Trial Decision Re: Reasonable and Necessary, issued on September 12, 2012, by Judge Garbis; Exhibit G – Memorandum and Order Re: Motion to Dismiss Count II, issued on November 30, 2012, by Judge Garbis; Exhibit H – Plaintiffs' Consent Motion to Voluntarily Dismiss Counts III Through VI and Count VIII Without Prejudice, filed December 18, 2012; Exhibit I – Memorandum and Order Re: Amended Complaint, issued on July 22, 2016, by Judge Garbis; and Exhibit J – Letter of February 28, 2011, from defense counsel to Judge Garbis.

the "Motion");[3] (2) Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiffs' Motion (filed June 28, 2017; Paper Nos. 21 and 20/1; hereinafter referred to as the "Cross-Motion"); (3) Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion for Partial Summary Judgment on Count I of the Class Action Complaint, with Exhibits A, A1 and B[4] (filed July 31, 2017; Paper No. 21/1; hereinafter referred to as "Plaintiffs' Opposition"); and (4) Defendant's Reply Memorandum in Support of Cross-Motion for Summary Judgment (filed August 31, 2017; Paper No. 21/2).

II. PROCEDURAL BACKGROUND AND STATUS

A. The Federal Litigation

In June 2010, Plaintiffs sued Defendant (the "City") in the United States District Court for the District of Maryland, Northern Division, *inter alia*, challenging the federal constitutionality of City of Baltimore Ordinance 10-306, which amended Article 22 of the Baltimore City Code, the codification of the Baltimore City police and firefighter retirement benefits plan defined in the Code as the "Fire and Police Employees' Retirement System of the City of Baltimore" and herein referred to as the "Plan." Following a tripartite trial, with as many written opinions, the District Court (the Honorable Marvin J. Garbis presiding) ruled, *inter alia*, that Ordinance 10-306 violates the Contract Clause (Art. I, Sec. 10 of the United States Constitution) and (by agreement of the

[3] Plaintiffs' Class Action Complaint (Paper No. 1, hereinafter referred to as the "Complaint") asserts the following claims: Count I – Declaratory Judgment; Count II – Breach of Contract on behalf of "Retired and Disabled Plaintiffs"; Count III – Breach of Contract on behalf of "Retirement-Eligible Plaintiffs"; and Count IV – Breach of Contract on behalf of "Active Plaintiffs."

[4] Exhibit A is a spreadsheet titled Plaintiffs' Response to Factual Assertions in Defendant's Cross-Motion for Summary Judgment; Exhibit A1 is titled "List of Key Players"; Exhibit B is Appellant's Brief and Record Extract filed in *Saxton v. Board of Trustees of the Fire and Police Employees Retirement System of the City of Baltimore*, filed May 17, 1972, Case No. 38, Court of Special Appeals of Maryland.

parties) dismissed as moot and without prejudice Plaintiffs' challenge related to the federal Takings Clause (set forth in the Fifth Amendment to the Constitution), as well as state law contract claims, and entered a final judgment subject to appeal. The parties cross appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit held that Plaintiffs' Contract Clause rights had not been impaired because Plaintiffs retained breach of contract remedies under Maryland state law. On this basis, the Fourth Circuit remanded the case for determination of whether state breach of contract remedies are available to Plaintiffs, which, the Fourth Circuit held, would obviate analysis and determination of whether the Ordinance violates the federal Contract Clause. The Fourth Circuit also reinstated Plaintiffs' federal Takings Clause claims as an avenue of potential relief for Plaintiffs following pursuit of state breach of contract remedies.

In consideration of the Fourth Circuit's ruling, Plaintiffs sought to resuscitate their state contract claims in the District Court (previously dismissed without prejudice by agreement), to which the City objected. The District Court, by memorandum and order issued July 22, 2016, denied Plaintiffs' request, declined to accept supplemental jurisdiction over Plaintiffs' state law contract claims, and (by separate order) stayed the federal case pending resolution of such contract claims in state court.

B. Plaintiffs Pursue Relief in State Court

Thereafter, on August 19, 2016, Plaintiffs filed a Class Action Complaint against the City (*see* note 3, *supra*), specially assigned to the undersigned on February 17, 2017, by order of the Administrative Judge of the Circuit Court for Baltimore City, the Honorable W. Michel Pierson. On March 17, 2017, the court convened a scheduling and status conference and issued a Modified

Scheduling Order of equal date, which reflects the parties' joint request to submit dispositive motions in advance of litigating the contested issue of class certification.

On April 5, 2017, the parties submitted to the court the Index to the Record before the District Court under cover of Plaintiffs' counsel's letter (hereafter the "Index"). On April 11, 2017, the parties submitted to the court in hard and electronic format the record materials identified in the Index, as well as a Stipulation Regarding Record Before the District Court, setting forth the parties' stipulation as to the authenticity of the trial transcripts and trial exhibits set forth in the Index. As required by the Modified Scheduling Order, on May 3, 2017, in advance of filing dispositive motions, the parties filed a Joint Statement of Stipulations of Fact and Other Matters (the "Stipulations of Fact").

The parties appeared for oral argument on the instant cross dispositive motions on November 2, 2017. Further to inquiry of the court during the hearing, on November 16, 2017, the parties filed Stipulation Regarding Certain Allegations in Class Action Complaint. Specifically, the Stipulation makes clear there is no dispute as to the employment and Plan status of each of the named Plaintiffs as set forth in Paragraphs 32 and 33 of the Class Action Complaint. On November 28, 2017, Plaintiffs filed a First Amended Class Action Complaint to substitute Plaintiff Christopher Houser for Plaintiff John Lewandowski (deceased) (hereafter the "Amended Complaint"). The City elected not to file a second answer (presumably pursuant to MD. RULE 2-341(a)); neither did it move to strike the Amended Complaint. Rather, on December 14, 2017, the parties filed a Stipulation Regarding Certain Allegations in First Amended Class Action Complaint identical to the parties' previous stipulations regarding the employment and Plan status of the named Plaintiffs but for the party substitution of Mr. Houser for Mr. Lewandowski (as well as an additional change to Paragraph 3 not relevant to the instant memorandum). (The Stipulation

Regarding Certain Allegations in First Amended Class Action Complaint is referred to as the "Stipulation of Plaintiff Status.")

In view of the limited purpose of the Amended Complaint and the Stipulation of Plaintiff Status regarding all named Plaintiffs, although arguably not a procedural necessity, the court construes and deems the parties' dispositive motions and related papers to pertain to the Amended Complaint.

III. MARYLAND RULE 2-501 AND UNDISPUTED FACTS

A motion for summary judgment is required to be supported by affidavit if the motion is based on facts not contained in the record. MD. RULE 2-501(a). Rule 2-501(b) pointedly mandates that "[a] response to a motion for summary judgment shall … (1) identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath." MD. RULE 2-501(b).

As referenced above, the parties stipulate to (1) the authenticity of all trial transcripts and trial exhibits identified in the Index; (2) all facts identified in the Stipulations of Fact; and (3) the employment and Plan status of each of the named Plaintiffs as set forth in the Stipulation of Plaintiff Status. For economy of space and time, the court will not restate here verbatim each fact set forth in the 48-paragraph Stipulations of Fact, but rather incorporates by reference herein the stipulations set forth therein for purposes of completeness. The court summarizes or recites below

those uncontested and stipulated facts on which the court places pronounced focus and importance in its adjudication of the pending dispositive motions.

It is undisputed that:

1. The Charter of the City of Baltimore confers upon the City the authority to establish and maintain the Plan, a defined benefits plan under which retirement, disability, and death benefits are a function of a formula tied to factors including, without limitation, employee length of service or disability, and employee earnings. (Stipulations of Fact ¶¶ 1, 5, 6, with internal citations to BALT., MD., CHARTER and BALT., MD., CODE art. 22.)[5];
2. In 1962, the Mayor and City Council of Baltimore City adopted the Plan, which was incorporated into Article 22 of the Baltimore City Code. (Stipulations of Fact ¶ 2, with internal citations to BALT., MD., CODE art. 22.);
3. The Plan covers all uniformed officers of the Baltimore Fire and Police Departments, as well as certain other public safety workers. (*Id.* ¶ 7.);
4. Participation in the Plan by covered workers is mandatory during their employment. (Stipulations of Fact ¶ 8.);
5. There are three categories of retirement benefit eligibility under the Plan: Service Retirement; Non-Line-of-Duty Disability Retirement; and Line-of-Duty Disability Retirement. (Stipulations of Fact ¶ 13, with internal citations to BALT., MD., CODE art. 22.);
6. In 1983, what is referred to as the "Variable Benefit" feature was added to the Plan as section 36A to provide post-retirement cost-of-living benefit increases for retirees and

[5] The court will endeavor to avoid confusion as to whether citation or reference to Article 22 refers to Article 22 before or after Ordinance 10-306. Where no distinction is made, the reader may assume adoption of the Ordinance did not affect a change in such provision.

beneficiaries with more than two years of retirement. (Stipulations of Fact ¶¶ 3, 21, with internal citations to pre-10-306 BALT., MD., CODE art. 22.);

7. The Plan, at Article 22, Section 36 of the City Code, requires that the City make annual contributions to fund the Plan. (*Id.* ¶ 9.);
8. Each year, the Plan actuary develops an Actuarial Valuation Report, which sets forth the actuary's opinion and recommendation to the Plan's Board of Trustees (hereafter the "Board") regarding the required annual contribution amount. The Actuarial Valuation Report is based on, *inter alia*, the interest rate set forth in Article 22, Section 30 of the City Code, and mortality and other statistical tables accepted by the Board. (*Id.* ¶¶ 9-11.);
9. Following the Board's approval of the assumptions and methods on which the Actuarial Valuation Report is based, as well as the actuary's recommendation and advice regarding the required contribution, the Board certifies the amount of the City's annual Plan contribution, which is then incorporated into the City's operating budget. (*Id.* ¶ 11.);
10. The City is required to balance its budget. (Stipulations of Fact ¶ 27.);
11. The City operates on a July 1 fiscal year. For example, FY 2011 begins July 1, 2010 and closes on June 30, 2011. (*Id.* ¶ 28.);
12. Prior to Ordinance 10-306, the Service Retirement Benefit for a member retiring following in excess of 20 years of service was 50% of the member's Average Final Compensation ("AFC") as then (*i.e.*, before adoption of Ordinance 10-306) defined in Article 22, Section 30(11). (Stipulations of Fact ¶¶ 14, 16, with internal citations to pre-10-306 BALT., MD., CODE art. 22; *see also* ¶ 29, *supra.*);
13. Prior to Ordinance 10-306, members who commenced employment prior to July 1, 2003, were eligible for Service Retirement upon attaining age 50 or upon accruing 20 years of

service. Members who commenced employment on or after July 1, 2003, were eligible for Service Retirement upon attaining age 50 with 10 years of service as a contributing member or upon accruing 20 years of creditable service with 10 years of service as a contributing member. (*Id.* ¶ 15.);

14. Prior to Ordinance 10-306 (and following enactment of Ordinance 93-262), active Plan members contributed six percent of their regular annual compensation to the Plan via automatic pay deduction. (*Id.* ¶ 17.);
15. Line-of-Duty Disability Retirement benefits are provided to members who are incapacitated for the performance of duty as defined in Article 22, Sections 34(e-1) and (f-1). As of the effective date of Ordinance 10-306, 720 of 4,565 retired members were receiving Line-of-Duty Disability Retirements benefits as defined in Section 34(e-2) or (f-2), depending on the nature and extent of the member's incapacitation. (Stipulations of Fact ¶¶ 18, 19, with internal citations to BALT., MD., CODE art. 22, and Mercer, *The Fire and Police Employees' Retirement System of the City of Baltimore, Actuarial Valuation Report for June 30, 2010* (dated October 2010).);
16. Non-Line-of-Duty Disability Retirement benefits are available for members who have completed five years of service and are incapacitated as defined in Article 22, Section 34(c). As of the effective date of Ordinance 10-306, 290 of 4,565 retired members were receiving Non-Line-of-Duty Disability Retirement benefits as defined in Section 34(d). (Stipulations of Fact ¶ 20.);
17. Prior to Ordinance 10-306, the Variable Benefit was contingent upon the annual investment performance of Plan assets as follows: any and all earnings between 7.5 and 10%, plus half the earnings in excess of 10% (if any), of the two funds that held assets earmarked for

retiree payments would be allocated and transferred to the Paid-Up Benefit and Contingency Reserve Funds – the two Plan funds established to hold Variable Benefit assets. The amount of earnings formed the basis to calculate the annual increase to the pension benefit to be paid for the expected life of each eligible member or beneficiary in accordance with the statutory rate. (Stipulations of Fact ¶¶ 22-23, with internal citations to pre-10-306 BALT., MD., CODE art. 22 (2009).);

18. Variable Benefit payments were not guaranteed by the City. (The pre-10-306 Code enunciated that any benefit increase "is not and does not become an obligation of the City of Baltimore.") Instead, once the retiree assets reached the defined performance threshold to invoke the Variable Benefit, such enhanced pension benefits would be paid so long as the Paid-Up Benefit and Contingency Reserve Funds permitted. (*Id.* ¶ 24.);
19. In 2002, the Plan's actuary, concerned about the negative impact of the Variable Benefit on the Plan's assets, specifically recommended that the City either (a) eliminate the Variable Benefit; or (b) reduce the statutory investment return assumptions, which would have the effect of increasing the City's annual Plan contribution. (Stipulations of Fact ¶ 25.);
20. "At the beginning of FY 2009, the City closed a $68.5 million deficit by imposing significant cuts. …Because of the severe decline in tax revenues that resulted from the Great Recession in 2008 and 2009, the City confronted a new, $120 million deficit going into FY 2010." "In spring 2010, the City faced its third consecutive year of declining revenues and multi-million dollar budget deficits as it prepared its budget for FY 2011." The City addressed the FY 2010 crisis with additional cuts to core services, but "unforeseen reductions in State aid and revenue shortfalls resulted in an additional, mid-year deficit of

$60.2 million" which necessitated more cuts including unpaid furloughs. The record snow fall that season required still more cuts to City services and personnel, and use of $30 million of emergency reserves. As a result of these conditions, "the City confronted a $121 million budget deficit for FY 2011." The FY 2011 budget included a $101 million contribution for the annual Plan, but the deficit did not take into account the "additional $64 million contribution that the City would be required to make if it retained the Variable Benefit and followed the Board's recommendation to reduce the investment-return assumption on certain assets." As a result, the City eked out still more cuts and raised $50 million with new taxes. (*Id*. ¶¶ 26, 29-33.);

21. City Council Bill 10-0519, introduced June 7, 2010, proposed changes to the retirement benefits provided under the Plan. The City Council voted to adopt the Bill on June 21, 2010. Then Mayor Stephanie Rawlings-Blake signed Bill 10-0519 into law as Ordinance 10-306, effective June 30, 2016. (*Id.* ¶ 34-36.);

22. The Preamble to Bill 10-0519 (later Ordinance 10-306) announces its purpose and factual underpinnings, including, but not limited to, the following:

> WHEREAS, Article 22 of the City Code currently includes a variable post-retirement benefit formula that provides increases to F&P retirees and beneficiaries in years in which the system achieves positive investment performance, but makes no provision for negative investment performance years.
>
> WHEREAS, the current formula results in a diminished asset base under which the F&P cannot fully benefit . . . .
>
> WHEREAS, it is now estimated that the annual F&P contribution needed to maintain the current variable post-retirement benefit increase structure is an additional $64 million on top of the budgeted $101 million require annual contribution, which would bring to $165 million the total annual contribution to F&P by the City for FY2011.

> WHEREAS, in its FY2011 budget the City projects a $121 million budget gap which is presently projected to be closed only after reducing basic services, closing facilities, and furloughing and laying off employees or by raising City taxes.
>
> WHEREAS, the City's Fiscal 2011 Preliminary Budget Plan reports that 'The major driver of cost growth is the City's pension contributions . . . .
>
> WHEREAS, a task force of the Greater Baltimore Committee . . . found the current contributions to fund the F&P are inadequate to fully cover its existing and anticipated liabilities, that the funded ratio of the F&P based on the June 30, 2009 market value is only 58.2%, and that the F&P underfunding problem 'threatens the City's fiscal stability … and could result in immediate and long term financial burdens on the City and its citizens.'
>
> WHEREAS, an independent actuary and an independent financial consultant have confirmed that the F&P, as presently constituted, is unsustainable . . . and have recommended changing the F&P's benefit structure in order to reduce the F&P's present and future actuarial liability and the City's concomitant annual contribution to the F&P.
>
> . . .
>
> WHEREAS, the City Council has concluded that it is necessary and reasonable to implement the recommendations of the independent actuary and financial consultant by modifying the current F&P structure in order to restore the actuarial soundness of the F&P in a manner that minimizes diminution of benefits to F&P members.

(Stipulations of Fact ¶ 35, with internal citations to BALT., MD., ORDINANCE 10-306.);

23. Ordinance 10-306 replaced the Variable Benefit feature with a tiered cost-of-living adjustment ("COLA"). Prior to 10-306, retirees (and beneficiaries of deceased retirees) who received periodic benefit payments for two or more years as of June 30 each year (beginning 1986) were eligible to receive the Variable Benefit. The Variable Benefit was market driven, payable annually in January, and was not an obligation of (*i.e.*, not guaranteed by) the City.

Under Article 22 as amended by Ordinance 10-306, retirees (and beneficiaries of deceased retirees) who receive periodic benefit payments for two or more years as of June

30 are eligible for an age-dependent, zero to two percent COLA, payable in January immediately following eligibility. A retiree member (or beneficiary) age 54 or younger on June 30 shall receive no increase; a one percent increase is paid to those aged 55 to 64 years as of June 30; a two percent increase is paid to those aged 65 and older as of June 30.[6] (Stipulations of Fact ¶¶ 37, 43-44.);

24. Under 10-306, for the first time, the City became a guarantor of all COLAs and past Variable Benefit increases.[7] "Ordinance 10-306 also permitted the City to transfer assets previously held in the Paid-Up Benefit Fund and Contingency Reserve Fund to the Plan's general asset account." (Stipulations of Fact ¶¶ 37, 43-44.);

25. As set forth above in Paragraph 17, prior to 10-306, assets dedicated for distribution under the Variable Benefit were held in specific funds separate and apart from general Plan assets. The assets held in the Variable Benefit dedicated funds were "invested in fixed-income securities and managed to match the payout streams of the post retirement increases." (Stipulations of Fact ¶ 47, with internal citation to Thomas Taneyhill & David A. Randall, *Fire & Police Employees' Ret. Sys., Comprehensive Annual Financial Report for the Year Ended Jun. 30, 2010* (Dec. 2010).)

26. In the recent and relevant time frame before Ordinance 10-306, the Plan included no benefit floor for retiree members or their beneficiaries. Ordinance 10-306 amended Article 22 to include a $16,000 minimum annual benefit for spousal beneficiaries of pre-July 1, 1996 retirees who completed 20 or more years in service. (Stipulations of Fact ¶ 47.);

[6] No COLA was payable in January 2011 for service and disabled retirees ages 55 to 64. (Art. 22, as amended by 10-306, §36(B)(h)(1); Stipulations of Fact ¶¶ 37, 43.)
[7] *Compare* ¶ 18, *supra.*

27. July 1, 1996 marked the start of the Deferred Retirement Option Plan, commonly referred to as "DROP." *See* BALT., MD., CODE art. 22, § 36B. On August 26, 2009, the City adopted a modification to the DROP benefit structure, which is commonly referred to as "DROP 2." As set forth below, Ordinance 10-306 modified DROP 2. (Stipulations of Fact ¶¶ 39-41, with internal citations to pre-10-306 BALT., MD., CODE art. 22 (2009).)

28. DROP was developed to enable retirement-eligible members to continue in active service without sacrificing the pension benefits they would have received in retirement. (DROP also enabled the City to retain and benefit from the skills and experience of senior F&P members.) Under the original DROP, those with 20 or more years of service (and therefore eligible for normal Service Retirement) who remained active in service received their regular salaries plus the sum of what would have been their retirement benefit. The would-be retirement benefit was deposited into an interest-bearing "DROP account" held for the benefit of the member until he or she retired. Upon a DROP member's retirement, the DROP account funds were available to the member for full withdrawal or as an add-on to monthly benefit payments. (*Id.* ¶ 39.)

29. Prior to Ordinance 10-306, Service Retirement eligibility depended on the date an employee became a Plan member. For those who became Plan members before July 1, 2003, Service Retirement was available upon the earlier of reaching age 50 or completing 20 years of service. For those who became Plan members after June 30, 2003, Service Retirement was available upon the earlier of reaching age 50 with at least 10 years of covered F&P service, or completing 20 years of service of which at least 10 years were covered F&P service. (Stipulations of Fact ¶¶ 37-38.)

Following the effective date of Ordinance 10-306, Service Retirement eligibility was bifurcated into those who were grandfathered into pre-10-306 eligibility criteria, and those who were not. Members who met pre-10-306 Service Retirement eligibility as of June 30, 2010, as well as members with 15 or more years of covered F&P service as of June 30, 2010, were grandfathered into pre-10-306 Service Retirement eligibility criteria.[8] All other active Plan members are subject to 10-306 normal Service Retirement criteria. (Stipulations of Fact ¶¶ 37-38, with internal citations to post-10-306 BALT., MD., CODE art. 22 (2010).)

Under Ordinance 10-306 normal Service Retirement benefits are available to Plan members upon the earlier of completion of 25 years of continuous F&P service, or reaching age 55 with a minimum 15 years of continuous F&P service. (*Id*.)

30. Ordinance 10-306 created a new early retirement benefit that enables non-grandfathered members to retire at their pre-10-306 Service Retirement eligibility date, or any date thereafter but before their post-10-306 Service Retirement eligibility date, subject to a statutory benefit reduction formula. (*Id*. ¶ 46.)

31. Prior to 10-306, Plan members were required to contribute six percent of their regular pay toward the Plan. Ordinance 10-306 modified this to a seven to 10% contribution depending on the year: a) as of July 1, 2010, seven percent of regular pay; b) as of July 1, 2011, eight percent of regular pay; c) as of July 1, 2012, nine percent of regular pay; and d) as of July 1, 2013, 10% of regular pay. (Stipulations of Fact ¶ 37.)

[8] Ordinance 10-357, effective August 10, 2010, removed the "continuous" service requirement for grandfathering members with 15 year of service, and provided a means by which members can purchase credits to satisfy the 10-306 15-year service requirement. (Stipulations of Fact ¶48.)

32. Prior to 10-306, the Plan operated under a "Regular interest" definition of 5.5 percent annually for the Annuity Savings Fund into which member contributions are deposited. Ordinance 10-306 modified this to three percent. (This change does not affect Service Retirement benefits.) (*Id*.);

33. Prior to 10-306, the Plan employed a two-tiered "Regular interest" investment assumption for valuation purposes (which figured into the annual City contribution): 8.25% on pre-retirement assets and 6.8% on post-retirement assets. Ordinance 10-306 modified the investment assumption to a straight eight percent on all assets. (*Id*.);

34. As set forth above, Ordinance 10-306 modified DROP 2. Before 10-306, DROP 2 was available to Plan members with 20 or more years of service as of December 31, 2009, as well as to Plan members hired on or after January 1, 2010, upon completion of a minimum of 20 years of continuous F&P service. (*Id*.)

    Following the effective date of Ordinance 10-306 (June 30, 2010), DROP 2 eligibility was bifurcated into those who were grandfathered into pre-10-306 eligibility criteria and those who were not. Members with 15 or more years of covered F&P service as of June 30, 2010, are grandfathered into pre-10-306 DROP 2 eligibility criteria upon completing 20 or more years of service. Members with fewer than 15 years of covered F&P service as of June 30, 20010, are not grandfathered. (Stipulations of Fact ¶ 37.)

    For those not grandfathered into the pre-10-306 DROP 2 eligibility, DROP 2 eligibility is attained upon completion of 25 or more years of covered F&P service. (*Id.*);

35. Prior to Ordinance 10-306, AFC (a calculation critical to determination of a member's retirement benefit amount) was the average annual regular pay earnable by a member for the 18 consecutive months during which the pay was highest. (*Id.; see also* ¶ 12, *supra.*)

Following the effective date of Ordinance 10-306 (June 30, 2010), a member's AFC (*i.e.,* AFC as a defined term) depended upon whether or not the member was grandfathered into the pre-10-306 AFC definition. Members with 15 or more years of covered F&P service as of June 30, 2010, are grandfathered into the pre-10-306 AFC definition. Members with fewer than 15 years of covered F&P service as of June 30, 20010, are not grandfathered. (Stipulations of Fact ¶ 37.)

36. Under 10-306, AFC is the average annual regular pay earnable by a member for the 36 consecutive months during which pay was highest. (Stipulations of Fact ¶¶ 37, 42, with internal citations to post-10-306 BALT., MD., CODE art. 22 (2010).)
37. As of the effective date of Ordinance 10-306, Plaintiffs Robert F. Cherry, Jr., Thomas S. Lake, Robert J. Sledgeski, Charles Williams, and Christopher Houser were members and beneficiaries of the Plan. (Stipulation of Plaintiff Status ¶ 4);
38. As of the effective date of Ordinance 10-306, Plaintiffs Houser and Williams were entitled to, and receiving, Plan benefits. (*Id.*);
39. As of the effective date of Ordinance 10-306, Plaintiff Sledgeski was eligible to retire, but was not entitled to receive Plan benefits because he remained working.[9] (*Id.*);
40. As of the effective date of Ordinance 10-306, Plaintiffs Cherry and Lake were working and not yet eligible to receive Plan benefits. (*Id*.);
41. As of June 30, 2010, Plaintiff Cherry had completed more than 15 years of service with the Baltimore Police Department. (Stipulation of Plaintiff Status ¶ 5);
42. As of June 30, 2010, Plaintiff Lake had completed fewer than 15 years of service with the Baltimore City Fire Department. (*Id*.)

[9] The parties agreed in informal discourse on the record at the November 2, 2017, hearing that Plaintiff Sledgeski was enrolled in DROP as of the effective date of the Ordinance.

IV. NO GENUINE DISPUTE OF MATERIAL FACT

Both sides contend there is no genuine dispute of material fact. In some measure, their shared opinion in this regard is self-evident, given that both sides have filed cross-motions for summary judgment (partial summary judgment, in the case of Plaintiffs). The papers and the Stipulations of Fact demonstrate the parties' respective commitment to detail in researching and documenting the conditions under which the City Council considered and ultimately voted in favor of Ordinance 10-306, Article 22 both before and following passage of the Ordinance, as well as the practical effect of Ordinance 10-306 on each of Plaintiffs Cherry, Lake, Sledgeski, Williams and Houser.

While the parties do not dispute the existence of these historic, objectively verifiable facts, the parties raise a sharp contest as to the significance of (some of) these facts. As Plaintiffs observe: "In contrast to the parties' serious dispute as to the state of the law, the parties have only minor disagreements regarding the material facts; rather, the parties disagree as to the relevancy of certain facts and the inferences to be drawn from those facts . . . ." (Plaintiffs' Opposition at 2.)

The City asserts generally that (1) the City approved 10-306 against the backdrop of having several times pared back what had been eroded to whisper thin, anemic City services, and only when faced with no plausible alternative short of outright eliminating core safety services; and (2) amid the volatile swings of the global financial markets and related crises of the time, the pre-10-306 Variable Benefit imperiled the Plan's basic benefit. The City contends that the Variable Benefit threatened to consume entirely the Plan's basic benefit because of the Variable Benefit's market gains-based structure, and that Ordinance 10-306 was necessary to rescue the Plan from self-destruction, to ensure the Plan's health and viability for current and future members (and their beneficiaries), to enable the City to attract and retain fire, police and other emergency services

workers, and to position the City to accomplish these things without sacrificing core and other services for City residents.

Plaintiffs, on the other hand, present their view that Ordinance 10-306 is the product of the City's lackadaisical approach to its fiscal responsibilities. Plaintiffs urge that (1) the City approved the Ordinance to avoid the difficult task of ferreting out additional cost efficiencies in its challenging budget, favoring convenience over fulfilment of its commitments to Plaintiffs; and (2) had the City acted in accordance with the repeated advice and recommendations of the Plan's actuary directed at the sustainability of the overall Plan structure (including the Variable Benefit), the City's tills would have been sufficiently flush to support the Plan in its entirety – the basic benefit as well as the Variable Benefit. Plaintiffs posit that the City improvidently managed and oversaw funding of the Plan, including for example the City's failure to heed repeated advisements of Plan actuary Thomas Rowe beginning in 2002 that the City adopt lower interest rate assumptions for prospective earnings in order to support continuation of the Plan and its benefits structure. Had the City done right and done well, Plaintiffs argue, the Plan's health and sustainability would not have been imperiled, thus obviating the need to consider a legislative safety net the likes of Ordinance 10-306.[10]

[10] Plaintiffs commend the court's attention to Exhibit A to the Plaintiffs' Opposition, a 22-page, single spaced spreadsheet listing "Facts" asserted by the City in its papers and the Plaintiffs' "Response" to each such "Fact." Exhibit A is titled "Plaintiffs' Response to Factual Assertions in Defendant's Cross-Motion for Summary Judgment." The spreadsheet is largely dedicated to voicing Plaintiffs' view of the facts, not generating a dispute about the existence or non-existence of material facts. For example: "The unfunded liabilities of the Plan were the result of the City's conscious failure to adequately fund the Plan"; "Had the City adequately funded the Plan in accordance with the regular recommendations of the Plan's actuary, there would have been sufficient money in the Plan to pay all of the basic benefits, along with the anticipated Variable Benefit increases in the future"; "Any 'flaws' in the Variable Benefit system derive from the City's knowing and systematic underfunding of the Plan, and such flaws would not have existed had the City adequately funded the Plan"; "The only issue with the Variable Benefit increases was that the City no longer wanted to pay for them"; and "Ordinance 10-306 was not a measured response to a perceived problem with the Plan. Instead, it was the end result of the City's efforts to transform the Plan as quickly as possible, with no intention of preserving as much of the existing benefits as possible." (Plaintiffs' Opposition at Ex. A, pp. 2, 4, 7, 12, 21.)

The City counters that in the context of the financial climate of the times, the reality of the City's budget rendered lowering interest rate assumptions a practical impossibility. Regardless, however, whether the City flatly ignored Rowe's advice or whether the City determined in the exercise of considered judgment that it was a fiscal impossibility to lower interest rate assumptions and maintain any semblance of core services for the welfare and protection of City residents is a distinction without a difference for purposes of the instant motions.

The parties expend a great deal of effort and space to persuade the court to view these historic, objectively verifiable facts through one or another particular lens: one with a view to the City's effort to survive a long financial winter; the other trained on the earnest unfulfilled expectations of the City's treasured emergency workforce. Overlaying the parties' respective assertions results not in incongruous, divergent versions of a story, but rather in a more fulsome and detailed explanation of events – not unlike two transparencies merged to create a complete picture. Though not without minor deviations, the parties' respective representations of historic fact reveal not two sides at material factual odds, but rather two sides at material perspective odds.

Recitations of perspective may well be important to a genuine, thorough understanding of the contextual underpinnings of the instant dispute and the conditions culminating in Ordinance 10-306; they do not, however, generate a dispute of material fact for the finder of fact, which is to say they do not materially affect the outcome of the parties' dispute. At bottom, resolution of the parties' dispositive motions is found in the second half of the 2-501 standard; that is to say, whether, in advance of trial, either movant is entitled to judgment as a matter of law.

V. APPLICABLE LAW

A. Declaratory Judgment Act

The Maryland Uniform Declaratory Judgments Act exists "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. It shall be liberally construed and administered." Further, the court is empowered to "declare rights, status, and other legal relations whether or not further relief is or could be claimed" regarding all many of legal disputes, including breach of contract. Moreover, "[a]ny person interested under a … written contract, or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, [or] contract, . . . may have determined any question of construction or validity arising under the . . . ordinance . . . or . . . contract, . . . and obtain a declaration of rights, status, or other legal relations under it." MD. CODE ANN., CTS. & JUD. PROC. §§ 3-401 *et seq.*

B. Breach of Contract

Section 42 of Article 22 of the Baltimore City Code (both pre- and post- 10-306) provides:

> Upon becoming either a Class A, a Class B, or a Class C member of the Employees' Retirement System, or upon becoming a member of the Fire and Police Employees' Retirement System, established under this Article 22, such member shall thereupon be deemed to have entered into a contract with the Mayor and City Council of Baltimore, the terms of which shall be the provisions of this Article 22, as they exist at the effective date of this ordinance, or at the time of becoming a member, whichever is later, and the benefits provided thereunder shall not thereafter be in any way diminished or impaired.

BALT., MD., CHARTER and BALT., MD., CODE art. 22, § 42 (2009 and 2010).

Buttressing the language of Section 42, Maryland common law holds that pensions are contractual in nature (as opposed to merely gratuitous) but not subject to the strict or rigid application of contract law one would apply in a commercial setting. More specifically, under

certain conditions, the government may unilaterally modify the terms of a pension contract, including the benefits provided thereunder. *City of Frederick v. Quinn,* 35 Md. App. 626 (1977).

In *Quinn,* five retired City of Frederick police officers sued the city over the city's unilateral 1961 legislative repeal of a section of the city's charter which covered the plaintiffs under a noncontributory retirement and disability benefit plan. The plaintiff retired officers sought declaratory judgment that they were entitled to benefits under the repealed portion of the charter, and damages for breach of contract. The repealed section of the charter (Article XVI, Section 196) stated in pertinent part:

> Any policeman, including the Chief of Police, who is in good standing and who has served on the force for a period of 20 consecutive years, including the years of service of any policeman now on the force, provided they are consecutive, and who has been retired from active service as provided in Section 196 shall be paid, for life, a sum of money equal to one-half of a prevailing salary, payable in semimonthly installments. Any policeman retired as provided in Section 196 who shall not have served on the force for a period of 20 years shall be paid, for life, a sum of money prorated in the proportion that the years he has served as a policeman bears to the whole period of 20 years.

Id. at 628 (quoting FREDERICK, MD., CHARTER art. XVI, § 196, prior to the 1961 legislative repeal).

The *Quinn* court examined the pension rights theories espoused by courts nationwide, which it divided among a gratuitous rights theory and a strict contract theory, the majority and minority approaches, respectively, at the time *Quinn* was decided. Addressing the trial court's subscription to the strict contract theory, the court reasoned:

> The court below followed the strict contract theory, holding that when pension rights vested upon employment or adoption of the plan those rights were immune from prospective legislative impairment. . . . Although we think that holding goes too far, we agree that a pension is more contractual than gratuitous. . . .
>
> It is reasonable to assume, as the court below found factually, that appellees were induced, at least in part, to their employment by the pension benefits held out at the time, just as they were induced by the salary then offered. . . . The future benefits vested as they were proratedly earned, just as the employees' rights to their salary vested as it was earned. Momentarily assuming for argument that the City could terminate either or both of these benefits at its option, by doing so it would have no more right to withdraw retroactively

> the pro rata pension benefits that had accrued than it could demand repayment of the salary the employees had earned and had been paid. To that extent at least, especially in view of the proportionate prorating provision of Section 196, the pension rights vested absolutely. The provision acts as an express assurance to the employees that pension benefits they have earned by satisfactory service cannot be divested.
>
> But the analogy of earned salary and vested pension does not withstand prospective comparison. The pension plan is not immutable and the government-employer need not keep its provisions precisely intact. As government grows in size and complexity and as more employees draw from the fund, changes must often be made to assure the soundness of the fund and permit its growth commensurate with its prospective needs. *The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee. In short, the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare. This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here.*

City of Frederick v. Quinn, 35 Md. App. 626, 629-31 (1977) (emphasis added).

Finding itself "in accord with our overseers," the *Quinn* court found its path lit well by the Court of Appeals. "'In all states, municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies.'" *Quinn,* 35 Md. App. at 633 (quoting *Saxton v. Bd. of Trs. of the Fire and Police Employees Ret. Sys. of Baltimore,* 266 Md. 690, 694 (1972)). Importantly, "the rights which have accrued under the terminated plan may not be retrospectively withdrawn from him." 35 Md. at 631.[11] *See also, Howell v. Anne Arundel Co.,* 14 F. Supp.2d 752 (D. Md.) (1998) (Davis, J.) (granting summary judgment to defendant county on federal Contract Clause pension dispute, holding that (1) plaintiff employees who had

[11] The court notes that, unlike the pension benefits at issue in the instant case, the pension benefits in *Quinn* were subject to vesting on a *pro rata* basis. This does not materially distinguish *Quinn* from the instant case for purposes of whether it is controlling law. Whether Plaintiffs' respective entitlement(s) to Plan benefits had "vested" as of the effective date of the Ordinance figures into evaluation, *infra,* of whether the Ordinance exacted prospective or retrospective modifications. The court revisits *Quinn* for that purpose below.

not yet qualified for benefits based on years of service and age lacked standing to sue; and (2) a law that prospectively affects benefits does not constitutionally impair rights within the meaning of the Contract Clause).[12]

Five years before *Quinn*, in *Saxton*, a Baltimore City fireman's widow was denied special death benefits in connection with the death of her husband. Mr. Saxton was a long time fireman who, after nearly 30 years in service, suffered an on-the-job injury in 1968, which disabled him from service. After receiving his full (regular) salary for a year following injury, in May 1969, Mr. Saxton was involuntarily retired and received a special disability benefit. On January 1, 1970, Mr. Saxton died of his work-related injury. Following her husband's death, Mrs. Saxton applied for a special death benefit under Article 22, Section 34(i) (since amended). Although it was undisputed that Mr. Saxton's work injury caused his death, the Board denied the death benefit because he retired prior to his death. Section 34(i) required as a condition precedent to receipt of the benefit that the plan member's death "'aris[e] out of and in the course of the actual performance of duty.'" *Saxton*, 266 Md. at 692 (quoting BALT., MD., CODE art. 22, § 34(i) (1966)).

Mrs. Saxton argued that, against the backdrop of the legislative history and evolution of the statutory provision, Section 34(i) should not be read to "limit[] entitlement to death benefits to instances where death occurred in service, if it were occasioned by injuries sustained in the line of duty", and that pension law should be "liberally construed." *Saxton*, 266 Md. at 693-94. The Court of Appeals, affirming the denial of Mrs. Saxton's request for writ of mandamus, opined that the statutory language "presents no ambiguity and poses no problems of statutory construction."

[12] *Howell* also educates the reader regarding the interplay between state and federal law in Contract Clause disputes, noting that "state law informs the analysis of the question whether a contract exists, [and] whether there has been an 'impairment' is a federal question." Following a determination that defendant was entitled to summary judgment on the Contract Clause claim, the court declined to exercise supplemental jurisdiction over the plaintiff's breach of contract claim and, therefore, declined to engage in the *Quinn/Saxton* "reasonable" analysis of the law's prospective impact on benefits. 14 F. Supp.2d at 756-57.

Id. at 694. "The ground rules here, to put it quite simply, were changed prior to the date when Lieut. Saxton sustained his injuries. In all states municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies." *Id.*

More recently, in 1994, the Court of Special Appeals had occasion to revisit this subject matter in *Davis v. Mayor and Alderman of Annapolis,* 98 Md. App. 707 (1994). In *Davis,* an Annapolis police officer sued for disability benefits, which had been denied by the Public Safety Disability Retirement Board. At trial, the court denied relief. On appeal, the Court of Special Appeals held that the Board erroneously applied an amended version of the benefits statute despite the fact that the officer's entitlement to his disability benefit had fully vested under the statute prior to amendment. In its analysis as to the contractual nature of the plaintiff's disability benefits and application of plan modifications to previously vested benefit entitlements, the Court of Special Appeals returns to old stomping grounds, citing with favor and quoting at length from *Quinn* and its forebear, *Saxton*. *Id.* at 715-20.

Saxton and *Quinn* make plain that a government employer is entitled unilaterally to modify a pension plan, including the benefits offered thereunder, provided such modifications are (1) prospective and not retrospective (*i.e.*, provided the modification does not operate to divest a plan member of benefits already earned), and (2) reasonable. In determining whether a prospective modification is reasonable, a court must consider the following: (1) whether the modification "was reasonably intended to preserve the integrity of the pension system by its actuarial soundness;" and (2) whether the modification causes "serious detriment" to the plan member. *City of Frederick v. Quinn,* 35 Md. App. 626, 631 (1977). The second prong of this inquiry calls upon the court to examine whether, notwithstanding the modification, the plan member retains "substantially the

program he bargained for" and whether any reduction or diminution of benefits has been balanced by comparable other benefits "or justified by countervailing equities for the public welfare." *Id.* (citing with approval *City of Downey v. Bd. Of Admin., Pub. Emp. Retire. Sys.*, 47 Cal. App.3d 621 (1975)).[13]

Although a federal case examining a claim of Contract Clause violation, *Maryland State Teachers Assoc., Inc. v. Hughes,* 594 F. Supp. 1353 (D. Md. 1984) (Miller, Jr., J.), offers helpful guidance in navigating the evaluation of whether a prospective modification is reasonable. In *Hughes*, the plaintiff class of public school teachers (and others) sued, alleging, *inter alia*, that a pension reform law violated the federal Contract Clause. In its discussion of the essential legal analysis steps, the court offers that a state may "constitutionally impair" the contractual obligations "imposed by its own contract . . . if the legislation doing so is reasonable and necessary to serve a legitimate or important public purpose." *Id*. at 1360. The court aptly cautions

> Where a state's own contract is involved, '*complete* deference [by a reviewing court] to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.' . . . If it has been determined that a contract exists which has been substantially impaired by subsequent legislative action, then, as previously explained, the third question a reviewing court must decide is whether the challenged legislation is reasonable and necessary to serve a legitimate or important public purpose. It is at this level of analysis that a more strict review is necessary to be applied to contracts of a state than to solely private contracts since the state's self-interest might cause its legislature to make legislative findings and judgments which are not objective but prejudiced in favor of the state. . . . Nevertheless, this is not to say that the legislative history and findings are to be ignored or that the court is to sit as a super legislature, making its own totally independent assessment of reasonableness and necessity. As the Court in *United States Trust Co.* said, it is only '*complete* deference' (emphasis supplied) to the legislative findings which is to be avoided. And, in both public as well as private contract cases, the level of court scrutiny will vary directly with the extent of the contractual impairment imposed by the challenged legislation.

[13] "Such modifications must be reasonable, and it is for the courts to determine upon the facts of each case what constitutes a permissible change. To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages." *City of Downey*, 47 Cal. App.3d at 632.

Id. (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S. Ct. 1505, 1519, 52 L. Ed.2d 92 (1977), and citing *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed.2d 569 (1983)).[14]

VI. AUTHORITIES AND LEGAL THEORIES THE COURT DECLINES TO APPLY

A. Persuasive/Non-controlling Authority

Plaintiffs propose two avenues of authority that, while not binding on this court, bear discussion.

First, Plaintiffs argue that the City did not reserve the right to modify the Plan as did its sister Baltimore[15] and Anne Arundel[16] Counties. This has no bearing on the application of the *Quinn/Saxton* line of controlling authority. (The court notes further that Anne Arundel County's code simply gives voice to the holding in *Saxton*.)

Next, Plaintiffs cite to cases from Alaska, Illinois and New York to urge the court to hold that Section 42 "ensures that, upon becoming a plan member, the member will receive a minimum level of benefits that cannot be reduced by subsequent legislation." Plaintiffs assert that upon the moment employment took effect, their entitlements to benefits set forth in the Plan fully and instantly matured (*i.e.*, vested); that Plaintiffs are contractually entitled to all benefits regardless of

[14] Should there be any misunderstanding in need of correcting, this court does not misconstrue the instant case to assert a Contract Clause claim; nor does the court conflate the analysis mandated by *Quinn* and *Saxton* to be the same as that applicable to a federal Contract Clause case. To be clear, the court finds value in *Hughes* for its advisement that when evaluating the intended purpose and effect of the Ordinance on Plaintiffs (should the court reach that point), the court ought not to accept as dogma the City's self-evaluation. *See also Davis v. Mayor and Alderman of Annap.*, 98 Md. App. 707, 713 (1994), *supra*, (quoting and citing *Pineman v. Oechslin*, 494 F. Supp. 525, 548 (D. Conn. 1980) (vacated on other grounds, 637 F.2d 601 (2d. Cir. 1981)), citing in turn, *United States Trust Co. v. New Jersey*, *supra*, for this same principle).

[15] "The county shall from time to time amend this subtitle in such manner as may be found to be advisable to meet changed conditions or, as in the light of experience, may be considered necessary." BALT. CO., MD., CODE § 5-1-259 (2017).

[16] "[T]he County reserves the right to amend or terminate each plan. If a plan is amended or terminated, amendment or termination may not adversely affect accrued benefits as of the effective date of the amendment or termination." ANNE ARUNDEL CO., MD., CODE § 5-1-103(a) (2017).

whether contingencies for any such benefit to apply have occurred. Therefore, Plaintiffs argue, the Ordinance operates retrospectively as to all Plaintiffs. (Motion at 28-29.) This argument does not account for the clear holdings of *Saxton* and *Quinn*, and rather turns on its head the unequivocal pronouncement that Maryland does not abide the strict contract approach rejected in *Quinn*. Further, these cases are inapposite and, in the court's opinion, the Motion does not fully recite their import.

The state constitutions of Alaska, Illinois and New York each contain mandatory language bestowing constitutional pension rights upon public workers. *Hammond v. Hoffbeck*, 627 P.2d 1052 (Ala. 1981); *In re Pension Reform Litigation*, 32 N.E.3d 1 (Ill. 2015); *Kleinfeldt v. New York City Employees' Retire. Sys.,* 324 N.E.2d 865 (N.Y. 1975). In each of these out-of-state cases, plaintiffs sued asserting that their constitutional rights had been violated because of a change to their pension benefits. The courts found that – because the rights were constitutional in origin – public employees' pension plan rights vest upon employment. That notwithstanding, each court further agreed that pension plans and entitlements thereunder are properly evaluated according to principles of contract law. The points of interest do not end there.

Notably, the *Hammond* court announced: "We . . . hold that the fact that rights in [the pension plan] vest on employment does not preclude modifications of the system; that fact does, however, require that any changes in the system that operate to a given employee's disadvantage must be offset by comparable new advantages to that employee." 627 P.2d at 1057. The *Kleinfeldt* court took pains to ensure that its holding not be construed beyond the court's intention: "This does not mean necessarily, and it should not be decided now, that no part of the formula, however trivial, or however within the contemplation of the 'contracting parties' would never be subject to retroactive modification. The retirement plan like any other human contract is not inscribed on

tablets of stone." 324 N.E.2d at 869. The *Pension Reform Litigation* court took the state legislature to task, chastising it for not shouldering its financial pension related burdens despite the fact that the financial problems that culminated in the challenged law were foreseeable (if not foreseen). The court expressly held that the challenged legislation would not pass muster under a reasonable and necessary Contract Clause analysis (were it to apply), and that the framers of the state constitution pointedly and intentionally omitted language entitling plan modifications to cure financial exigencies (noting that similar such permission was granted elsewhere in the constitution and citing to legislative history on the precise subject). 32 N.E.3d at 23-24.

The court is not persuaded to apply these authorities to the instant action.

B. ***Harford County v. Bel Air*** **and the Ghosting of** ***Quinn***

Plaintiffs urge application of *Harford County v. Bel Air,* 348 Md. 363 (1998), both for what it says and what it does not say. Specifically, Plaintiffs argue that *Harford County* establishes that Section 42 is not subject to unilateral modification and that the holding "overruled *sub silentio"* the *Saxton/Quinn* line of authority. (Motion at 31.) In *Harford County,* the town sued for declaratory judgment that the county violated a long-standing contract between the town and the county relating to waste disposal. The Court of Appeals rejected Harford County's argument that the doctrine of governmental immunity entitled it to "'abrogate its obligations under a contract entered into in the performance of a government function if dictated by the public good.'" *Id.* at 366. The Court, Judge Eldridge writing, held that Harford County was not protected by governmental immunity (noting that such an affirmative defense to breach of contract was legislatively abolished in 1976 by the General Assembly). In so holding, the Court noted that the "Court has consistently taken the position that 'Maryland law has never recognized the defense of

governmental immunity in contract actions against counties and municipalities' and that 'counties and municipalities are normally bound by their contracts to the same extent as private entities.'" *Id.* at 372.

Plaintiffs argue that *Harford County* establishes that Section 42 is not subject to unilateral modification and that the holding "overruled *sub silentio"* the *Saxton/Quinn* line of authority. The court disagrees on both fronts and declines to give the holding the effect Plaintiffs seek. In short, the court does not find plausible that the Court of Appeals would overrule a well-documented and oft-applied line of authority by design without announcing its purpose. The court finds even less allure in a theory that the State's high court might do so in a fat-fingered slumber.[17] Lest there be any doubt, as recently as July 2017, the Court of Special Appeals relied on *Quinn* and *Saxton* in *Priester v. Board of Appeals of Baltimore County,* 233 Md. App. 514 (2017). *Quinn* and *Saxton* remain the law of the State and apply to this case.

C. Preemption by Federal Bankruptcy Law

Plaintiffs ask that the court find that federal bankruptcy law preempts the City's "attempt to reduce its pension debt" through enactment of the Ordinance. (Motion at 40-48.) Plaintiffs' argument is founded upon its citation to then Mayor Stephanie Rawlings-Blake's testimony in the Federal Litigation (see p. 2, *supra*) that, in her view, if the City did "nothing" (as opposed to modifying the Plan), "the City would face bankruptcy." (Motion at 40, quoting Trial Tr., Feb. 2, 2012, at 27:2-6). On this premise, Plaintiffs surmise that the City decided it "was no longer convenient for the City to pay … promised pension benefits" and therefore enacted the Ordinance

[17] The court notes further that four years after *Harford County,* the federal district court operated under the correct impression that *Saxton* and *Quinn* remained the law of the State. *Howell v. Anne Arundel Co.,* 14 F. Supp.2d 752 (D. Md.) (1998) (Davis, J.).

to "'cram down' the City's pension debts outside of a bankruptcy proceeding" … "without payment of damages for the breach contract."[18] (Motion at 40.) Alighting upon what Plaintiffs appear to construe as an admission of sorts by Rawlings-Blake, Plaintiffs argue that the federal Bankruptcy Code at 11 U.S.C. § 903 preempts "the field of debt modification … even where the municipality lacks access to federal bankruptcy court," and therefore, the City's efforts essentially to reduce its pension benefits "debt" using the Ordinance is disallowed by federal law. *Id.* at 41 (citing *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016)). Plaintiffs assert the Ordinance is a "method of composition of indebtedness" absent creditors' consent that federal Bankruptcy law prohibits.[19] *Id*. at 43. Should this be so, Plaintiffs assert, the analysis under *Quinn* and *Saxton* is of no moment, as the court never reaches it.

Apart from citation to cases pertaining to preemption of debt restructuring within the bankruptcy context, Plaintiffs do not engage in more fulsome discussion of preemption law in the larger legal landscape. In order to ensure that the court has fully engaged Plaintiffs' argument, a brief overview of the subject is in order.

> The doctrine of federal preemption of state law arises under the supremacy clause of the United States Constitution, art. VI, cl. 2. Preemption occurs in any of three manners: (1) Congress may pass a statute that by its express terms preempts state law, (2) Congress, though not expressly so stating, may imply that it is preempting state law by occupation of an entire field of regulation, so that no room is left for supplementary state regulation, (3) Congress may speak neither expressly nor impliedly of preemption, nonetheless state law is preempted to the extent it actually conflicts with federal law; such a conflict occurs when (a) compliance with both state and federal law is impossible or (b) when state law stands as an impediment to a federal purpose.

[18] A "cramdown," as defined as by the Bloomberg Financial Glossary, is "[t]he ability of the bankruptcy court to confirm a plan of reorganization over the objections of some classes of creditors." https://isotranslations.com/resources/Bloomberg%20Financial%20Glossary.pdf (as of December 21, 2017).

[19] Section 903(1)'s proscription is directed at "State law prescribing a method of composition of indebtedness of" its municipality. The Ordinance is not a law of the State of Maryland. For purposes of this discussion, the court accepts without finding that a municipal law that prescribes a method of composition of its own indebtedness is encompassed within section 903(1)'s prohibition.

Abbot by Abbot v. American Cyanamid Co., 844 F.2d 1108, 1112 (4th Cir. 1988) (citing *Michigan Canners and Freezers Assoc. v. Agricultural Mktg. and Bargaining Bd*., 467 U.S. 461, 469, 104 S. Ct. 2518, 2522-23, 81 L. Ed.2d 399 (1984)); *see also Chateau Foghorn LP v. Hosford*, 455 Md. 462 (2017) (providing deep analysis of the "express," "field," and "conflict" forms of preemption and the application of preemption principles to areas traditionally dominated by state common law).

Plaintiffs' Motion does not announce at the outset of the preemption argument which form or forms of preemption Plaintiffs assert are at play. At page 41, Plaintiffs remark that "Because Congress has preempted the field of debt modification, a municipality has no . . . authority . . . ." Later, on page 43, Plaintiffs assert, "In Chapter 9, Congress expressly preempted the field of local government debt adjustment . . . ." Plaintiffs' argument appears in substance to rest exclusively on a theory of express preemption, and does not articulate an argument of field preemption as described above. Nonetheless, the court will evaluate both express and field preemption. Plaintiff does not assert conflict preemption.

Plaintiffs' theory requires, first, that the court accept that the City owed a "debt" to Plaintiffs, as this notion is the font from which the balance of the argument flows – specifically, that the Ordinance is a verboten involuntary "composition of indebtedness" to avoid breach of contract damages. From there, the argument goes, the *Quinn/Saxton* analysis is consigned to irrelevance. The initial question of whether the City owes a debt, however, is a matter of state, not federal, law. *In re Miller*, 292 B.R. 409 (9th Cir. 2003) (holding that, "[w]hile the dischargeability of debts in bankruptcy is governed by federal law, the existence and validity of a debt is determined by reference to state law. Congress did not intend to preempt state law on this point.") Determination of whether, under state law, the City owes debts to Plaintiffs requires the court to

examine state law on the subject, which is to say, the *Quinn*/*Saxton* line of authority. Absent scrutiny of the Ordinance against the contract principles announced through this well-established state common law, reference to Plaintiffs' alleged entitlements as a "debt" in the context of the federal Bankruptcy Code is misplaced.

The court notes that in the opening sentence of *Franklin,* a case upon which Plaintiffs place great emphasis, the Supreme Court instructs as to the meaning and effect of section 903(1): "The Federal Bankruptcy Code [at 11 U.S.C. § 903(1)] pre-empts *state bankruptcy laws* that enable insolvent municipalities to restructure their debts over the objections of creditors and instead requires municipalities to restructure such debts under Chapter 9 of the Code." 136 S. Ct. at 1942 (emphasis added). The court acknowledges that section 903(1) reads "State law" (not "state bankruptcy law"). *Franklin's* clarifying instruction appears to acknowledge that only once a claimant has established he is owed a "debt" according to applicable state common law does federal bankruptcy law step in to control the mechanism through which such debt may be treated by a municipal debtor in bankruptcy (or receivership).

Regarding field preemption, the court does not agree that Congress has regulated the field of local pension plan modification such that, outside the context of bankruptcy or receivership, the court could find that Congress has left no room for state or local law on the subject. Although not raised by Plaintiffs, the court does not find that the Ordinance "actually conflicts with" federal law, as compliance with both the Ordinance and federal law is not impossible; neither does the Ordinance impede a federal purpose.

Finally, although the court is not so cynical as to believe that fresh theories have no place in well-trodden legal territory, it must be acknowledged that, at least to the knowledge of this court and apparently to the knowledge of Plaintiffs' counsel, there is no case holding that federal

bankruptcy law preempts state (or municipal) pension plan/benefit modification outside the context of a bankruptcy (or receivership). The court is not persuaded that federal bankruptcy law preempts the City's modification of the Plan through the Ordinance.

VII. ANALYSIS

Count I for Declaratory Judgment requests that the court declare in summary or conclusive fashion matters which are informed in large measure by analyses applicable to Counts II through IV of the Amended Complaint. Therefore, the court will address the merits of the parties' cross motions as to Count I following analysis of the City's Cross-Motion directed at Counts II through IV.[20] Fundamental to the court's evaluation of the Motion (directed only at Count I) and the Cross-Motion (directed at all counts), the parties do not dispute the language of Section 42 and the court finds as a matter of law that each Plaintiff entered a contract with the City upon employment, the terms of which are set forth in Article 22 as of the date of each Plaintiff's employment.

A. Count II – Breach of Contract (Contractual Rights of Retired and Disabled Plaintiffs)

Incanting the holdings of *Quinn* and *Saxton*, the City offers language- and logic-based arguments that the Ordinance's elimination of the Variable Benefit is prospective and not retrospective. Section 36A(e)(ii) of the pre-10-306 Code provides in pertinent part: "The granting of any benefit increase under this section is contingent on the performance of the [Plan's] investment funds;" that the "continuation of any benefit increase previously accrued . . . is

[20] For purposes of clarity and housekeeping, consistent with the Stipulation of Plaintiff Status, the court construes "Active Sub-Class" to mean Plaintiffs Cherry and Lake; "Retired Sub-Class" to mean Plaintiffs Houser and Williams; "Retirement-Eligible Sub-Class" to mean Plaintiff Sledgeski; and "Class" to mean Plaintiffs Cherry, Lake, Houser, Williams and Sledgeski collectively.

contingent on the ability of the Paid-Up Benefit Fund and the Contingency Reserve Fund to provide these benefits in the future;" and that "§§ 37 and 42 to the contrary notwithstanding, any benefit increase does not become an obligation of the City . . . ." Pre-10-306 BALT., MD., CODE art. 22, § 36A(e)(ii).

In its language-based argument, the City asserts that the above-referenced language of (pre-10-306) Section 36A establishes as a matter of law that elimination of the Variable Benefit cannot form the basis for breach of contract liability. In its logic-based argument, the City argues that, because the Variable Benefit is market driven (Undisputed Facts ¶ 23, *supra*), the amount of the benefit to be paid (if any) is unknowable from one year to the next and, therefore, is, necessarily, prospective in nature. For the reasons set forth below, the court is not persuaded at this time that Section 36A's carve out or the market driven nature of the Variable Benefit, as a matter of law, renders elimination of the Variable Benefit a prospective change in the meaning of *Quinn* and other authority cited herein.

Section 36A's expression that "§§ 37 and 42 to the contrary notwithstanding, any benefit increase does not become an obligation of the City" does not carry the import the City wishes the court to find. Section 37, titled "Guaranty," appears to this court to be self-limiting. Specifically, Section 37 refers to "maintenance of . . . reserves as provided for," and "payment of . . . other benefits granted under the provisions of this subtitle . . . ." Pre-10-306 BALT., MD., CODE art. 22, § 37. Further, Section 37 mandates that funds derived from Plan-related deposits and investments shall not be diverted from the Plan for another City purpose. *Id.*

Section 42, as well known by any reader reaching this page, articulates the contractual relationship between the City and the Plan members (including Plaintiffs). Its language, well-wrung (and rung) by this point, need not be restated. Section 36A's expression that Section 42

does not render "any benefit increase" an obligation of the City mutes neither the balance of Section 42 nor the portions of Section 36A directed at things other than "benefit increase." Specifically, Section 36A's limiting language does not mean that the Variable Benefit is not to be counted among the "provisions of this Article 22" to which Section 42 refers to as the "terms" of the contract. When read together,[21] Sections 36A and 42 appear as happy bedfellows: (1) the City has an obligation to maintain and manage the Variable Benefit feature of the Plan as set forth in Section 36A; and (2) if Plan investment funds are insufficient to grant an increase or if the Paid-Up Benefit Fund and Contingency Reserve Fund are unable to support continuation of accrued benefit increases, these conditions (alone) cannot form the basis to hold the City liable for breach of contract for failure to pay the "benefit increase" or "continuation."

This leads the court next to address the City's logic-based argument, which is equally unavailing at summary judgment. Section 36A states in detail terms of eligibility, benefit allocation methods and criteria, benefit increase formulas, and benefit and reserve fund maintenance. These prescriptions, by their terms, are fixed. That the amount of any benefit increase (if any) is market driven – a condition written in to Section 36A(e)(ii) – does not extract the Variable Benefit facility from the "provisions" of Article 22 which, according to Section 42, form the terms of the contract between the City and Plan members.

Inasmuch as Plaintiffs Houser and Williams were entitled to, and receiving, Plan benefits as of the effective date of the Ordinance (Undisputed Facts ¶ 38, *supra*), the court is not persuaded by the City's argument that the Ordinance does not retroactively impair or diminish the rights or benefits of Plaintiffs Houser and Williams under the Plan. Therefore, the court shall deny the City's Cross-Motion as to Count II of the Amended Complaint.

[21] And subject to common law interpretation.

B. Count III – Breach of Contract (Contractual Rights of Retirement-Eligible Plaintiffs)

For the reasons set forth above in reference to Count II, as Plaintiff Sledgeski was eligible to retire, but was not entitled to receive Plan benefits as of the effective date of the Ordinance, because he remained working (as a DROP enrollee) (Undisputed Facts ¶ 39, *supra*), the court is not persuaded by the City's argument that the Ordinance does not retroactively impair or diminish the rights or benefits of Plaintiff Sledgeski under the Plan. Therefore, the court shall deny the City's Cross-Motion as to Count III of the Amended Complaint.

C. Count IV – Breach of Contract (Contractual Rights of Active Plaintiffs)

As set forth in the Undisputed Facts at paragraphs 40 through 42, *supra*, as of the effective date of Ordinance 10-306, Plaintiffs Cherry and Lake were working and not yet eligible to receive Plan benefits. Specifically, as of June 30, 2010, Plaintiff Cherry had completed more than 15 years of service with the Baltimore Police Department and Plaintiff Lake had completed fewer than 15 years of service with the Baltimore City Fire Department.

At oral argument on November 2, 2017, Plaintiffs argued that despite the fact that "active" members (including Plaintiffs Cherry and Lake) had not satisfied all contingencies to receive Plan benefits prior to the enactment of 10-306, their rights and entitlements to Plan benefits were fully vested and accrued by virtue of Section 42's acknowledgment that, upon their employment, they each entered a contract with the City, the terms of which are the provisions of Article 22 (before the advent of the Ordinance). In short, Plaintiffs assert that any entitlement the City has to make changes to the Plan is limited to changes that affect employees not yet hired as of the effective date of the Ordinance, and that the City is prohibited from making Plan changes that affect any Plan

member existing as of the date of the Ordinance. In so arguing, Plaintiffs contend that "prospective" (as that term is used by *Quinn* and other authority) refers to persons not yet members of the Plan – to future employees. This flies in the face of well-established Maryland law.

In *City of Frederick v. Quinn,* the Court of Special Appeals expressly rejected the strict approach espoused by Plaintiffs. "The court below followed the strict contract theory, holding that when pension rights vested upon employment or adoption of the plan those rights were immune from prospective legislative impairment. . . . Although we think that holding goes too far, we agree that a pension is more contractual than gratuitous. . . ." *City of Frederick v. Quinn,* 35 Md. App. 626, 629 (1977). Maryland law entitles the City, by virtue of a reserved legislative authority, to make prospective, reasonable modifications to the Plan, including its terms and benefit offerings, that affect Plan members who have not yet satisfied all contingencies to receive Plan benefits.

> The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. . . . This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here. . . . 'In all states, municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies.'

Quinn, 35 Md. App. at 629-31, 633 (quoting *Saxton v. Bd. of Trs. of the Fire and Police Employees Ret. Sys. of Baltimore,* 266 Md. 690, 694 (1972)).[22]

"Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee. In short, the employee must have available

[22] As examined above in Applicable Law, this principle has been revisited and confirmed numerous times by Maryland's appellate and federal district courts. *See, supra,* Section V, pp. 20-25.

substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare." *Quinn,* 35 Md. App. at 631.

The court is persuaded that the changes to the Plan ushered in by Ordinance 10-306 are prospective, not retrospective, with respect to Plaintiffs Cherry and Lake, as these Plan members had not satisfied all defined contingencies to receiving Plan benefits as of the effective date of Ordinance 10-306. The question whether the Plan changes made by 10-306 are reasonable remains undecided by the court and will not be adjudicated by summary judgment. The court acknowledges that dispute as to whether 10-306 was necessary to avoid collapse of the Plan or whether 10-306 is, as Plaintiffs urge, the legislative equivalent of wearing sweatpants may not bar summary judgment. Surely, however, these debates present, or at least include, a dispute of perspective, perhaps of financial expert opinion. This is an issue best left for trial in order that the trial court may have the full benefit of expert witness and other relevant presentation.[23]

[23] As briefly mentioned at oral argument on November 2, 2017, the court has considered whether determination of the reasonableness issue is appropriate for summary judgment as a question of law or whether it is more in keeping with a factual determination (the legal equivalent of the third rail to a 2-501 court). Although whether something presents a question of law or fact (or a mixed question) pertains to appellate review standards, the court read with interest Randall H. Warner, *All Mixed Up About Mixed Questions,* 7 J. APP. PRAC. & PROCESS, 1 (Spring 2015), and finds it helpful. Because Maryland law does not apply strict breach of contract principles to pension plans, but rather imbues the legislature with some reservation of power to modify a plan's terms, determining whether the City is liable for breach of contract calls upon the court to determine whether the proposed modification runs afoul of that reservation. If it surmounts the challenge as to whether 10-306 imposes retrospective or prospective changes to a given plaintiff's entitlements, the City must next confront whether the proposed Plan modification is reasonable. The question of reasonableness as a discrete issue seems a bit tort masquerading as contract. To resolve the issue, the court must engage in what Mr. Warner describes as an "evaluative determination," wherein the court assesses a set of historical facts (*e.g.,* what a person did) against community standards and expectations (*i.e.,* reasonableness). Although determination of "reasonable" as set forth in *Quinn* reflects on empirically objective factors (not only community standards), there is little room to doubt that this inquiry and its component considerations bleed beyond pure questions of law. As alluded to above, whether an inquiry consists of questions of law, questions of fact or the "elusive abomination" of mixed questions of fact and law is primarily relevant to determining the applicable standard of review on appeal. *Id.* at 101. Nonetheless, it seems foolish not to attempt to determine into which camp an issue falls at the 2-501 juncture, as the entire case for certain parties may rise and fall squarely on disposition of the issue. As the inquiry of reasonableness requires some semblance of an evaluative determination, resolution of the issue seems ill-suited to summary judgment. The court also notes that the *Quinn* Court of Special Appeals remanded the case to the trial court "to determine factually" whether the substituted plan at issue was "either necessary or reasonable." *City of Frederick v. Quinn,* 35 Md. App. 626, 634 (1977). Moreover, and equally important (though less so if judging by

Therefore, as set forth herein, the court will grant in part and deny in part the City's Cross-Motion as to Count IV; and, in accordance with Rule 2-501(g), as to Count IV, liability as to Count IV will be limited to the issue of whether the changes to the Plan effected through Ordinance 10-306 are reasonable as set forth in *Quinn* and other authority cited herein.[24]

D. Count I – Declaratory Judgment

Plaintiffs and the City seek summary judgment as to Plaintiffs' Count I for Declaratory Judgment. The court finds as a matter of law, and the City does not contest, that Plaintiffs are entitled to pursue and have properly stated a claim for relief under the Maryland Uniform Declaratory Judgments Act as set forth in MD. CODE ANN., CTS. & JUD. PROC. §§ 3-401 *et seq.*

The Amended Complaint sets out 14 requested declarations of the court, identified as A through N (Amended Complaint at 54 through 55.) The court addresses each requested declaration as set forth in the Amended Complaint as follows:[25]

A. [Whether] the City, by adopting Ordinance 10-306, engaged in the unlawful taking of property without just compensation.

Neither side presents argument or authority in their motions papers on this subject, and none was presented at oral argument on November 2, 2017. Therefore, the court will deny the Motion and the Cross-Motion as to Count I, requested declaration A.

volume), the court prefers to evaluate firsthand expert and fact witness testimony, as well as other trial evidence, on the subject.

[24] See pages 24-5, *supra*, for discussion of what a court considers in determining whether a prospective modification is reasonable.

[25] Plaintiffs' requested declarations are set out in the affirmative in the Amended Complaint. As the City also seeks summary judgment as to Count I, the court construes each requested declaration to be set off with the word "Whether" to pose the statement as an inquiry. For example, "F. *Whether* the City, by adopting Ordinance 10-306, breached its contract with the members of the Plan."

B. [Whether] the City, by adopting Ordinance 10-306, unlawfully diminished and impaired the benefits of the members of the Plan and their beneficiaries.

The court finds that, by enacting Ordinance 10-306, the City retrospectively, and therefore unlawfully, withdrew from Plaintiffs Houser, Williams and Sledgeski their rights to the Variable Benefit feature of the Plan as it stood prior to the Ordinance. *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977) (holding that "the rights which have accrued under the terminated plan may not be retrospectively withdrawn from" a pension plan member). The Motion as to Count I requested declaration B is granted to that extent and otherwise denied. Likewise, the City's Cross-Motion as to Count I requested declaration B is denied as to Plaintiffs Houser, Williams and Sledgeski. The City's Cross-Motion as to Count I requested declaration B is further denied as to Plaintiffs Cherry and Lake, as whether Plan modifications under 10-306 are reasonable per *Quinn* (or, to the contrary, unlawfully diminished and impaired Plan benefits) is reserved for trial pursuant to Rule 2-501(g).

C. [Whether] members of the Plan and their beneficiaries are entitled to the benefits provided under Article 22, § 29 et seq. that existed immediately prior to the enactment of Ordinance 10-306.

The court finds that by enacting Ordinance 10-306, the City retrospectively, and therefore unlawfully, withdrew from Plaintiffs Houser, Williams and Sledgeski their rights to the Variable Benefit feature of the Plan as it stood prior to the Ordinance. *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977) (holding that "the rights which have accrued under the terminated plan may not be retrospectively withdrawn from" a pension plan member). The Motion as to Count I requested declaration C is granted to that extent and otherwise denied, as the declaration incorporates a measure of damages for which no authority has been cited, and further assumes that 10-306 fails to meet the reasonableness standard articulated by *Quinn* (and other authority cited

herein) with respect to Plaintiffs Cherry and Lake, which the court will adjudicate following trial on the issue pursuant to Rule 2-501(g) (*see*, analysis on the Cross-Motion as to Count IV, *supra*).

The City's Cross-Motion as to Count I requested declaration C is denied for the foregoing reasons.

D. [Whether] members of the Active Sub-Class,[26] by virtue of their membership in the Plan prior to the adoption of Ordinance 10-306, held contractual rights to the benefits provided under the Plan that the City could not unilaterally diminish or impair.

The City is entitled to make prospective and reasonable unilateral modifications to the Plan. As set forth in *Quinn*, "the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare." *City of Frederick v. Quinn*, 35 Md. App. 626, 631 (1977). Plaintiffs Cherry and Lake held contractual rights coterminous with this pronouncement. Specifically, to the extent Ordinance 10-306 modified enumerated Plan benefits, the City must provide Plaintiffs Cherry and Lake substantially the pension plan that existed at the time of their employment, and the City is obligated to balance any diminution of Plan benefits with other benefits or to demonstrate that the diminution in Plan benefits is equitably justified. Therefore, the Motion as to Count I requested declaration D is granted to that extent and denied in all other respects. Likewise, the City's Cross-Motion as to Count I requested declaration D is granted to the extent that the City is entitled to make unilateral, prospective, reasonable modifications to the Plan consistent with *Quinn's* mandate recited above.

[26] Consistent with the Stipulation of Plaintiff Status, for purposes of the instant motions, the court construes "Active Sub-Class" to mean Plaintiffs Cherry and Lake; "Retired Sub-Class" to mean Plaintiffs Houser and William; "Retirement-Eligible Sub-Class" to mean Plaintiff Sledgeski; and "Class" to mean Plaintiffs Cherry, Lake, Houser, Williams and Sledgeski collectively.

E. [Whether] members of the Retired and Retirement-Eligible Sub-Classes, having satisfied all of the contractual conditions precedent to receipt of benefits under the Plan prior to the adoption of Ordinance 10-306, held vested rights to Plan benefits that the City could not unilaterally diminish or impair.

Pursuant to *Quinn* and *Saxton,* the City's entitlement to make unilateral, reasonable modifications to the Plan is limited to prospective changes, *i.e.*, changes that affect Plan members who have not yet satisfied the defined contingencies to eligibility for or receipt of the subject benefit or benefits. As Plaintiffs Houser, Williams and Sledgeski had satisfied all such defined contingencies, the City was disallowed from making changes to the Plan that removed, diminished or impaired those benefits. Therefore, the Motion as Count I requested declaration E (as to Plaintiffs Houser, Williams and Sledgeski) is granted. The City's Cross-Motion as to Count I requested declaration E (as to Plaintiffs Houser, Williams and Sledgeski) is denied.

F. [Whether] the City, by adopting Ordinance 10-306, breached its contract with the members of the Plan.

Pursuant to Section 42, each Plaintiff entered a contract with the City upon employment, the terms of which were the provisions of Article 22 as it existed upon his date of employment. Under *Quinn* and *Saxton,* the City has a reserved legislative power to make unilateral, prospective, reasonable modifications to the Plan. Likewise, the City is prohibited under these common law authorities from enacting retrospective changes. Ordinance 10-306, by eliminating the Variable Benefit effectively removed from Plaintiffs Houser, Williams and Sledgeski a benefit in connection with which each had satisfied the defined eligibility or entitlement contingencies.

Therefore, the Motion as to Count I requested declaration F is granted as to Plaintiffs Houser, Williams and Sledgeski as follows: by enacting Ordinance 10-306, the City breached its contract with Plaintiffs Houser, Williams and Sledgeski. Based on the analysis as to Count IV (Plaintiffs Cherry and Lake), *supra,* the Motion as to Count I requested declaration F is denied as

to Plaintiffs Cherry and Lake. Further, inasmuch as requested declaration F refers to "members of the Plan," to be clear, other than as set forth herein, the Motion as to Count I requested declaration F is denied.

For these same reasons, the City's Cross-Motion as Count I requested declaration F as to Plaintiffs Houser, Williams and Sledgeski is denied. The City's Cross-Motion as Count I requested declaration F as to Plaintiffs Cherry and Lake is likewise denied, as the issue of reasonableness of 10-306 shall be subject to trial.

G. [Whether] Article 22 § 42 prohibits the City from unilaterally diminishing or impairing Class members' benefits under the Plan.

As set forth in *Quinn* and *Saxton,* and as cited with favor by other Maryland state and federal authority discussed above, in Maryland, pension plans are not subject to the rigors of strict contract construction. The law reserves for the legislature power to make unilateral, prospective, reasonable modifications.

> The contractual or vested rights of the employee in Maryland are subject to a reserved legislative power to make reasonable modifications in the plan, or indeed to modify benefits if there is a simultaneous offsetting new benefit or liberalized qualifying condition. Each case where a changed plan is substituted must be analyzed on its record to determine whether the change was reasonably intended to preserve the integrity of the pension system by enhancing its actuarial soundness, as a reasonable change promoting a paramount interest of the State without serious detriment to the employee. In short, the employee must have available substantially the program he bargained for and any diminution thereof must be balanced by other benefits or justified by countervailing equities for the public's welfare. This seems to be the substance of the majority of cases which have found municipal pension plans contractual in nature and it is the view we expressly adopt here.

City of Frederick v. Quinn, 35 Md. App. 626, 629-31 (1977). "'In all states, municipal corporations may make reasonable modifications of a pension plan at any time before the happening of the defined contingencies.'" *Id.* at 633 (quoting *Saxton v. Bd. of Trs. of the Fire and Police Employees Ret. Sys. of Baltimore*, 266 Md. 690, 694 (1972)). Critically, however, "the

rights which have accrued under the terminated plan may not be retrospectively withdrawn" from a Plan member. *Quinn*, 35 Md. App. at 631.

Therefore, the Motion as to Count I requested declaration G is granted as follows and otherwise denied: Section 42, as interpreted by Maryland common law, prohibits the City from retrospectively modifying the Plan such that the modification removes, diminishes or impairs a Plan benefit where the Plaintiff had satisfied all defined contingencies related to such benefit prior to the effective date of the modification. For these same reasons, the City's Cross-Motion as Count I requested declaration G as to Plaintiffs Houser, Williams and Sledgeski is denied. The City's Cross-Motion as to Count I requested declaration G as to Plaintiffs Cherry and Lake is likewise denied, as the issue of reasonableness of 10-306 shall be subject to trial.

H. [Whether] the City is prohibited from unilaterally diminishing or impairing the benefits of members of the Retired and Retirement-Eligible Sub-Classes who have satisfied all of the contractual contingencies necessary to receive retirement benefits under the Plan.

See requested declaration E, *supra.* [27]

I. [Whether] the City is obligated to compensate members of the Retired Sub-Class in accordance with the Variable Benefit provision of the Plan in place prior to the enactment of Ordinance 10-306.

Requested declaration I incorporates a measure of damages for which no authority has been cited. The cross motions as to this requested declaration are denied.

[27] The court is unable to discern a material distinction between E and H. But for their flip-flopped fragments and H's replacement of "conditions precedent" with "contingencies," these requested declarations appear to be the same.

J. [Whether] the City is obligated to reimburse members of the Retirement-Eligible and Active Sub-Classes the full amount they were required to pay in increased employee contributions as a result of Ordinance 10-306.

Requested declaration J incorporates a measure of damages for which no authority has been cited, and further assumes that 10-306 fails to meet the reasonableness standard articulated by *Quinn* (and other authority cited herein) with respect to Plaintiffs Cherry and Lake, which the court will adjudicate following trial on the issue pursuant to Rule 2-501(g) (*see*, analysis on the Cross-Motion as to Count IV, *supra*). The cross motions as to this requested declaration are denied.

K. [Whether] the tiered-COLA provided under Ordinance 10-306 is . . . the equivalent of the Variable Benefit that was provided under the Plan prior to the enactment of Ordinance 10-306.

The cross motions as to this requested declaration are denied.

L. [Whether] the City is required to restore all Plan benefits that were unlawfully diminished or impaired through its enactment of Ordinance 10-306.

At the summary judgment hearing on November 2, 2017, Plaintiffs orally withdrew their Motion as to requested declaration L. The City's cross motion is denied as to this requested declaration.

M. [Whether] the City had the financial ability, as of June 30, 2010, to adequately fund the benefits provided under the Plan.

At the summary judgment hearing on November 2, 2017, Plaintiffs orally withdrew their Motion as to requested declaration M. The City's cross motion is denied as to this requested declaration.

N. [Whether] the members of the Class have the right to an adequately-funded Plan.

The cross motions as to this requested declaration are denied.

VIII. CONCLUSION

By accompanying order of the court:

The Motion, which is directed solely to Count I of the Amended Complaint, will be **GRANTED IN PART AND DENIED IN PART** consistent with this Memorandum Opinion;

The Cross-Motion, which is directed at the Amended Complaint in its entirety, will be **GRANTED IN PART AND DENIED IN PART** as to Count I consistent with this Memorandum Opinion; **DENIED** as to Counts II and III; and **GRANTED IN PART AND DENIED IN PART** as to Count IV consistent with this Memorandum Opinion.

[JUDGE'S SIGNATURE ON ORIGINAL]

January 2, 2018

_____
Judge Julie R. Rubin

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