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Missouri State Auditor

Clay County

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CITIZENS SUMMARY

Findings in the audit of Clay County

Annex Project	The former County Commission did not openly discuss and document key decisions regarding the county annex project, county procurement policies were not followed, and the county allowed one commissioner to approve millions of dollars in contracts related to the project.
Additional Compensation	The former County Commission approved a 2-year employment contract with the former County Administrator and 1-year employment contracts with the former Assistant County Administrators that automatically renewed and included generous severance payments, and the former County Commission executed separation agreements with each of those employees upon their resignation that provided additional severance benefits beyond the benefits outlined in the employment agreements. The county did not comply with Internal Revenue Service guidelines for reporting the value of the rent-free housing fringe benefits as income, and has not established a policy for providing housing to county employees.
Closed Meetings	The county did not fully comply with the Sunshine Law regarding closed commission meetings.
Personnel and Payroll Controls and Procedures	Employee pay rates were not always authorized in the county pay plan and/or documented in employee personnel files, and some employee job titles are not included in the county pay plan. Former county personnel did not always submit employment change forms timely. The county does not ensure supervisors prepare employee performance appraisals in accordance with county policy.
County Contracting and Payment Procedures	The county did not have adequate procedures to verify invoiced prices against contract amounts when the county used either (1) an existing cooperative agreement/contract between the contractor and another government jurisdiction or (2) the county's term and supply contract with a vendor. Written contracts were not entered into timely and county personnel did not obtain sufficient documentation to ensure that a not-for-profit organization used county funds in accordance with contract terms.
Procurement Procedures	The county did not solicit proposals for some professional services as required by county code. County personnel did not maintain adequate documentation to support how they selected the bridge engineering services vendor and did not always comply with county procurement policies regarding the composition of selection committees and the completion of surveys by selection committee members. The county used the same provider to serve as both financial advisor and underwriter for the issuance of the Certificates of Participation.
Expenditures and Purchasing Cards	The county made a $20,000 prepayment on November 29, 2018, to an information technology service provider but did not ensure the amount was applied to its outstanding balance or used to reduce subsequent payments. The county spent approximately $5,000 on food purchases for 5 events that may not have been a prudent, reasonable, or a necessary use of county funds, and the county does not have a written employer-provided food policy governing the allowability of events and documentation

	requirements. The Highway Department does not reconcile fuel usage to billings. County controls and procedures over purchasing cards need improvement.
Smithville Lake	Parks Office personnel do not always maintain change funds at constant amounts. Parks and Recreation Department practices for providing discounts for Smithville Lake fees are inconsistent or contrary to county ordinance.
Information Technology	The county does not have a plan for resuming normal business operations and recovering computer systems and data in the event of a disaster or other extraordinary situations, does not periodically test for recovery of data from backup files, has not developed records management and retention policies in compliance with published guidance, and has not always retained email and text messages in accordance with requirements.
Contract Approvals and Capital Assets	The County Auditor was unable to review county contracts. The County Auditor did not perform complete annual inventories of county-owned property.
County Boards	Some county boards did not properly prepare or approve meeting minutes. Budgets prepared by various boards did not contain all required elements. The Children's Services Fund Board does not adequately monitor its activities for potential conflicts of interest.
Additional Comments	Because counties are managed by several separately-elected individuals, an audit finding made with respect to one office does not necessarily apply to the operations in another office. The overall rating assigned to the county is intended to reflect the performance of the county as a whole. It does not indicate the performance of any one elected official or county office.

In the areas audited, the overall performance of this entity was **Poor**.*

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***The rating(s) cover only audited areas and do not reflect an opinion on the overall operation of the entity. Within that context, the rating scale indicates the following:

Excellent: The audit results indicate this entity is very well managed. The report contains no findings. In addition, if applicable, prior recommendations have been implemented.

Good: The audit results indicate this entity is well managed. The report contains few findings, and the entity has indicated most or all recommendations have already been, or will be, implemented. In addition, if applicable, many of the prior recommendations have been implemented.

Fair: The audit results indicate this entity needs to improve operations in several areas. The report contains several findings, or one or more findings that require management's immediate attention, and/or the entity has indicated several recommendations will not be implemented. In addition, if applicable, several prior recommendations have not been implemented.

Poor: The audit results indicate this entity needs to significantly improve operations. The report contains numerous findings that require management's immediate attention, and/or the entity has indicated most recommendations will not be implemented. In addition, if applicable, most prior recommendations have not been implemented.

Clay County
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Missouri State Auditor

County Commission
and
Officeholders of Clay County
Clay County, Missouri

The State Auditor was petitioned under Section 29.230, RSMo, to audit Clay County. We have audited certain operations of the county commission, county boards, and county officials in fulfillment of our duties. The county engaged Cochran Head Vick & Co., P.C., Certified Public Accountants (CPAs), to audit the county's financial statements for the year ended December 31, 2018. To minimize duplication of effort, we reviewed the CPA firm's audit report. The scope of our audit included, but was not necessarily limited to, the year ended December 31, 2018. The objectives of our audit were to:

1. Evaluate the county's internal controls over significant management and financial functions.

2. Evaluate the county's compliance with certain legal provisions.

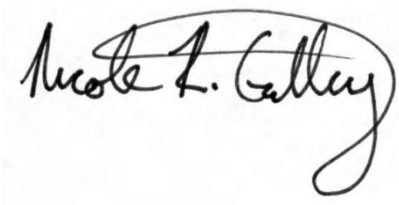
3. Evaluate the economy and efficiency of certain management practices and procedures, including certain financial transactions.

We conducted our audit in accordance with the standards applicable to performance audits contained in *Government Auditing Standards*, issued by the Comptroller General of the United States. Those standards require that we plan and perform our audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides such a basis.

The accompanying Organization and Statistical Information is presented for informational purposes. This information was obtained from the county's management and was not subjected to the procedures applied in our audit of the county.

For the areas audited, we identified (1) deficiencies in internal controls, (2) noncompliance with legal provisions, and (3) the need for improvement in management practices and procedures. The accompanying Management Advisory Report presents our findings arising from our audit of the Clay County Commission and boards. No findings resulted from our audit of the County Assessor, Prosecuting Attorney, or County Treasurer.

We previously issued the following reports for other officeholders: *Clay County Clerk*, report number 2020-018, issued April 2020; *Clay County Recorder of Deeds*, report number 2020-026, issued June 2020; *Clay County Public Administrator*, report number 2020-032, issued June 2020; *Clay County Collector*, report number 2020-114 issued December 2020; and *Clay County Sheriff*, report number 2021-032, issued June 2021.



Nicole R. Galloway, CPA
State Auditor

Clay County
Introduction

Background

The State Auditor's Office (SAO) was petitioned by the citizens of Clay County to conduct an audit. We began fieldwork for the audit of Clay County in December 2018, and completed fieldwork in July 2021. Upon the announcement of our petition audit of Clay County and throughout our engagement, the SAO received several concerns from Clay County citizens regarding the handling of government operations by the former County Commission. We considered these concerns as part of the audit. While the audit was brought about by petition from Clay County voters under state law, the former County Commission[1] acted to prevent the SAO from fulfilling its statutory duties to conduct the audit.

County impeded audit

These actions included filing a lawsuit to prevent the State Auditor from conducting a comprehensive review, providing limited information to the SAO, and only providing access to county records after a judge ordered the county to provide the documents in an action by the SAO to enforce its subpoenas. Full access to county records was only provided after two new County Commissioners took office in 2021. As a result, delays occurred in completing the audit. The former County Commissioners (Gene Owen and Luann Ridgeway), forming a voting majority of the County Commission, approved county legal efforts to deny the SAO access to records and information. A summary of significant events in our efforts to obtain information for the audit follows:

- At the beginning of the audit, between December 19, 2018, and January 30, 2019, the SAO submitted to the county, on several occasions, lists of needed records and information. While county officials provided certain requested documents and data during this period (some after delays and repeated requests), they refused to provide closed meeting minutes.

- On January 31, 2019, because access to the complete record of closed minutes is essential to properly perform a public sector audit, the SAO issued a subpoena to the county to produce these records. (see Appendix A). On the same day, the county filed a lawsuit[2] to prevent the State Auditor from conducting a comprehensive review of Clay County.

- On February 4, 2019, because of the active litigation regarding the SAO's ability to perform the audit, the SAO temporarily paused fieldwork in the

[1] References to the "former County Commission" throughout this report refer to the County Commission prior to January 2021, comprised of Presiding Commissioner Jerry Nolte (elected November 2014), Commissioner Luann Ridgeway (elected November 2012 and re-elected November 2016), and Commissioner Gene Owen (elected November 2012 and re-elected November 2016). Commissioners Ridgeway and Owen retired in December 2020, while Commissioner Nolte was re-elected in November 2018 and began serving another 4 year term in January 2019.

[2] *Clay County Commission v. Galloway*, No. 19AC-CC00055 (19th Cir. Ct., 2019).

county. One week later, the SAO filed a motion to dismiss the lawsuit, seeking to bring a quick resolution to the dispute.

- On October 23, 2019, the Circuit Court of Cole County, Missouri, dismissed the former County Commission's lawsuit (see Appendix B). The former County Commission, through its attorney, continued to file motions with the court.

- On October 31, 2019, the SAO outlined, in a letter to the county, requests previously made in December 2018 and January 2019, that remained outstanding, as well as additional information needed for the audit. This information included 2019 unredacted closed meeting minutes and the expected production dates for each request beginning November 7, 2019.

- On November 6, 2019, the former County Commission, through its attorney, responded to the SAO indicating it was reviewing the requests to determine whether any were objectionable and would notify the SAO if it believed that the requests exceeded the State Auditor's authority. The county did not produce the unredacted closed meeting minutes or the other records requested to be produced on November 7, 2019.

- On November 8, 2019, because the county failed to produce the records, the SAO served a second subpoena requesting the records as well as requiring Assistant County Administrator (ACA) Nicole Brown (the ACA responsible for Public Services and the Custodian of Records) to provide testimony regarding the same on November 25, 2019, (see Appendix C). The former County Commission, through its attorney, indicated the records with a requested production date of November 21, 2019, including various personnel records, would not be provided. As a result, on November 22, 2019, the State Auditor served a third subpoena to Clay County requiring the county to turn over requested documents and Ms. Brown to provide testimony concerning the same on December 11, 2019. (see Appendix D).

- On November 25, 2019, Ms. Brown did not appear for her transcribed interview required by the November 8, 2019, subpoena.

- On December 4, 2019, the State Auditor filed a petition in the Circuit Court of Clay County to enforce the November 8, 2019, subpoena (subpoena enforcement case) (Appendix E).[3] While this case was pending, the SAO continued its fieldwork in the county.

[3] *Galloway v. Clay County*, No. 19CY-CV12168 (7th Cir. Ct., 2020).

- On December 12, 2019,[4] Ms. Brown did not answer questions from the auditors as required by the November 22, 2019, subpoena.

- On December 20, 2019, the State Auditor amended the petition in the subpoena enforcement case to include enforcement of the November 22, 2019, subpoena (Appendix F).

- On February 18, 2020, the former County Commission filed an appeal with the Missouri Court of Appeals of the former County Commission's lawsuit.

- On February 27, 2020, the SAO filed a motion for an expedited hearing in the subpoena enforcement case.

- On October 23, 2020, the Circuit Court of Clay County issued a judgement in the subpoena enforcement case in favor of the SAO requiring the county to comply with subpoenas and provide to the SAO, within 10 days, meeting minutes and personnel performance appraisals. (see Appendix G).

- On October 26, 2020, the county filed a motion with the circuit court to amend the deadlines in the court order.

- On November 3, 2020, Clay County voters elected Megan Thompson and Jon Carpenter as County Commissioners.

- On December 1, 2020, the former County Commission filed an appeal with the Missouri Court of Appeals of the subpoena enforcement case.

- In December 2020, the county provided responses to many outstanding questions previously posed by audit staff related to county expenditures. Officials provided these responses and supporting records only a few weeks prior to the retirement of 2 of the 3 County Commissioners (Ridgeway and Owen) and resignation of several key members of the Clay County administration, including the 3 ACAs. In addition, the ACA's 2020 severance and settlement agreements included provisions that the county would compensate each ACA at a daily rate of $500, and other personnel at $300 per day, for any information and/or assistance provided the county in connection with the SAO audit after their resignation, or they would not be expected to cooperate at all. These agreements also allowed for "at least 21 days' notice of any request for cooperation."

[4] The deposition was rescheduled from December 11 to December 12, 2019, due to scheduling conflicts.

- On December 29, 2020, the Court of Appeals, Western District, affirmed the dismissal of the County Commission's lawsuit. (see Appendix H).

- In January 2021, after the change in commissioners and administration, the county began the process to withdraw from all pending litigation against the State Auditor. The County Commission appointed as County Counselor, the attorney who formerly served in that position and reappointed the newly appointed County Clerk as Custodian of Records.

- On February 22, 2021, the County Commission filed a voluntary dismissal of their appeal of the subpoena enforcement case and the Missouri Court of Appeals dismissed the appeal.

- In March 2021, at the county's request, the State Auditor served a final subpoena to Clay County after which the county provided unredacted closed meeting minutes and personnel records (records initially requested in December 2018 and October 2019, respectively) (see Appendix I).

While SAO personnel worked as effectively and efficiently as possible given the difficulties encountered, the delays increased audit costs. We notified the former County Commission on June 17, 2020, that the audit costs would likely exceed our original estimate. The reasons for the additional costs included delays due to the withholding of certain records by the former County Commission and the overall number of concerns. Additionally, the delays significantly extended the period of time subsequent to the audit period and thereby increased our audit work to review significant events and transactions during that extended period.

Significant actions taken by the former County Commission

During the period reviewed, the former County Commission voted on the following significant actions in votes of 2 to 1 with former Commissioners Ridgeway and Owen voting in favor and Presiding Commissioner Nolte voting opposed.

Certificates of Participation

On October 15, 2018, the former County Commission authorized the issuance of approximately $49 million in Certificates of Participation (COPs) to (1) acquire, improve, construct, furnish, and equip various county buildings; (2) improve various park facilities; (3) improve county roads and bridges and existing buildings; and (4) pay the issuance cost of the COPs.

Lease participation certificates are a method of financing a capital project whereby a financial institution sells interests in the capital project, leases the project to a public entity, and repays the certificates with the lease payments. After the certificates have been repaid, the local government typically has the option to purchase, at a nominal amount, the capital project it has been leasing. Lease participation certificates are not required to be approved by

county voters and can carry higher borrowing costs than traditional bond financing.

The county's annual lease payments average approximately $3.7 million through May 1, 2038. The interest rate on the certificates range from 2.95 percent to 5 percent. The county's proposed use of this funding included improvements to the existing administration building, Shrader building, golf courses, historic sites, marinas, and parks, as well as approximately $20 million to acquire land and construct a new annex building.

As of April 30, 2021, more than 2 years after issuance of the COPs, the county had spent approximately $18 million of this funding on the new annex, golf courses, bridges and culverts, electrical and bathroom upgrades, marinas, vehicles and equipment, trails and trailheads, historical buildings, parking lots and roads, and playgrounds.[5]

New annex building

In August 2019, the former County Commission acquired land on which to construct the new annex building for approximately $2.1 million, and from March 2019 to April 2021 the county incurred costs totaling approximately $1.4 million for site selection, architectural, engineering, and legal services related to the new annex. In addition, the former County Commission contracted for project management services in December 2019 totaling approximately $745,000 and construction services in August 2020 totaling approximately $9.6 million and paid costs totaling approximately $1.4 million through April 2021. The annex was expected to be completed in 2022. In January 2021, after 2 new commissioners took office, the County Commission decided to pause the project. The project manager then exercised a clause in the contract allowing him to void the contract, effectively stopping it.

Public participation in meetings

In December 2017, the former County Commission eliminated public comments at regular commission meetings by removing that agenda item and replacing it with a public comment period held on the third Friday of each month. Commissioners were not required to attend those meetings and, if in attendance, were not expected to make comments or respond to comments from citizens.

County administrators

Until his resignation in July 2018, the county employed a county administrator, Dean Brookshier, as the senior appointed official of the commission and chief budget officer of the county with broad responsibility to direct and manage all county operations, facilities, and personnel under the

[5] In September 2021, due to the termination of the new annex building project, the county issued COPs totaling approximately $18 million to refund (along with other available county funds) the 2018 COPs.

jurisdiction of the commission. After his resignation, the former County Commission delegated the duties/responsibilities of that position to the 3 ACAs - Laureen Portwood, Nicole Brown, and Brad Garrett - and executed employment agreements with them that provided compensation and pay increases from their previous salaries as follows:

- ACA Portwood received a raise of $32,387, effective November 15, 2018, for a total salary of $140,267.
- ACA Brown received a raise of $25,841, effective November 15, 2018, for a total salary of $111,974.
- ACA Garrett received a raise of $17,230, effective November 15, 2018, for a total salary of $103,363.

Also, the former County Commission provided rent-free housing to ACA Brown and ACA Garrett. The former County Commission did not fill the vacant county administrator position.

Severances and settlements

The former County Commission approved separation and settlement agreements with the County Administrator in July 2018 and each of the 3 ACAs and 3 other employees (Public Relations and Events Manager, Tourism and Project Development Manager, and Human Resources Manager) in December 2020 that provided for large severance and/or settlement payments to the employees upon their resignations. The separation agreements in December 2020 indicated the employees had claims against the county for harassment, discrimination, retaliation, hostile work environment, civil rights violations, abuse of process, and/or ethical misconduct and provided for settlement payments to the employees of $50,000 to each of the 3 former ACAs and $73,582, $48,582, and $23,669 for the Public Relations and Events Manager, Tourism and Project Development Manager, and Human Resources Manager, respectively. The agreements also required the county to pay the legal fees of the employees, which totaled $19,530.

In addition, the separation agreements with the former County Administrator and ACAs provided for severance payments of 15 months' salary totaling $196,613 for the County Administrator and 4 months' salary totaling $38,833, $48,645, and $35,846 for ACAs Brown, Portwood, and Garrett, respectively. The former County Commission approved the separation agreements in closed meetings.

Custodian of records

In February 2017, the former County Commission voted to appoint the former County Administrator as Custodian of Records, removing this duty from the County Clerk's office. This is a duty assigned to that office in many other

counties.[6] In July 2018, upon the County Administrator's resignation, the former County Commission delegated this duty to ACA Nicole Brown. Because the County Commission reestablished the County Clerk as the Custodian of Records in 2021, we made no recommendations related to this issue.

External legal counsel

The former County Commission contracted with outside law firms for services that had been previously performed by county personnel. In June 2016, the county hired a law firm to consult with the county regarding Sunshine Law requests, assist in developing a process for handling these requests, and handle any related litigation. The County Clerk's office previously handled Sunshine Law requests with legal guidance from the in-house County Counselor. In December 2017, the former County Commission decided to terminate the county-employed County Counselor Kevin Graham, and engaged a law firm, to act as County Counselor. Payments to this firm totaled approximately $2.2 million from March 14, 2017, through December 31, 2020, including travel, legal defense on lawsuits (including those filed against the SAO), and routine legal work (e.g. attending County Commission meetings). Payments to the firm providing Sunshine Law services totaled approximately $480,000 from May 2, 2017, through December 31, 2020.

Sheriff's budget

On January 28, 2019, the former County Commission reduced appropriations (approximately $700,000) used by the Sheriff's office to pay vendors for inmate food and healthcare costs. On April 19, 2019, the Sheriff filed a lawsuit against the former County Commission regarding the inadequacy of his 2019 budget. Because the appropriations were insufficient to cover costs, the Sheriff's office could not pay some invoices for inmate food and healthcare costs until settlement of the lawsuit. On August 29, 2019, the court ordered the former County Commission to allocate and budget an additional approximately $1 million to cover the Sheriff's financial obligations (see Appendix J). The former County Commission subsequently appealed the decision but on December 5, 2019, the Appeals Court affirmed the previous ruling in favor of the Sheriff (see Appendix K), including awarding legal fees because of the county's bad faith actions with regard to the Sheriff's budget and during litigation before the trial court. Because this issue was resolved by the courts, we made no additional recommendations.

Voters approved changes to county government

In December 2019, the former County Commission voted to place on the ballot a question as to whether a commission should be appointed by the Seventh Judicial Circuit to frame a county constitution to submit to voters. The former County Commission also appointed a Constitutional Charter

[6] Under Section 51.120, RSMo, the clerk's duties include keeping "an accurate record of the orders, rules, and proceedings of the county commission."

Advisory Committee, made up of Clay County citizens, to seek public input on establishing a new charter form of government.

Voters approved a new constitutional charter effective January 1, 2021. On June 2, 2020, the voters approved the establishment of a Constitution Commission composed of 14 citizens selected by the judges of the Seventh Judicial Circuit court tasked with drafting the new Clay County Constitution, and on November 3, 2020, voters approved the proposed constitutional charter drafted by the Constitution Commission. Significant changes to county operations included in the constitutional charter addressed some of the significant actions of the former County Commission previously discussed, including the following:

- Beginning in 2023, the County Commission will be composed of 7 members and their terms limited to serving 2 consecutive, 4 year terms in the same office and a total of 4 terms of 4 years each.

- The office of the County Counselor will continue to exist, be appointed by the County Commission, and filled by a Clay County resident.

- All employment contracts in place prior to January 2021 will be void.

- All contracts executed prior to January 2021 "which were not publicly voted on by the entire County Commission and which may have been entered into under a delegation of authority to a single Commissioner are voidable and may be considered by the County Commission taking office on the first business day of January 2023."

- "Any vote of the County Commission necessary for the issuance or obligation of debt in an amount which exceeds fifteen (15%) percent of the County's prior year's revenues shall require a supermajority[7] of the County Commission."

- "The Commission shall hold its meetings at such times and places as will allow the general public the opportunity to attend and participate in such meetings . . . The County Commission shall video record all regular, open, business meetings of the County Commission in which a vote is taken. Such video shall be transmitted live and be immediately available

[7] Once a seven-member County Commission is seated in 2023, any matter requiring a supermajority of the County Commission shall require approval by 5 members of the County Commission, regardless of the number of commissioners voting. Prior to the first business day of January 2023, any matter requiring a supermajority of the County Commission shall require approval by 3 members of the County Commission, regardless of the number of commissioners voting. The Presiding Commissioner may cast a vote on any matter requiring a supermajority of the County Commission.

on a publicly available platform. The County Commission shall also retain such videos as open records, pursuant to Missouri law."

- "The Commission shall hire, based on education and experience in public administration, a professional County Administrator who shall be the chief administrative officer of the County … and shall refrain from activities that undermine public confidence in professional administrators."

- "The officeholders under this Article [Elected Offices] shall be entitled to an appropriate budget allocation for the operation of their respective offices."

Scope and Methodology

The scope of this audit included evaluating (1) internal controls, (2) policies and procedures, and (3) other management functions and compliance requirements in place during, but not limited to, the year ended December 31, 2018.

Our methodology included reviewing minutes of meetings, written policies and procedures, financial records, and other pertinent documents; gathering information regarding various contract awards and expenditures through discussions with various current and past county personnel and reviewing the information obtained; and testing selected transactions.

We obtained an understanding of the applicable controls that are significant within the context of the audit objectives and assessed whether such controls have been properly designed and placed in operation. We also obtained an understanding of legal provisions that are significant within the context of the audit objectives, and we assessed the risk that illegal acts, including fraud, and violation of contract or other legal provisions could occur. To gain an understanding of legal requirements governing contract awards and expenditures, we reviewed applicable state laws; County Code of Ordinances (County Code) and written policies and procedures; and interviewed various individuals.

To evaluate various county procedures for compliance with county, statutory, and federal requirements, and to evaluate the economy and efficiency of certain other management practices and procedures; we performed the following specific tests and procedures:[8]

- We reviewed the site selection and purchase of the new annex land from COPs proceeds.

[8] Due to the nature of our selection methods, the results of our test work cannot be projected to the population.

- We reviewed employment contracts and compensation of the former County Administrator and ACAs, as well as severance and settlement agreements for employees.

- We reviewed all meeting minutes of the County Commission from January 3, 2017, to December 7, 2020, including those provided by the county for 71 closed meetings held. In addition, we reviewed all meeting minutes of the County Commission through our fieldwork completion in July 2021.

- We reviewed personnel files and payroll expenditures for 10 judgmentally selected employees of the Sheriff's office and 20 other judgmentally selected county employees. We made separate selections because separate Human Resource departments are maintained by the Sheriff and the rest of the county. We selected the 30 employees for review based on information provided through our Whistleblower Hotline or communications with other parties.

- We judgmentally selected 15 COPs expenditures (in addition to those noted in the first bullet point) from 2018, 2019, and 2020, including additional costs related to the new annex and other items of interest. Four of the expenditures tested were procured using cooperative contracts and 11 were county-procured contracts, including 6 open purchase orders/term and supply contracts. These expenditures totaled approximately $1.75 million.

- We initially identified and judgmentally selected 10 expenditures from 2018 and 2019 for further review. However, upon scanning more recent expenditures, we identified and judgmentally selected 5 additional payments (to the same vendor for the same contract) made in 2020, to include in our review. As a result, we tested 15 expenditures totaling approximately $384,000 for 11 contracts. Of the 11 contracts, county officials used 4 cooperative contracts of other jurisdictions, procured 5 contracts, and contracted with not-for-profit organizations for the other 2.

- We reviewed the county's solicitation for inmate telephone services in 2018.

- We judgmentally selected and reviewed 39 legal service expenditures totaling approximately $1 million, including 6 expenditures totaling $120,000 paid with purchasing cards, as well as legal service retainers paid in December 2020 totaling $230,000.

- We analyzed purchasing card usage and limits and judgmentally selected and reviewed 25 purchasing card transactions from 2017 to 2019, totaling approximately $13,000.

- On selected days in January 2020, February 2020, and March 2021, we conducted unannounced counts of cash receipts and change funds and reviewed petty cash disbursements, if applicable, at the Camp Branch Parks Office, marinas, airport, Jesse James Farm, and various county departments including the Planning and Zoning, Highway, and Facilities offices.

- We reviewed 10 judgmentally selected contracts for boat slip rentals on Smithville Lake.

- We reviewed county email messages related to specific activities and purchases. We developed an email search protocol with search terms, selected names, and/or email addresses relating to subjects including land, annex, budget, and assessment. Based on the established protocol county personnel searched the email archives and provided us applicable messages responsive to our request.

- We reviewed applicable meeting minutes and budgets of various boards.

1. Annex Project

The former County Commission did not openly discuss and document key decisions regarding the county annex project, county procurement policies were not followed, and the county allowed one commissioner to approve millions of dollars in contracts related to the project. These actions contributed to a lack of support for the project by the current County Commission and county citizens, and at least $2.8 million in costs incurred that may not be recovered.

Transparency of decisions

The former County Commission approved various annex project actions without publicly discussing the key decisions, and as a result, there was little opportunity for public involvement in the decision to construct the new annex building. As information became known to the public about the proposed land purchase, new annex construction and debt issued to pay for it, residents expressed concerns. Various news media reported there was strong public opposition to the annex project and land acquisition expressed at commission meetings in June, July, and August 2019. Despite the concerns, the former County Commission approved the acquisition of land and engineering, architectural, project management, and other services for the project.

In December 2016, the county contracted with an architect to perform a countywide facilities assessment. In September 2017, the architect provided a report that included 3 options for the county to consider to address its needs for office space. One of the options called for constructing a new county office building (i.e. new annex) to house the offices of the Assessor, County Collector, County Auditor; some Sheriff personnel; event space; meeting rooms; and to allow space for future growth. Other options presented involved either relocating some offices to leased space or various building renovations and office reorganizations and relocations.

Although an architect's assessment of the office space needs of the county was publicly reported as the basis for new annex plans of the former commission, we identified no indication in meeting minutes of any discussion, resolution, ordinance, or other decision related to the architect's report. Additionally, we identified no documented public decisions, votes, or discussions by the former County Commission in commission meetings about building a new annex or the funding for the project until October 2018, when the former County Commission voted to issue COPs for projects including the estimated $20 million new annex building.

The two Commissioners[9] elected to replace Commissioners Ridgeway and Owen agreed with Presiding Commissioner Nolte, during the first meeting of the new County Commission on January 4, 2021, to pause the new annex

[9] Commissioners Jon Carpenter and Megan Thompson were elected in November 2020 and took office in January 2021.

project, temporarily stop incurring any new expenditures, consult with bond counsel, and evaluate the county's options. Each of the new Commissioners expressed concerns about whether the project was needed and its location. After the county notified the project manager of its desire to pause the project, the project manager voided the contract and work on the new annex stopped.

According to the Interim County Administrator, the county intends to consider repairing and updating the old annex and/or other additional projects, and the county hopes to eventually sell the land. However, approximately $2.8 million in costs incurred and paid for site selection, legal, engineering, architectural, construction, and project management services may not be recovered.

Site study and land purchase

The former County Commission did not maintain adequate documentation of the site selection process. As a result, it is not clear how the county determined the site purchased to be the most suitable site for the new annex or if the former County Commission considered any recommendations made by the engineering firm hired and paid to evaluate building sites.

On October 29, 2018, in closed session, the former County Commission authorized hiring an engineer to evaluate sites for the new annex. The engineer evaluated six potential sites. The engineer indicated that his firm determined 5 of the sites to evaluate and former ACA Brown (upon request from one of the commissioners) directed them to consider an additional site. The additional site, in Gladstone, was owned by an individual that was reported in the news media[10] to be an acquaintance of former Commissioner Owen. The engineer issued a report to the county dated May 6, 2019, scoring the suitability of each of the six sites. The evaluation cost $61,154.

On May 13, 2019, in closed session, the former County Commission authorized the negotiations for purchase of 2 different properties, and, according to commission meeting minutes, no description or location of these 2 properties was disclosed publicly in an open meeting, until June 3, 2019. On that date, the former County Commission drafted resolutions for consideration on the purchase of each of the two properties, the Gladstone property, which ranked third in the engineer's study, and another property located on North Brighton in Kansas City that was not among the original 6 properties studied by the engineer. The meeting minutes made no mention of the engineer's report. The news media[10] reported that, in June 2019, Commissioner Owen offered to recuse himself from votes regarding the Gladstone site due to his relationship with the owner and he had researched the North Brighton property as an alternative.

[10] News media reporting disclosed certain information about the sites and purchase process that was not disclosed in county records reviewed by the SAO.

County officials could provide no other documentation explaining how the North Brighton property was determined to be considered for the annex project or how the site compared to the other properties using the evaluation criteria developed by the engineer. On July 23, 2019, in closed session, the former County Commission authorized negotiations for the purchase of the North Brighton property.

On August 28, 2019, in open session, the former County Commission approved the purchase of the North Brighton property for approximately $2.1 million. The engineer indicated a second evaluation was performed that included the North Brighton property, but neither he nor the county could provide a copy of the study, and there were no discussions of this second study in either the open or closed meeting minutes. The engineer billed for the additional site study in October 2019 (work completed through September) and December 2019 (work completed through November), after the land purchase was approved, at a total cost of $36,103. Ultimately, the county closed on the purchase of the property on July 15, 2020, after extending the closing date several times.

Selection of architect/engineer

Former county officials did not follow the county's procurement policy when selecting the firm for architectural and engineering services for the new annex. They did not use a selection committee and or complete the required surveys to support the selection of the 4 firms awarded the engineering and architectural services term and supply contracts in October/November 2018, including the firm selected for the new annex. At the time of the selection, the county had existing architectural service contracts in place with 3 other firms.

According to a county employee, despite existing term and supply contracts for architectural services, the Purchasing Department "was told to issue another one [Request For Quote] because one of the Commissioners wanted a specific vendor to design the annex." The employee indicated the former ACAs were generally unresponsive to questions about the evaluation process and the Purchasing Department was directed to select 4 vendors and include the vendor ultimately chosen. As a result of this discussion, in September 2018, the Purchasing Department made a recommendation to the ACA - Finance and received confirmation that all 3 ACAs agreed with the recommendation and to proceed with the firm chosen.

Six of the 7 engineering and architectural term and supply contracts were later renewed in 2019 (including the firm selected for the new annex), and County Commissioner Owen approved an agreement (Scope of Work and Fee Proposal) with the annex project architect/engineer on March 6, 2020. The value of the contract totaled approximately $1.2 million. The county paid this firm $955,519 related to the annex project from January 28, 2020, through April 30, 2021.

For the procurement of professional services, County Code Section 37.39 requires forming a selection committee comprised of county personnel from the Purchasing Department and the officeholder or department head using the professional services; the committee members prepare surveys of the proposals received that will be evaluated by the Purchasing Department; and the Purchasing Department negotiates with the highest ranking firm and presents the resulting agreement to the County Commission for approval.

Without a selection committee, subject matter experts are not a part of the selection process, which may limit the county's ability to receive the best available services.

Approval of contracts

Only one commissioner approved approximately $12.3 million in contract awards for the annex project. The ability of former County Commissioner Owen to unilaterally execute new annex project contracts resulted in a loss in transparency of the procurement and contracting process and did not serve any apparent purpose.

Former County Commissioner Owen executed the contract for the architect/engineer and 4 other contracts for the new annex project for geotechnical/surveying/engineering/platting services, project construction, material testing and inspection, and interior finishes. None of these contracts were voted on in any open or closed commission meetings. In addition, it is unclear when the contract approval authority was originally granted to Commissioner Owen and by whom, because no official action of the former County Commission was taken related to this matter until April 6, 2020. At that time, the former County Commission approved Resolution 2020-110 ratifying the prior appointment of former Commissioner Owen as the county's designated representative for the annex project, and ratifying all previous actions taken by former Commissioner Owen. Commissioner Owen approved 2 of the 5 contracts prior to this resolution.

County Code 37.22 indicates the County Commission shall make the final bid award and has sole authority to obligate the county. Having all commissioners involved in the execution of significant contractual obligations, such as that for a $20 million building project, is a necessary business practice to ensure all decisions are appropriate and in the best interest of the county.

Conclusion

The former County Commission's actions of not discussing publicly and not documenting much of its considerations and decisions about the annex project and failing to follow county procurement and contract approval procedures contributed to a lack of support for the project.

The slow progression and stoppage of the project has resulted in an inefficient use of the 2018 COPs proceeds. When the county paused the project in January 2021, the 2018 COPs issued for construction of the new annex (and

other county projects) had been outstanding and accruing interest for more than 2 years. In addition, the county will derive little or no benefit from the costs incurred for annex project site selection, legal, engineering, architecture, construction, and project management services for the annex totaling approximately $2.8 million.

Transparent decisions, community support, and consent among the decision-makers are generally needed for large projects to proceed economically and efficiently. Clear documentation to support decisions made is important to establish trust and maintain support. The lack of transparency and documentation supporting the decisions made by the county did not create the requisite trust among stakeholders - taxpayers, vendors, government officials - for the project to succeed. According to the Government Finance Officers Association: "The underlying reason for transparency is to help create trust among citizens, government administrators, and elected officials … people gauge trust primarily through competence (ability to accomplish goals and perform tasks) and values (underlying motives) … helping citizens understand the decision-making process is important for government officials to demonstrate competence and good values"[11] and "when citizens believe that decisions are fact based and take all concerns into consideration, they are more likely to support those decisions."[12] Also, the county has a fiduciary responsibility to ensure that public funds are used effectively.

Recommendation

The County Commission openly discuss and maintain adequate documentation to support decisions made, follow county procurement policy, and involve all commissioners in the approval of significant contracts.

Auditee's Response

The County Commission provided a written response. See Appendix L.

2. Additional Compensation

The county approved employment contracts that automatically renewed and included significant severance payments. In addition, the procedures for county-provided housing need improvement.

2.1 Employment contracts and severance

The former County Commission approved a 2-year employment contract with the former County Administrator and 1-year employment contracts with the former ACAs that automatically renewed and included generous severance payments. In addition, the former County Commission executed separation agreements with each of those employees upon their resignation that provided additional severance benefits beyond the benefits outlined in the employment agreements.

[11] Government Finance Officers Association, *Transparency: A Means to Improving Citizen Trust in Government*, January 2018, <https://www.gfoa.org/materials/transparency-a-means-to-improving-citizen-trust>, accessed August 6, 2021.
[12] Government Finance Officers Association, *Code of ethics*, <https://www.gfoa.org/ethics>, accessed August 6, 2021.

Employment contracts

The former County Administrator's contract,[13] approved in closed session and effective from April 1, 2017, through March 31, 2019, contained automatic renewals for additional 2 year periods and provided for severance payments equal to 18 months' salary[14] if the county terminated him without cause or asked him to resign, or 12 months' salary[15] if he voluntarily resigned and provided at least 90 days' notice. The contracts with the former ACAs, approved in closed session and effective from November 15, 2018, through November 15, 2019, contained automatic renewals for additional 1-year periods, and provided for severance payments equal to 12 months' salary[16] if the county terminated the employee without cause or asked the employee to resign, or 3 months' salary if the employee voluntarily resigned and provided at least 4 weeks' notice.

The automatically renewing contracts for the ACAs essentially guaranteed they would receive severance payments if terminated by the employer without cause or upon the employee's voluntary resignation because the contracts never expired. The former County Administrator's contract allowed the county to stop the automatic renewal by giving 365 days of notice, so the contract could potentially expire, but the default auto renewal and length of the advanced notice requirement increased the possibility that he would receive severance pay. No other county officials or employees had multi-year or annual automatically renewing employment agreements.

Severance paid upon separation

The county did not maintain documentation to support additional severance provided to the former County Administrator and ACAs. Upon the resignation of the former County Administrator in July 2018, and the three former ACAs in December 2020, the former County Commission approved separation agreements with each of the employees that provided an additional 3 months' severance for the former County Administrator and an additional 1 month of severance to each of the former ACAs. These severance payments were in addition to the amounts provided in the employment agreements, and the separation agreements waived the required termination notice requirements in the original employment agreements. For the County Administrator, the separation agreement also provided for an additional 3 months of county-provided health insurance.

[13] The April 2017 agreement indicates the purpose of the agreement was to both renew a previous agreement and settle the former County Administrator's claims against the county for hostile work environment and breach of contract.

[14] The county would also continue to provide and pay its portion of the cost to continue for 18 months the health insurance, short term disability insurance, long term disability insurance, and life insurance in effect at the time of termination.

[15] The county would also continue to provide and pay its portion of the cost to continue for 12 months the health insurance in effect at the time of termination.

[16] The county would also continue to provide and pay its portion of the cost to continue for 12 months the health insurance in effect at the time of termination.

The separation agreements for the 3 ACAs indicated that each of the ACAs had claims against the county for harassment, and provided a $50,000 settlement for those claims, in addition to the severance benefits. The Clay County Human Resources Policy Manual does not provide for severance payments to county employees upon termination.

Conclusion

Under Missouri law, unless otherwise provided, employment is generally at will. For at-will employees, the county would not be liable or bound to pay an official any substantial compensation or severance benefits after employment is terminated. However, the former County Commission entered into multi-year and annual employment agreements with the former County Administrator and ACAs, respectively, that bound the county to severance payments if their employment was terminated without cause or by employee resignation. In addition, the former County Commission executed separation agreements with each of those employees upon their resignations that provided additional severance payments beyond those provided by the employment agreements.

If considered necessary, employment contracts and separation agreements must be in the best interest of the county. The county has a fiduciary responsibility to ensure that public funds are used effectively.

2.2 County housing

The county did not comply with Internal Revenue Service (IRS) guidelines for reporting the value of the rent-free housing fringe benefits as income, and has not established a policy for providing housing to county employees.

In 2017, the county executed lease agreements with 5 county employees for rent-free county housing for as long as they were employed by Clay County in exchange for on-call services. The county leased 4 Smithville Lake houses to an ACA, 2 park rangers, and a highway employee. As part of the agreements, the employees were required to provide "on call" services at the county parks for no less than 6 months or snow removal services. The county also leased an apartment at one of its historic sites, rent-free, to another ACA in exchange for similar services. The former County Commission authorized the former County Administrator to enter into these leases on May 1, 2017, in closed session. According to the Human Resources Manager, as of May 2021, the 2 former ACAs, as well as, most of the other employees have left the county housing or are in the process of leaving county housing.

The county had no policy authorizing such rentals to employees or establishing any guidelines about the process, and the county did not report the value of the rent-free housing fringe benefit to the IRS on the employees' W-2 forms. County personnel could not explain why the benefits were excluded from W-2 forms.

IRS Publication 15-B states that any fringe benefit provided by an employer is taxable and must be included in the employee's pay unless excluded by law. IRS publication 15-B[17] allows the exclusion from income of lodging provided employees if all of the following 3 tests are met (1) the lodging is on employer premises, (2) is furnished at the employer's convenience, and (3) is accepted by the employee as a condition of employment. However, we found no provision in either the lease agreements of the 5 employees or the employment contracts for the 2 former ACAs requiring the employees to accept the county housing as a condition of employment. The IRS publication also indicates the fringe benefit value of the lease is its fair market value or the amount an employee would normally have to pay to lease the residence.

A county housing policy is necessary to ensure compliance with IRS guidelines and to help ensure equitable treatment among employees. By not properly reporting the value of fringe benefits on employee W-2 forms, the county could potentially be subject to IRS penalties.

Recommendations

The County Commission:

2.1 Refrain from entering into automatically renewing employment contracts and separation agreements with additional severance amounts, and consider the necessity of severance payments.

2.2 If housing for county employees is considered necessary, establish a county housing policy and ensure the housing is properly reported as taxable wages, if applicable. In addition, the County Commission should consult with legal counsel and consider amending previous year employee W-2 forms, as appropriate.

Auditee's Response

The County Commission provided a written response. See Appendix L.

3. Closed Meetings

The county did not fully comply with the Sunshine Law regarding closed commission meetings.

Meeting minutes

The county could not provide minutes for the closed meeting on November 28, 2017, or unredacted minutes for 10 closed meetings from January 3, 2017, through July 27, 2017. The county redacted portions of those minutes that the County Counselor indicated were attorney-client privileged matters in conjunction with its lawsuit with the State Auditor's Office. After the lawsuit was resolved in 2021 and the county agreed to provide unredacted minutes, the County Clerk could not locate some of the original unredacted minutes.

[17] Department of Treasury, Internal Revenue Service, *Publication 15-B, Employer's Tax Guide to Fringe Benefits, For use in 2021*, February 5, 2021, <https://www.irs.gov/pub/irs-pdf/p15b.pdf>, accessed June 21, 2021.

As a result, it is not clear whether the discussions at those meetings related to allowable topics.

Allowable topics

Some topics voted on in the closed meetings were not specifically allowable under the Sunshine Law. Closed commission meeting minutes indicated custodial service, legal representation, and financial planning contracts were terminated in closed session in June 2017, July 2017, and January 2018, respectively.

Conclusion

Missouri's Sunshine Law, Chapter 610, RSMo, provides for transparency and openness of government. Section 610.020.7, RSMo, requires minutes of meetings be maintained as a record of business conducted and to provide an official record of actions and decisions, including the date, time, place, members present, members absent, and a record of any votes taken. The minutes need to provide sufficient details of discussions to demonstrate compliance with statutory provisions and support important decisions made. Section 610.021, RSMo, lists the topics that may be discussed in closed meetings. Section 610.022.3, RSMo, mandates that the discussion topics and actions in closed meetings must be limited to only those specifically allowed by law as announced in justification for closing the meeting.

Recommendation

The County Commission maintain complete minutes for all closed meetings and ensure only topics allowed by state law are discussed in closed meetings.

Auditee's Response

The County Commission provided a written response. See Appendix L.

4. Personnel and Payroll Controls and Procedures

County personnel and payroll controls and procedures need improvement. Payroll expenditures totaled approximately $26.1 million in 2018, $26.4 million in 2019, and $27.9 million in 2020.

4.1 Pay plan and approved pay rates

Employee pay rates were not always authorized in the county pay plan and/or documented in employee personnel files. In addition, some employee job titles are not included in the county pay plan.

Pay plan

The county pay plan was not complete and did not reflect changes in employee positions and pay rates, including cost of living adjustments. As a result, some pay rates may not be approved.

We found 7 Sheriff's office employees' and 2 other county employees' pay rates exceeded the maximum range adopted in the county 2018 pay plan. In addition, the Airport Manager position was not listed in the county pay plan. The County Auditor noted similar concerns in his 2020 payroll review issued November 2020.

Based on our review of pay plans dating back to 2015, no significant changes have occurred to the pay plan since at least that time. County officials could not explain why pay rates were not in accordance with the pay plan. The former County Commission or a former ACA approved the pay rates for the 3 employees with rates that either exceeded the maximum allowable rate or was excluded from the pay plan. Sheriff's office personnel indicated the former Sheriff approved pay increases above pay plan maximums in order for law enforcement salaries to be competitive.

Approved pay rates for COLA increases

The county did not maintain documentation of all employee approved pay rates or cost of living adjustments (COLA) in employee personnel files. Documentation of the pay increase and approval for the 2018 COLA increases (5 percent) was not included in any of the 10 Sheriff's office employee personnel files reviewed. There was no support for any COLA increases for the Sheriff's office employees reviewed since at least 2016. Sheriff's office personnel indicated this documentation is not necessary because salaries are reflected in the county's payroll system. However, the County Commission only sets a maximum COLA in its annual budget and then requires the expenditure authorities (e.g. Sheriff's office) to determine and document how it is applied. We saw no documentation this occurred for the Sheriff's office employees reviewed.

Conclusion

Section 11 of the county Human Resources Policy Manual states the county pay plan is approved annually as part of the budget process and that the "Commission approves minimum and maximum pay ranges for all County positions." Failing to annually update the pay plan as part of the county budget process limits its effectiveness as a tool to ensure projected payroll expenditures do not exceed approved budgetary appropriations. In addition, without documentation of actual COLA salary increases, there is less assurance payments to employees are proper.

4.2 Employment change

Former county personnel did not submit employment change forms timely for 5 of the 9 employees reviewed who had employment changes in 2018. We found 7 instances of untimely change forms for the 5 employees. The 3 former ACAs supervised all of them. In 3 of the 7 instances, the late submissions resulted in retroactive pay:

- The former Airport Manager received retroactive pay totaling approximately $2,100 in 2019 dating back to his May 2018 promotion. The employment status change form authorizing his promotion in May 2018 was approved in November 2019.

- A park ranger received his uniform allowance retroactive to his November 2016 hiring, totaling $1,288, in February 2018. The employment status change form authorizing the uniform allowance was approved in January 2018. He also received another $81 retroactive

payment in September 2018, upon approval of the employment status change form for his August 2018 promotion.

Employment status change forms require approval/review of the (1) Office Holder/Department Manager, (2) ACA, (3) Chief Budget Officer, and (4) County Human Resources/Payroll. The change form also clearly indicates, in bold type and yellow highlight, that changes must be received in the Human Resources department prior to the effective date of the change. However, a county official indicated the former ACAs did not always comply with this requirement.

Timely approval of employment status changes is necessary to ensure all parties are aware of changes to their compensation and prevent misunderstandings.

4.3 Performance appraisals

The county does not ensure supervisors prepare employee performance appraisals in accordance with county policy. Most Sheriff's office and other county employees selected for review did not have a current appraisal in their personnel file. Sheriff's office personnel indicated they provided us all 2018 appraisals performed of their personnel. However, in 2018, the Sheriff's office had approximately 196 employees, but we received current appraisals for only 23 employees.

Section 7-1 of the county Human Resources Policy Manual states "Employees should receive performance appraisals on an annual basis for purposes of identifying performance levels, development and training opportunities and ensuring appropriate departmental productivity." In addition, Section 7-2 of the manual states "Introductory employees and employees in new positions receive an initial appraisal on or before the end of the introductory period." County personnel could not explain why employees had not received appraisals as required by policy. Performance appraisals are needed to adequately evaluate employee performance and provide documented feedback to employees. Performance appraisals also assist in personnel decisions.

Recommendations

The County Commission:

4.1 Ensure the compensation for all county employees is approved in the annual pay plan and documentation of COLA increases for all county employees are maintained.

4.2 Ensure employment changes are timely approved.

4.3 Ensure documented performance appraisals are performed in accordance with the established policy or modify the policy.

Auditee's Response

The County Commission provided a written response. See Appendix L.

5. County Contracting and Payment Procedures

County contracting, vendor monitoring, and disbursement procedures need improvement.

5.1 Contract pricing

The county did not have adequate procedures to verify invoiced prices against contract amounts when the county used either (1) an existing cooperative agreement/contract between the contractor and another government jurisdiction or (2) the county's term and supply contract with a vendor.

Cooperative agreements/contracts

County personnel did not always verify invoiced prices with cooperative contracted prices. Also, county personnel could not provide price listings or other documentation for various cooperative contracts to support the amounts invoiced and paid.

County Code Section 37.36 allows the use of cooperative procurement programs. The section defines these as competitively bid or procured contracts established by other government jurisdictions that can be used by other public entities.

We identified concerns with the following expenditures the county paid with COPs funding:

- County personnel could not provide documentation to ensure prices paid for 2 large area mowers were in accordance with the cooperative contract price. In July 2019, the county paid $92,500 each for the mowers (excluding destination charges totaling $5,693). The county's Request for Official Action document indicated the county intended to trade in two of its mowers as part of the purchase and the price quote from the vendor indicated a price of $180,693 for the mowers after a $10,000 trade in credit ($90,347 per mower). The sales invoice; however, does not refer to the price quote or indicate any trade-in credit. While former county personnel indicated the prices paid were less than the cooperative contract price of 21.8 percent below the manufacturer's suggested retail price, or $96,007 each, they could not provide documentation of the trade-in credits received or explain why the amounts paid exceeded the price quote.

- County personnel did not review a complete price listing before approving expenditures under a September 2017 bathroom replacement cooperative contract. The only list county personnel could provide included one price for a double vault toilet unit, $26,290. However, in

November 2019 the county purchased 4 units costing $18,025, $23,465, and $47,532 (2 units). Former county personnel indicated "No documented process existed for department level checking at that time. However, . . . Standard Operating Procedures are now in place." This vendor was paid $863,304 for bathroom replacements at county parks from December 2018 through November 2020.

- County personnel did not document their review to ensure the pricing they received for the purchase of 2 skid loaders ($64,542 each) in November 2019, was in compliance with the cooperative contract utilized. The cooperative contract states "pricing is provided in accordance with the applicable percentage discounts off of current list prices," which in November 2019 was listed as 31 percent for the skid loader purchased. When asked how they ensured they received the required discount, former county personnel indicated the "Department may have checked against the original contract. But there is no supporting documentation." Former county officials indicated a standard operating procedure would be used for future purchases.

- County personnel could not provide a price listing for playground equipment purchased in December 2018 ($99,796) to ensure amounts paid were in compliance with the cooperative contract utilized. When asked how compliance was verified, county personnel responded with only a list of procedures for verification, but neither confirmed verification nor provided any additional documentation to support the pricing.

In addition, we noted concerns with the following expenditures paid from non-COPs county funding sources:

- The county Highway Department did not verify rack prices for fuel purchases to ensure the unit price per gallon charged (rack price plus markup) was appropriate. For a May 2018 expenditure tested, the county paid $2.162 per gallon for unleaded and $2.3989 per gallon for diesel fuel. Former county officials indicated "Currently, the vendor sends an email detailing the price the Department will pay for fuel each time an order is placed. In the future, they will include the daily (or rack) price in the email." Fuel purchases totaled approximately $306,000 for 2018.

- The price list provided by county officials for a digital security vendor did not include pricing for all items purchased, including a battery case ($210), noise canceling speaker ($182), an alarm auto dialer ($204), or the hourly cost for programming and project engineering/consulting ($95/hour). In addition, the price listing provided was dated March 2020, more than a year after the November 2018, $21,865 purchase from the

digital security vendor. County officials provided no explanation on how they verified the amounts paid.

- The county used and participated in an existing media consulting contract from the State of Arizona; however, former county officials indicated "prices were not checked against the State of Arizona contract at the time of purchase." For the October 2018 expenditure tested, the county was invoiced $8,083 for marketing ($5,000 for content marketing and $3,083 for various social media ads). While these charges were based on the vendor's June 2018 quote to the county, it is unclear how these charges relate to cooperative contract pricing provisions (i.e. advertising rates and packages). The county paid this firm $95,000 during 2018.

Term and supply contracts

The county paid invoiced amounts that did not agree with amounts listed in the related term and supply contracts for 2 tested expenditures paid from COPs funding. County personnel could not explain why this occurred.

County Code Section 37.42 allows the use of open purchase orders, or term and supply contracts, which it defines as competitively bid or procured "long term contracts for goods or services, purchased on a repetitive basis," generally "based on a fixed per unit price or a percentage discount or from some verifiable list pricing." Once these contracts have been awarded to selected vendors, one of those vendors must then be selected to provide the specific good or service.

- The county paid the new park office building design contractor $79,918 for November 2019 and January 2020 billings. However, hourly rates billed did not agree to the renewed term and supply contract rates. The hourly rate charged for the project manager was lower than any rate listed on the billing rate schedule provided, while the hourly rates charged for other personnel (various levels of engineers, designer/draftsmen, and clerical/administrative personnel) did not agree to applicable rates listed on the schedule (some rates were higher and some were lower).

- Amounts paid exceeded the bid for the restoration of the Jesse James Historical Family Home. The county solicited invitations for bid in May 2018 for the restoration of the building. The county awarded vendors term and supply contracts in August 2018 for 2 contractors and renewed the contracts in July 2019. Bid documentation from the contractor ultimately chosen for the restoration work shows a projected cost of $338,380 for the restoration services, but the county ultimately paid $497,960. The $338,380 generally agrees to the contractor's Application and Certification for Payment (ACP), adjusting for changes made, including a deduction of plaster repair ($82,720) and additions of siding removal and replacement ($127,200), foundation repairs ($79,800), windows ($27,000), and other miscellaneous costs.

Former county personnel indicated the "original bid amount was based on an estimate after a prebid walkthrough of the historic site. Upon being awarded the contract, the contractor was able to do a deeper inspection of the structure and recognized far more significant deferred maintenance. This caused the project scope to expand, which is accounted for by using the fee schedule, and the final project budget was within the $500,000 estimate set out in the bond project budget." County personnel could not provide documentation that any county official approved a change order for the additional work. In addition, the change order summary on the contractor's ACP did not indicate any change orders occurred.

Conclusion

County Code Section 37.23 describes the requisition process, including describing quantities and cost and referencing applicable contracts. In addition, County Code Section 37.78 describes the payment authorization process, including verifying the price billed with the price on the purchase order.

Invoice amounts need to be verified to contract amounts or price listings prior to making payment. Only by reviewing contract amounts or price listings for payments can county personnel ensure the amounts billed for payment are appropriate, accurate, and comply with contract provisions. In addition, maintaining change order documentation is necessary to demonstrate the work was authorized.

5.2 Executed timely

Written contracts were not entered into timely.

The contract for public relations consulting services was not timely executed. In total, this firm was paid $54,000 from March 2020 through December 2020. The contract was not signed by the ACA until April 24, 2020, but the vendor began incurring charges for services provided dating back to November 2019. In addition, one payment of $4,500 on March 27, 2020, preceded the date the ACA signed the contract.

Former county officials indicated signing contracts after the effective date was not an unusual occurrence. To support their claim they provided other contracts executed in 2019 after services began including 5 contracts for contributions to not-for-profit organizations, and one contract to a vendor for testing and certification of the county weather observing system.

Contracts must be executed before work is performed. Under Section 432.070, RSMo, only future consideration for contracts may be considered. Clear, detailed, and timely written contracts are necessary to ensure all parties are aware of the services to be performed and the compensation to be paid for the services.

5.3 Monitoring

County personnel did not obtain sufficient documentation to ensure that a not-for-profit organization used county funds in accordance with contract terms. The county annually provides $75,000 in funding to a not-for-profit organization dedicated to neighborhood improvement and revitalization in Clay and Platte counties.

The contract only requires the entity provide the county a copy of the "current budget." However, the budget expenditure summary provided does not include enough detail for county officials to ensure the funding is spent in accordance with contract terms that require the funds be spent in Clay County with no more than 50 percent spent in one city, and other provisions. Former county officials indicated "Prior to the Clay County Commission adopting the annual budget, outside agencies present to the Commission usage for the previous and upcoming year."

Obtaining documentation supporting compliance with contract terms is necessary to ensure county resources are effectively used and the county's expectations for results are met.

Recommendations

The County Commission:

5.1 Ensure amounts paid on cooperative and term and supply contracts are verified per contract terms and adequate supporting documentation is maintained to support those payments. In addition, use change orders and maintain documentation for all significant project changes.

5.2 Enter into written contracts timely.

5.3 Ensure sufficient documentation is provided to properly monitor contracts and ensure contract provisions are met.

Auditee's Response

The County Commission provided a written response. See Appendix L.

6. Procurement Procedures

County procurement procedures need improvement.

6.1 Requests for proposals for professional services

The county did not solicit proposals for some professional services as required by county code.

Legal services

The former County Commission did not solicit proposals for the following legal services:

- In December 2017, the former County Commission hired a law firm to act as County Counselor. Payments to this firm from 2017 to 2020 totaled approximately $2.2 million.

- In June 2016, the former County Commission hired another law firm to review and respond to Sunshine Law requests and represent the county in court. Payments to this firm from 2017 to 2020 totaled approximately $480,000.

- In November 2020, the former County Commission approved the engagement of a third attorney to oversee the execution of various employee separation agreements. Payments to this firm during December 2020 totaled $9,000.

County officials provided no explanation regarding why the county did not solicit proposals for legal services.

Public relations services

The county did not solicit proposals for public relations consultation services including media relations strategy development, communications campaigns, message development, and issues management and crisis communications. The county paid the firm $54,000 from March 2020 through December 2020. County officials provided no explanation of why the county did not solicit proposals for these services.

Conclusion

County Code Section 37.39 requires use of a formal request for proposal (RFP) process when obtaining professional services. Soliciting proposals for professional services is also a good business practice, helps provide a range of possible choices, and allows the county to make better-informed decisions to ensure necessary services are obtained from the best qualified provider after taking expertise, experience, and cost into consideration.

6.2 Bridge engineering services

County personnel did not maintain adequate documentation to support how they selected the bridge engineering services vendor (paid with COPs funding). The proposal scoring summary prepared in September 2017 indicated the engineer selected ranked fourth of the 10 firms responding to the RFP. Included in the official action approved by the former County Administrator is a statement indicating, "MoDOT has reviewed and supports the award." However, former county personnel indicated no other support is available explaining why that vendor was chosen. The county paid the vendor $114,176 from December 2018 to July 2020.

County policy requires use of a selection committee to evaluate solicitations for professional services. County Code Section 37.39 (6) states, ". . . the purchasing agent/manager shall enter into negotiations with the highest ranking firm. If an agreement is unable to be reached, the purchasing agent/manager shall enter into negotiations with the next highest ranking firm

and so on until either a negotiated agreement is reached or the RFP is cancelled." Further, County Code Section 37.11 states, "All specifications, bid documents, purchase orders and supporting documents are public records . . ." Retaining documentation for the solicitation process for service contracts is necessary to demonstrate compliance with regulations and support decisions made.

6.3 Selection committees and surveys

County personnel did not always comply with county procurement policies regarding the composition of selection committees and the completion of surveys by selection committee members.

Selection committee composition

The selection committee for the county's procurement of an inmate medical service provider included an even number of members instead of the recommended odd number because the committee did not include a member of the Purchasing Department. The county paid this vendor $434,096 during 2019. Also, the selection committee for the solicitation of inmate telephone services did not include someone from the Purchasing Department as required. Committee members for both selections included only Sheriff's office personnel. Another selection committee for audio upgrades to the courtrooms did not have the recommended odd number of committee members. The county paid this vendor $40,185 during 2019.

Former county officials indicated "An odd number of committee members is always preferred and had there been a tie, the Purchasing Department was prepared to assist in breaking that tie."

Survey completion

Selection committee members did not complete surveys after their evaluation of the inmate medical service providers as required. The county maintained an email message from the Sheriff's office explaining the decision to retain the current vendor stating "The Sheriff is recommending that we stay with our current contract and maintain our current annual plan." Former county officials indicated a survey, while preferred, "is not required… in this instance, the attached email (from the Sheriff's office) was sent in place of the completion of surveys, justifying the recommendation of award to satisfaction." However, county policy does not provide for other selection process documentation.

Conclusion

For the procurement of professional services, County Code Section 37.39 requires forming a selection committee comprised of county personnel from the Purchasing Department and the officeholder or department head using the professional services; recommends committees have an odd number of members limited to 7; requires committee members to prepare surveys of the proposals received that will be evaluated by the Purchasing Department; and requires the Purchasing Department to enter into negotiations with the highest ranking firm. Appropriate selection committee composition and the

documentation of surveys is necessary to support procurement decisions made.

6.4 Financial advisor/underwriter

The county used the same provider to serve as both financial advisor and underwriter for the issuance of the COPs. County personnel believed a separate financial advisor was not necessary for COPs funding.

Using the same provider to act in the dual capacity of underwriter and financial advisor for a debt issuance creates an inherent conflict of interest. The lack of independent financial advice could result in the county not being adequately informed of debt issuance options or being unable to adequately evaluate debt proposals. According to the Government Finance Officers Association[18], "…advisors are the only parties with a federal fiduciary duty to the issuer. In contrast, the relationship between the issuer and underwriter is one where the relationship has a common purpose (sale of debt) but competing objectives (issuer: lowest interest rate, underwriter: higher interest rate to reduce the risk of not being able to sell the debt at a profit)."

Recommendations

The County Commission:

6.1 Solicit professional services in accordance with the county code.

6.2 Ensure documentation is maintained in compliance with the county code to support the selection of vendors awards.

6.3 Ensure selection committees include the required membership, have the recommended number of members, and members complete surveys as required.

6.4 Discontinue using an underwriter who also acts in a dual capacity as financial advisor for debt issuances.

Auditee's Response

The County Commission provided a written response. See Appendix L.

7. Expenditures and Purchasing Cards

County procedures for expenditures and purchasing cards need improvement.

7.1 Prepayment

The county made a $20,000 prepayment on November 29, 2018, to an information technology service provider but did not ensure the amount was applied to its outstanding balance or used to reduce subsequent payments. The

[18] Government Finance Officers Association, *Selecting and Managing the Method of Sale of Bonds*, March 2021, <https://www.gfoa.org/materials/selecting-and-managing-the-method-of-sale-of-bonds>, accessed September 7, 2021.

county generally pays the vendor through a prepayment/retainer process. The document county personnel provided listing outstanding prepayment balances, adjustments for prepayments, and ticket charges from September 2018 through June 2020, did not include the $20,000 prepayment, and the county provided no other supporting documentation or explanation of why the prepaid amount was not credited.

To ensure prepayments are properly applied to outstanding balances due, county personnel should follow-up with vendors and prepayments should be adequately tracked. Only by following up with vendors regarding prepayments can the county ensure services are received for these prepayments and tracking of outstanding prepayment balances is accurate.

7.2 Questionable purchases

The county spent approximately $5,000 on food purchases for 5 events that may not have been a prudent, reasonable, or a necessary use of county funds. In addition, the county does not have a written employer-provided food policy governing the allowability of events and documentation requirements.

These food purchases were for a board and County Commission reception (December 2016), employee service award luncheon (June 2017), luncheon for volunteers (November 2017), board and County Commission social event (November 2018), and employee appreciation luncheon (June 2019). The Public Relations Department Manager charged each purchase to her purchasing card. County personnel did not maintain a list of participants for any of these events. In addition, a review of the Public Relations Department Manager's purchasing card activity for similar events after June 2019 identified additional charges for reception and employee appreciation events, totaling $4,185, in January 2020 and December 2020. County officials provided no explanation of how any of the events benefited the county.

The county has not established any guidance or policy about food purchases or county events. Such guidance or policy can have various provisions. For example, the State of Missouri's agency provided food policy[19] only allows for food at official business functions and light refreshments at other agency sponsored activities (employee retirement, employee appreciation, etc.), but banquets for such activities are not allowed. In addition, the policy requires documentation to support food purchases including (1) purpose, (2) list of participants or estimated number of invitees, and (3) cost of food provided.

County residents have placed a fiduciary trust in their public officials to spend county revenues in a prudent and necessary manner. An established county

[19] Missouri Office of Administration, *State of Missouri Administrative Policy SP-5 - Agency Provided Food*, Issued January 2002, <https://oa.mo.gov/sites/default/files/agency_food.pdf>, accessed June 17, 2021.

provided food policy would give employees necessary guidance and better transparency for citizens about the use of public funds.

7.3 Highway Department fuel

The Highway Department does not reconcile fuel usage to billings. Fuel purchases for year ended December 31, 2018, totaled approximately $306,000.

The Highway Department has 2 fuel tanks (20,000 gallons each), one for regular gasoline and one for diesel fuel, for use by various county offices and departments. The Highway Department Transportation Manager indicated the department has a record of fuel purchased and can print a usage report from the fuel system, but department officials did not consider it necessary to measure or track fuel balances in the underground tanks to perform a reconciliation of usage to billings.

Procedures for reconciling fuel usage to bulk fuel purchased are necessary to prevent overpaying vendors and decrease the risk of loss, theft, or misuse of fuel occurring and going undetected. Failure to document beginning and ending fuel tank balances significantly reduces the effectiveness of any review process.

7.4 Purchasing cards

County controls and procedures over purchasing cards need improvement. County expenditures from purchasing cards totaled approximately $950,000, $1 million, $2.1 million, and $3.2 million for the years ended December 31, 2017, 2018, 2019, and 2020, respectively. For the year ended December 31, 2019, approximately 50 purchasing cards were assigned to various personnel and departments. Monthly cycle limits on the cards ranged from $500 to $225,000.

Purchasing limits

The county did not monitor monthly purchasing card limits, and limits for some individuals were excessive. Former county officials indicated they determined the monthly limits when the cards were issued, but they did not believe it necessary to periodically reevaluate the limits other than when temporary increases were made for special situations.

An analysis of employee purchasing card usage determined many employees had monthly cycle limits significantly greater than necessary to cover their typical actual purchases. For example, we identified an employee whose card had a monthly cycle limit of $50,000, but for the years ended December 31, 2019, and 2018, card purchases totaled less than $4,500 annually. In addition, for the year ended December 31, 2019, we noted one employee's card was not used and 19 other employees had average charges less than 10 percent of their cards' monthly cycle limits.

Purchasing card usage

The county purchasing card manual does not incorporate best practices for use of purchasing cards and has not been updated to reflect the use of

purchasing cards for invoiced transactions. In 2019, the county began using purchasing cards to pay for legal expenses, and other high cost transactions for which the county receives an invoice. The county used purchasing cards to pay legal expenses totaling approximately $773,000 for 2019. Similar billings were previously paid through the county accounts payable process.

The purchasing card manual includes cardholder roles and responsibilities, county purchasing guidelines, and some specific purchases allowed or not allowed, but does not specifically address all items allowed or unallowed, the scope of the purchasing card program, fraud prevention, or a training program.

A former county official indicated the county began using the cards for legal fees because one of the county's legal counsels requested payment in that manner and using purchasing cards to pay legal fees would help the county (1) reduce the likelihood of incurring late fees for untimely payments and (2) receive purchasing card usage rewards. However, such expenses could have been paid timely with efficient processing of the invoices through the county's normal payment processes. In addition, it was not until 2021, upon request of the County Auditor, that purchasing card rebates (approximately $20,000) were credited back to the county.

The County Auditor's report on purchasing cards issued June 2020, suggested the county pay invoices through normal payment processes rather than with purchasing cards. Government Finance Officers Association guidance for using purchasing cards[20] indicates a purchasing card program should define the scope of the program (generally for small dollar, high-volume transactions) and include fraud prevention and training elements. For example, the State of Missouri's purchasing card manual[21] indicates its purchasing cards are not intended for "in-hand invoices."

Conclusion

Purchasing card transactions are inherently more risky than other purchases because these purchases are or can be made prior to proper approval. That risk and the potential for inappropriate purchases or other misuse increases even more with excessive or unneeded limits and purchasing ability. By periodically comparing actual purchasing card activity of each employee and department to established monthly cycle limits and adjusting limits and/or the

[20] Government Finance Officers Association Best Practices, *Purchasing Cards to Streamline the Purchasing Process*, September 5, 2020, <https://www.gfoa.org/materials/purchasing-cards>, accessed June 17, 2021.

[21] Missouri Office of Administration, *State of Missouri Purchasing Card Policy & Procedure Manual*, Revised May 2019, <https://oa.mo.gov/sites/default/files/State%20of%20MO%20Purchasing%20Card%20Policy%20and%20Procedure%20Manual.pdf>, accessed June 17, 2021.

number of active cards as needed, county officials can strengthen controls over purchasing cards and reduce potential risks for these transactions.

In addition, limiting the number of high-cost purchases from purchasing cards and incorporating best practices into current purchasing card policies is necessary to ensure all credit card purchases are appropriate and to reduce the risk of unauthorized purchases occurring.

Recommendations

The County Commission:

7.1 Follow-up on the $20,000 prepayment and ensure prepayments are subsequently applied to services received by the county.

7.2 Ensure all disbursements are a necessary and prudent use of public funds. In addition, the County Commission should establish a policy regarding food purchases, if such purchases are considered necessary.

7.3 Ensure beginning and ending fuel tank balances are documented and reconciled to fuel usage and fuel purchases. Any significant discrepancies should be promptly investigated.

7.4 Periodically evaluate the need for each purchasing card issued and adjust employee purchasing card limits as deemed appropriate. In addition, reconsider the need to pay legal expenses and other high dollar invoiced expenses through purchasing cards and update purchasing card guidance to include best practices.

Auditee's Response

The County Commission provided a written response. See Appendix L.

8. Smithville Lake

Procedures for handling of change funds and discounts at Smithville Lake need improvement.

Smithville Lake offers boating, fishing, camping, and other activities for which the county collects fees. The Clay County Parks and Recreations Department has multiple collection locations for receipts including the Camp Branch Parks Office (Parks Office), marinas, fee booths, camp host stations, and honor boxes. Receipts totaled approximately $1.9 million for each the years ended December 31, 2018, and 2019.

8.1 Change funds

Parks Office personnel do not always maintain change funds at constant amounts. Our cash count on March 29, 2021, included $4,127 in change funds, which was more than the authorized amount of $4,050. Personnel believed the $77 overage was unrecorded honor box receipts. In addition, during our cash count at the Camp Branch Marina on March 29, 2021, we

noted $189 in the change fund which was less than the authorized amount of $200. Marina personnel could not explain the shortage.

Failure to maintain change funds at a constant amount increases the risk that loss, theft, or misuse of money will occur and go undetected. If a change fund is needed, it should be set at a constant amount and a procedure should be established to reconcile to this amount every time a deposit is made.

8.2 Discounts

Parks and Recreation Department practices for providing discounts for Smithville Lake fees are inconsistent or contrary to county ordinance. Department personnel indicated their practice is to limit taxpayer discounts to only one per household per year. However, neither Ordinance 2009-ORD-35, nor annual ordinances establishing Parks and Recreations Department fees specifically include such language. These ordinances indicate discounts are available for Clay County taxpayers purchasing seasonal vehicle ($10 discount for non-seniors, $15 for seniors), boat ($20 discount for non-seniors, $25 for seniors) or combination passes ($30 discount for non-seniors, $40 for seniors) with proof of personal property tax payment, but do not indicate annual limits.

In addition, department personnel indicated county retirees receive the same discounts as current employees, subject to certain restrictions, regarding free park entrance, camping, golf course green fees, and historic site tours, as well as a 50 percent discount on boat rentals. However, the ordinance provided by the former county administration to support retiree discounts (2002-ORD-32(a)), only discusses "regular full-time employees." County officials could not explain why these discounts are allowed.

Aligning current practices with established ordinances is important to ensure employees and the public know how discounts will be handled. If current practices reflect the intentions of the County Commission, new ordinances or revisions to existing ordinances are necessary.

Recommendations

The County Commission:

8.1 Ensure change funds are maintained at a constant amount.

8.2 Review park discount practices and ordinances and revise practices and/or ordinances as necessary.

Auditee's Response

The County Commission provided a written response. See Appendix L.

9. Information Technology

County information technology policies and procedures need improvement.

9.1 Disaster recovery plan and backups

The county does not have a plan for resuming normal business operations and recovering computer systems and data in the event of a disaster or other extraordinary situations. In addition, the county does not periodically test for the recovery of data from backup files. County officials indicated that under the prior administration a plan was in development, but it was not taken to the County Commission for approval. They also indicated an updated plan is currently under review.

A formal, written contingency/disaster recovery plan is needed to guide an organization through computer system and overall operation recovery following a disaster or other extraordinary event. Periodic evaluation, testing and updating of the plan helps ensure the recovery process will be effective if the plan has to be implemented.

9.2 Electronic communication policies

The county has not developed records management and retention policies in compliance with the Missouri Secretary of State Records Services Division guidance, as approved by the Missouri Local Records Commission. Missouri Secretary of State Records Services Division guidance recommends government entities have a policy on electronic messaging, including text messages, email, and other third party platforms. Additionally, the county has not always retained emails and text messages in accordance with requirements.

According to former county officials, county email messages were not retained for longer than 12 months regardless of the content or function of the messages because of lack of server space and/or the feasibility of retaining that volume of data. In January 2019, upon SAO request, the county agreed to stop "the routine removal of emails from our servers, until the audit is completed." In addition, the county had no procedure to archive business-related email messages from personal email accounts sent to other email accounts outside the county domain. Also, the county maintained no record of text messages, but documents indicating county business was conducted through text messaging were provided as evidence in *Vescovo v. Clay County*, 19CY-CV04353 (7th Cir. Ct., 2019) indicating such records should have also been retained.

Section 109.210(5), RSMo, defines a public record as "document, book, paper, photograph, map, sound recording or other material, regardless of physical form or characteristics, made or received pursuant to law or in connection with the transaction of official business." Section 109.270, RSMo, provides that all records made or received by an official in the course of his/her public duties are public property and are not to be disposed of except

as provided by law. Section 109.255, RSMo, provides that the Local Records Board issue directives for the destruction of records. The guidelines for managing electronic communications records can be found on the Secretary of State's website.[22]

The County Commission can help ensure compliance with state law by developing written policies to address the use of personal email, social media and message accounts, and management and retention of electronic communications, and retaining these records accordingly.

Recommendations

The County Commission:

9.1 Develop a formal, written contingency plan that is periodically tested, evaluated, and updated as needed, including periodic testing of data backups.

9.2 Develop written records management and retention policies to address electronic communications management and retention to comply with Missouri Secretary of State Records Services Division Electronic Communications Guidelines. In addition, retain electronic communications in accordance with these policies.

Auditee's Response

The County Commission provided a written response. See Appendix L.

10. Contract Approvals and Capital Assets

The County Commission and County Auditor have not ensured that processes for contract approval and capital asset inventories are performed as required.

10.1 Contract approval

The County Auditor was unable to review county contracts. He indicated he requested the county Finance Department provide contracts for his review as required by county code, but Finance Department personnel did not comply with this request. Contracts were reviewed and approved by the former County Commission or through official action by an authorized agent of the former County Commission (e.g. the former County Administrator or a former ACA). The County Auditor was not involved in this process.

County Code Section 37.85 states, "The county auditor's office shall review each purchase order and/or contract for availability of an unencumbered balance in the adopted budget and shall certify this fact before a purchase

[22] Missouri Secretary of State Records Services Division, *Electronic Communications Records Guidelines for Missouri Government*, May 14, 2019, <https://www.sos.mo.gov/CMSImages/LocalRecords/CommunicationsGuidelines.pdf>, accessed June 10, 2021.

order may be considered valid; order placed and/or mailed to a vendor." Section 55.160, RSMo, states, "no warrant shall be drawn or obligation incurred without the auditor's certification that an unencumbered balance, sufficient to pay the same, remain in the appropriate account or in the anticipated revenue fund against which such warrant or obligation is to be charged." Without timely review of contracts by the County Auditor, the County Commission cannot ensure unencumbered appropriation balances are available for payment.

10.2 Capital assets

The County Auditor did not perform complete annual inventories of county-owned property. As of December 31, 2019, the county's capital assets were valued at approximately $85.3 million, net of accumulated depreciation. The County Auditor indicated that because of a lack of cooperation from the former administration, he could not conduct periodic physical inventories and would often not receive responses to annual capital asset addition and disposal questions.

Section 55.160, RSMo, requires the County Auditor to keep an inventory of all county property under the control and management of the various officers and departments. Adequate capital asset records are necessary to safeguard county assets that are susceptible to loss, theft, or misuse, and provide a basis for proper financial reporting and insurance coverage.

Recommendations

The County Commission and the County Auditor:

10.1 Ensure all contracts are approved in accordance with county code and state law.

10.2 Continue to work with the other county officials to ensure complete annual physical inventories are conducted.

Auditee's Response

The County Commission provided a written response. See Appendix L.

The County Auditor provided a written response. See Appendix M.

11. County Boards

Improvements are needed in the handling of meeting minutes, budgets, and potential conflicts of interest by various county boards.

11.1 Meeting minutes

Some county boards did not properly prepare or approve meeting minutes.

- The Parks Advisory Board did not prepare meeting minutes for 7 of 16 Board meetings held between January 2017 and August 2019. The Golf Complex Advisory and Airport Advisory Boards did not prepare meeting minutes for any meetings.

- Children's Services Fund Board, Parks Advisory Board, and Developmental Disabilities Resources Board minutes were not signed by a Board member to indicate Board approval.

Board representatives did not provide an explanation as to why minutes were not always properly prepared or signed, but news media reported that the former County Counselor questioned whether the Sunshine Law applied to certain advisory boards.

Section 610.020.7, RSMo, requires meeting minutes be maintained as a record of business conducted and to provide an official record of actions and decisions. Signed meeting minutes provide an independent attestation that the minutes are a correct record of the matters discussed and actions taken during the meetings. In addition, County Code Section 34.013 indicates all boards are subject to the Sunshine Law and must honor the spirit of the law. County Code Section 34.015 also indicates meeting minutes should be kept routinely.

11.2 Budgets

Budgets prepared by various boards did not contain all required elements.

- The Children's Services Fund Board budgets for 2019 and 2020 did not contain a budget message, actual or budgeted amounts for the second of 2 preceding years, or a budget summary.

- The Senior Citizen Services Board budgets for 2019 and 2020 did not contain actual or budgeted amounts for the 2 preceding years.

- The Developmental Disabilities Resources Board budgets for 2019 and 2020 did not contain a budget message, actual or budgeted amounts for the 2 preceding years, or a budget summary.

- The Clay, Platte, Ray Mental Health Board of Trustees budgets for 2019 and 2020 did not contain budgeted revenues for the upcoming year, a budget message, actual or budgeted amounts for the 2 preceding years, or a budget summary.

Section 67.010, RSMo, requires the budget to present a complete financial plan for the ensuing budget year and sets specific guidelines for the information to be included in the budget. A complete and well-planned budget, in addition to meeting statutory requirements, can serve as a useful management tool by establishing specific financial expectations for board operations. It also assists in informing the public about board operations and current finances. Proper monitoring is necessary for the budget to be an effective management tool and to comply with state law.

11.3 Conflicts of interest

The Children's Services Fund Board does not adequately monitor its activities for potential conflicts of interest. In March 2018, the Board approved a

banking services proposal from the bank at which the Board Vice Chairman was employed. While the conflict was disclosed in the meeting, the Vice Chairman did not abstain from voting on the proposal.

Personal interests in business matters of a governing body create actual or the appearance of conflicts of interest, and a lack of independence could harm public confidence in that governing body and reduce its effectiveness.

Recommendations

The County Commission work with the various county boards to:

11.1 Ensure minutes are prepared for all meetings and signed.

11.2 Prepare annual budgets that contain all information required by state law.

11.3 Ensure various boards refrain from activities that could result in the appearance of or actual conflict of interest. Procedures should include educating board members, as needed, on identifying actual or apparent conflicts of interest and how to mitigate them.

Auditee's Response

The County Commission provided a written response. See Appendix L.

Clay County
Organization and Statistical Information

Clay County, as of 2018, was a county-organized, first-class county. The county seat is Liberty.

Clay County's government was composed of a three-member county commission and separate elected officials performing various tasks. All elected officials serve 4-year terms. The county commission has mainly administrative duties in setting tax levies, appropriating county funds, appointing board members and trustees of special services, accounting for county property, maintaining county roads and bridges, and performing miscellaneous duties not handled by other county officials. Principal functions of these other officials relate to law enforcement, property assessment, property tax collections, conduct of elections, and maintenance of financial and other records important to the county's citizens. In addition to elected officials, the county employed more than 600 full-time, part-time, and seasonal employees as of December 31, 2018. Voters approved significant changes to Clay County's form of government in November 2020 with the approval of the new Clay County Constitution.

The county provides various services and operations at its courthouse, annex, and various other county-owned or leased locations, including those surrounding Smithville Lake, which the county leases from the U.S. Army Corps of Engineers.

In addition, county operations include the Airport Advisory Board; Board of Equalization; Board of Zoning Adjustment; Building Commission; Children's Services Fund Board; Developmental Disabilities Resources Board; Domestic Violence Board; Golf Complex Advisory Board; Land Trustee; Clay, Platte, Ray Mental Health Board of Trustees; Millennium Historical Board; Parks Advisory Board; Planning and Zoning Board; Senior Citizen Services Board; and Tourism Board.

Elected Officials

The elected officials and their compensation paid for the year ended December 31 (except as noted) are indicated below:

Officeholder	2019	2018
Jerry Nolte, Presiding Commissioner	$	77,106
Gene Owen, Associate Commissioner (1)		138,733
Luann Ridgeway, Associate Commissioner (1)		138,925
Katee Porter, Recorder of Deeds		77,106
Megan Thompson, County Clerk		77,106
Daniel White, Prosecuting Attorney		138,644
Paul Vescovo, Sheriff		85,162
Ted Graves, County Treasurer		77,106
Carol McCaslin, County Auditor (1)		82,066
Sarah Mills, Public Administrator		77,106
Lydia McEvoy, County Collector, year ended February 28, (1)	80,336	
Cathy Rinehart, County Assessor, year ended August 31, (1)		77,723

(1) The compensation includes amounts paid in December 2018 for salary underpayments during 2013 through 2017. The adjustments were due to changes in state law. The amount for the County Assessor excludes the reimbursement since it was paid after the year ended August 31, 2018. The amounts were based on recommendations from the county's legal counsel and written agreements between the county and officeholders. The following table lists the salary underpayment amounts received by each official.

Salary underpayment amounts paid in December 2018

Officeholder	Amount
Gene Owen, Associate Commissioner	$ 63,720
Luann Ridgeway, Associate Commissioner	63,912
Carol McCaslin, County Auditor	4,960
Lydia McEvoy, County Collector	2,947
Cathy Rinehart, County Assessor	17,749

Clay County
Appendixes

The following appendixes provide supporting documentation for the subpoenas issued, court judgements, and the county's responses to the audit recommendations. The appendixes are summarized in the following table.

Appendix	Type of Supporting Documentation
A	State Auditor Subpoena January 31, 2019 - Nicole Brown, Assistant County Administrator
B	Circuit Court of Cole County - First Amended Petition Dismissed - October 23, 2019
C	State Auditor Subpoena November 8, 2019 - Nicole Brown, Assistant County Administrator
D	State Auditor Subpoena November 22, 2019 - Nicole Brown, Assistant County Administrator
E	Circuit Court of Clay County - Petition to Enforce Subpoena and Authority to Access Records - December 4, 2019
F	Circuit Court of Clay County - First Amended Petition to Enforce Administrative Subpoenas and for Declaratory Judgment - December 20, 2019
G	Circuit Court of Clay County - State Auditor Nicole Galloway vs. Clay County - October 23, 2020
H	Missouri Court of Appeals Western District - Clay County vs. State Auditor Nicole Galloway - December 29, 2020
I	State Auditor Subpoena March 10, 2021 - Tom Salisbury, Interim County Administrator
J	Circuit Court of Clay County - Sheriff Paul Vescovo, III vs. Clay County - August 29, 2019
K	Missouri Court of Appeals Western District - Sheriff Paul Vescovo, III vs. Clay County - December 5, 2019
L	County Commission Responses
M	County Auditor Responses

OFFICE OF MISSOURI STATE AUDITOR

SUBPOENA

To: Nicole Brown, Assistant County Administrator
1 Courthouse Square
Liberty, MO 64068

YOU OR A CLAY COUNTY, MISSOURI, CORPORATE DESIGNEE ARE COMMANDED AND REQUIRED to appear personally before the State Auditor or her representative, Joel Anderson, Chief Litigation Counsel, at the Fletcher Daniels State Office Building, Room 502, 615 East 13th Street, Kansas City, MO 64106, at 10:00 a.m. on Thursday, February 14, 2019, for purposes of providing testimony and producing for examination, copying, and interrogation the following records and documents listed on Exhibit A attached to this Subpoena.

In lieu of appearance, you may ship the records listed in Exhibit A to the Missouri State Auditor to the attention of Pam Allison for delivery no later than Monday, February 11, 2019, at the following address: State Auditor's Office, Springfield State Office Complex, 149 Park Central Square, Box 471, 8th floor, Suite 814, Springfield, MO 65806

ISSUED this 31day of January, 2019, pursuant to Section 29.235.4(1), RSMo.

Nicole L. Galloway
Nicole Galloway
Missouri State Auditor

I served the foregoing subpoena by 1:13 p.m. on this 31 day of January, 2019.

Robert McArthur II

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A

You are to preserve for production and inspection, and then appear as instructed on the attached subpoena and produce for inspection and examination, the following items in your possession or under your control:

All documentation (minutes) of meetings of the Clay County Commission for the calendar years of 2017 and 2018.

This request for records includes all materials that exist in paper ("hard copy") or electronic form (including but not limited to records and data maintained on computers, tablets, smart phones, external electronic storage drives, thumbnail drives, remote servers or back up tapes). All information requested in the items above are subject to inspection, review and copying by the state auditor. Section 29.235.4(1), RSMo.

IN THE CIRCUIT COURT OF COLE COUNTY MISSOURI

CLAY COUNTY COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19AC-CC00055
	)	
NICOLE GALLOWAY, AUDITOR OF THE STATE OF MISSOURI,	)	
	)	
	)	
Defendant.	)	

ORDER AND JUDGMENT

On this 23rd day of October, 2019, the Court takes up the motion of the Missouri State Auditor's Office (the Auditor or SAO) to dismiss all counts in Plaintiff Clay County Commission's (Commission) First Amended Petition.

On March 26, 2019, a hearing was held in which argument from counsel was heard on the motion to dismiss. The allegations in the First Amended Petition are taken as true for the purposes of the motion.

On a motion to dismiss, the well-pleaded allegations of fact, and such inferences as are fairly deducible from those facts, are admitted. *Ward v. W. Cty. Motor Co., Inc.*, 403 S.W.3d 82, 84 (Mo. banc 2013). Conclusions of the pleader are not admitted. *Therrien v. Mercantile-Commerce Bank & Trust Co.*, 227 S.W.2d 708 (Mo. banc 1950).

The Commission's First Amended Petition makes three requests for declaratory relief, upon which the Commission's requests for injunctive and other relief is based. All requests made by the Commission appear to turn on a single question of law.

The Commission's primary complaint is that the State Auditor requested closed meeting minute records, and such a request is unconstitutional because it is indicative of a "performance audit" and not restricted to a financial post-audit of transactions.

This Court finds that the authority of the State Auditor is not limited to financial post-audits of county accounts, and that the State Auditor is authorized to conduct a "performance audit." Section 29.005(2) RSMo defines an audit to include "performance," and §29.185 RSMo specifically provides that "an audit may include either financial or performance audit objectives or one or more objectives from both types of audits." Thus, the State Auditor is not limited to performing a particular kind of audit when auditing a political subdivision under §29.230.2 RSMo.

This Court further finds that there is nothing *per se* unconstitutional about a records request. If there is content in such records that should not be disclosed, such an issue is properly raised in a proceeding to enforce an administrative subpoena.

Finally, the Commission's various counts in this case are dependent upon the proposition that the request for closed meeting minutes is an unconstitutional act, a conclusion this Court cannot draw on the facts alleged. Accordingly, the Commission has not pleaded a case that can grant the relief it requests.

THEREFORE, this Court finds that the Commission has failed to state a claim upon which relief may be granted as a matter of law, and this case is hereby dismissed with prejudice. Costs are taxed to Plaintiff.

SO ORDERED

Jon E. Beetem, Circuit Judge – Division I

OFFICE OF MISSOURI STATE AUDITOR

SUBPOENA

To: Nicole Brown, Assistant County Administrator
1 Courthouse Square
Liberty, MO 64068

YOU ARE COMMANDED AND REQUIRED to appear personally before the State Auditor or her representative(s) at the Fletcher Daniels State Office Building, Room 502, 615 East 13th Street, Kansas City, MO 64106, at 10:00 a.m. on Monday, November 25, 2019, for purposes of providing testimony about and producing for examination, copying, and interrogation the records and subjects described in Exhibit A attached to this Subpoena.

ISSUED this 8th day of November, 2019, pursuant to Section 29.235.4(1) of the Revised Statutes of Missouri.

Nicole L. Galloway
Nicole Galloway
Missouri State Auditor

I served the foregoing subpoena by Leaving with Alison Cook, Public Services Receptionist, Commission Office *on this 8th day of November, 2019.*

November 8, 2019

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 1 of 3

1. 2017 and 2018 open and closed Clay County Commission meeting minutes;

2. Confirmation that the county is securing all county email and former County Administrator Dean Brookshier's computer;

3. List of employees with take home cars along with their home address and work address;

4. 2017 & 2018 payroll data;

5. Description of legal and professional services provided to the county by the following firms in 2017 and 2018, including copies of contracts, memoranda of understanding, engagement letters, etc., for such services:

   Fisher & Phillips LLP
   Gaddy Law
   Graves Garrett
   Husch Blackwell LLP
   Husch Blackwell Strategies
   Johnston Law Firm
   Morgan Pilate
   Spencer Fane LLP
   Wyrsch Hobbs & Mirakian

6. A listing or copies of all records and user files on the former County Administrator Dean Brookshier's computer;

7. Year Ended December 31, 2018 annual audit reports:

   a. Compliance
   b. Financial Statements

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 2 of 3

8. Detailed financial information for 2019 financial transactions to-date in Excel (as previously provided for 2017 & 2018, if applicable), including:

    a. Expenditures
    b. List of Disbursements
    c. P Card Transactions
    d. Payroll

9. County bid policies and procedures in place from 2017 to present, including policies regarding selection of the evaluation team, performing evaluations and making recommendations.

10. List of all officials and employees currently bonded;

11. Documentation of any software problems encountered with assessment and property tax system/systems during 2017, 2018, and 2019 to-date, and if applicable, how and when these problems were resolved;

12. Policies and procedures effective from 2017 to present regarding the assessment appeals process;

13. Assessments for Ford Motor Company and any additions/abatements for 2017, 2018, and 2019 to-date;

14. Assessments and additions/abatements for all properties owned by the 3 county commissioners for 2017, 2018, and 2019 to-date;

15. Total county assessed valuations by type of property (residential, commercial, personal) for 2017, 2018, and 2019 to-date;

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 3 of 3

16. Expense reports of the Tax Maintenance Fund for 2019 to-date;

17. Copies of the Collector's collection agreements with any cities effective from 2017 to present;

18. All written Parks Department cash handling procedures effective from 2017 to present (e.g. shelter houses, boat slips, camping, concessions/retail, etc.), excluding Jesse James Birthplace and Bank, which were previously provided;

19. A list of boat slips occupied and unoccupied, boat slip rental agreements, and report of revenues generated from each boat slip rental for 2018 and 2019 to-date;

This request for records includes all materials that exist in paper ("hard copy") or electronic form (including but not limited to records and data maintained on computers, tablets, smart phones, external electronic storage drives, thumbnail drives, remote servers or back up tapes). All information requested in the items above are subject to inspection, review and copying by the state auditor. Section 29.235.4(1), RSMo.

Where an attorney-client privileged communication or the attorney work product doctrine for imminent or pending litigation is asserted as a basis for redaction of any portion of any record requested, the county must provide a privilege log or statement noting the reason for each assertion of privilege or the work product doctrine. Such log must describe the nature of the redacted information in sufficient detail to permit the State Auditor's Office to assess the applicability of the attorney-client privilege or work product doctrine.

OFFICE OF MISSOURI STATE AUDITOR

SUBPOENA

To: Nicole Brown, Assistant County Administrator
1 Courthouse Square
Liberty, MO 64068

YOU ARE COMMANDED AND REQUIRED to appear personally before the State Auditor or her representative(s) at the Fletcher Daniels State Office Building, Room 306, 615 East 13th Street, Kansas City, MO 64106, at 10:00 a.m. on Wednesday, December 11, 2019, for purposes of providing testimony in connection with the audit of Clay County, Missouri pursuant to Section 29.230 RSMo, including producing for examination, copying, and interrogation the records and subjects described in Exhibit A attached to this Subpoena.

ISSUED this 22nd day of November, 2019, pursuant to Section 29.235.4(1) of the Revised Statutes of Missouri.

Nicole L. Galloway
Nicole Galloway
Missouri State Auditor

I served the foregoing subpoena by Leaving with Alison Cook Public Services Receptionist Commission Office *on this* 22nd *day of November, 2019.*

Todd M. [illegible] November 22, 2019

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 1 of 2

1. 2019 open and closed County Commission meeting minutes.

2. List of Dean Brookshier's emails from 2017 and 2018.

3. List of employees required to have Class E CDL license and their job duties for 2017, 2018, and 2019 to-date.

4. List of employees required to have random drug testing completed and their job duties for 2017, 2018, and 2019 to-date.

5. Personnel performance appraisals for the following individuals:

   i. Dean Brookshier
   ii. Laurie Portwood
   iii. Nicole Brown
   iv. Brad Garrett
   v. Randy Miller
   vi. Sean Benjamin
   vii. Olen Reed
   viii. James Foley
   ix. Leslie DeGroot
   x. Amanda Runkles
   xi. Michael Green
   xii. Jeff Windsor
   xiii. Rebecca Roach
   xiv. Patrick West
   xv. Lori Rodriguez
   xvi. Abbie Sanstra
   xvii. Former Airport Director or interim Airport Manager (Frank Branom) during 2017, 2018, and 2019
   xviii. Sheriff administrative employees including all Captains and Lieutenants.
   xix. All part-time County Clerk/Board of Equalization employee(s).

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 2 of 2

This request for records includes all materials that exist in paper ("hard copy") or electronic form (including but not limited to records and data maintained on computers, tablets, smart phones, external electronic storage drives, thumbnail drives, remote servers or back up tapes). All information requested in the items above are subject to inspection, review and copying by the state auditor. Section 29.235.4(1), RSMo.

Where an attorney-client privileged communication or the attorney work product doctrine for imminent or pending litigation is asserted as a basis for redaction of any portion of any record requested, the county must provide a privilege log or statement noting the reason for each assertion of privilege or the work product doctrine. Such log must describe the nature of the redacted information in sufficient detail to permit the State Auditor's Office to assess the applicability of the attorney-client privilege or work product doctrine.

IN THE CIRCUIT COURT OF CLAY COUNTY MISSOURI

NICOLE GALLOWAY, AUDITOR OF THE STATE OF MISSOURI, Plaintiff, v. CLAY COUNTY, MISSOURI, Serve: Megan Thompson, County Clerk 1 Courthouse Square Liberty, MO 64068 and JERRY NOLTE, Clay County Commissioner, Serve: 1 Courthouse Square Liberty, MO 64068 and GENE OWEN, Clay County Commissioner, Serve: 1 Courthouse Square Liberty, MO 64068 and LUANN RIDGEWAY, Clay County Commissioner, Serve: 1 Courthouse Square Liberty, MO 64068 and NICOLE BROWN, Assistant County Administrator and Records Custodian, Serve: 1 Courthouse Square Liberty, MO 64068 Defendants.	)	No. _____

PETITION TO ENFORCE ADMINISTRATIVE SUBPOENA AND FOR DECLARATORY JUDGMENT

The Missouri Constitution imposes a duty on the Missouri State Auditor (Auditor) to conduct all audits required by law. Mo. Const. Art. IV, Section 13. In conducting an audit, the Auditor is entitled by statute to inspect all records and examine witnesses. Pursuant to this authority, the Auditor is granted subpoena power to compel compliance with this authorized access, and criminal penalties are in place to punish conduct that interferes with the Auditor's performance of these duties. §§29.235; 29.250 RSMo.[1]

In December, 2018, the Auditor commenced an audit required by law of the county of Clay, Missouri (the County) pursuant to a citizen petition under §29.230.2. As part of this audit, the Auditor sought to review meeting minutes of the Clay County Commission (Commission). The Commission refused to produce any closed meeting minutes whatsoever. The Auditor served a subpoena to compel production of meeting minutes. The County refused to produce the records and failed to appear at the deposition.

The Auditor respects the court's time. Until today, the Auditor has never had to enforce a subpoena of an auditee. But the County's actions are unprecedented.

The Auditor here asks this Court to enforce the subpoena and/or enter a declaratory judgment as set forth below:

1. Nicole Galloway is the duly elected auditor of the State of Missouri.

[1] Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri, 2016, as amended.

2. Defendant Clay County, Missouri, is a political subdivision of the State of Missouri, and is a non-charter county of the first-class.

3. Defendant Jerry Nolte is a resident of Clay County, Missouri and is the duly elected presiding commissioner of Clay County, Missouri.

4. Defendant Luann Ridgeway is a resident of Clay County, Missouri, and is the duly elected eastern commissioner of Clay County, Missouri.

5. Defendant Gene Owen is a resident of Clay County, Missouri, and is the duly elected western commissioner of Clay County, Missouri.

6. Nicole Brown is an Assistant County Administrator and the designated custodian of records for Clay County.

7. By letter dated August 27, 2018, the State Auditor's Office informed the County that sufficient signatures were certified by the Clay County Board of Election Commissioners to commence an audit of Clay County (the County) pursuant to §29.230.2.

8. By letter dated December 18, 2018, the State Auditor's Office notified the County of the commencement of the audit, along with a description of the audit objectives and the responsibilities of County management during the audit.

9. In the description of audit objectives and the responsibilities of County management, the County was notified that the methodology of the audit includes "reviewing minutes of meetings, written policies and procedures, financial records, and other pertinent documents; interviewing various personnel, as well as certain external parties; and testing selected transactions."

10. At the commencement of an audit, survey work is done to obtain sufficient knowledge of a county's personnel, programs, and operations to plan the audit; to consider significance and risk in planning; to define audit scope and objectives; and to develop the methodology and detailed plan for addressing the audit objectives.

11. As part of the survey period of any audit, records of the governing body's meeting (minutes) are routinely reviewed in all types of audits required of the Missouri State Auditor under Missouri law.

12. The governing body of the County is the Clay County Commission.

13. The Commission is responsible for oversight of county budgets, expenditure of funds, and other significant decisions that impact County funds and resources, County policy, and other subjects of the business of the County.

14. Commission meeting minutes are a record of significant decisions made and discussion leading to those decisions.

15. Based in part on the allegations in paragraphs 13 and 14, it is necessary for auditors to review all Commission meeting minutes, both open and closed.

16. During the months of December 2018 and January 2019, audit staff requested Commission meeting minutes.

17. All requests for records by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

18. All requests for records by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

19. All requests for records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

20. All requests for records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

21. All requests for closed records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

22. All requests for closed records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

23. In response to requests for Commission meeting minutes, the audit staff were directed to the County's website for open meeting minutes, but denied access to closed meeting minutes in their entirety.

24. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes unless the records were open to the public.

25. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes unless the records were open within the meaning of Chapter 610 (the Sunshine Law).

26. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes.

27. The County refused to provide access to closed meeting minutes by claiming that the County is not required to provide access to records other than those of the County's accounts and transactions.

28. The County's website does not contain all open meeting minutes of the Commission.

29. On January 31, 2019, the Commission filed suit in the Circuit Court of Cole County seeking a declaratory judgment and injunction related to their claim that the State Auditor's Office's request for closed meeting minutes was an unconstitutional act because such a request constituted an unconstitutional "performance audit."

30. In the County's suit, the County objected to releasing records that might contain attorney-client privileged information. In spite of this limited objection, the Commission produced no closed meeting records whatsoever, redacted or otherwise.

31. On January 31, 2019, the State Auditor's Office served the Assistant County Administrator with a subpoena to produce all Clay County Commission meeting minutes for the calendar years of 2017 and 2018.

32. On February 4, 2019, the Commission amended their petition to include, among other things, the subpoena referenced in paragraph 31.

33. On April 8, 2019, the Circuit Court of Cole County denied the Commission's request for an injunction, and on October 23, 2019, that same court dismissed the remainder of the Commission's case ruling (1) that there is nothing per se unconstitutional about a records request; (2) that issues with the content of requested records are to be litigated in an action to enforce an administrative subpoena (which had not been filed); and (3) the Auditor is not limited to performing financial post-audits of county accounts, and is statutorily authorized to conduct "performance" audits.[2]

34. On October 31, 2019, the State Auditor's Office requested records and information from the County, including the request for open and closed Commission meeting minutes. The County did not fulfill the request.

35. On November 8, 2019, the State Auditor's Office served Assistant County Administrator and Records Custodian Nicole Brown with a subpoena attached as Exhibit A and incorporated by reference herein. This subpoena requires, *inter alia*, that the Commission produce closed meeting minutes.

36. The subpoena set a deposition and records production date of November 25, 2019.

37. The County refused to produce any Commission closed session meeting minutes, redacted or otherwise.

38. On November 25, 2019, Nicole Brown failed to appear for her deposition.

[2] The Commission did not challenge the constitutionality of the statute authorizing performance audits.

39. The County did not challenge the authority of the Auditor to subpoena Nicole Brown for the November 25, 2019, deposition.

40. Nicole Brown refused to appear for the November 25, 2019, deposition upon less than two business-days' notice to the Auditor that she had a "planned vacation."

41. On November 25, 2019, Defendant County failed to produce any closed meeting minutes, redacted or otherwise.

42. A review of County meeting minutes is necessary to properly conduct a lawful audit.

43. Testimony from the County's designated records custodian is necessary to properly conduct this audit of the County.

44. Testimony from the County's Assistant County Administrator is necessary to properly conduct this audit of the County.

COUNT I - ENFORCEMENT OF SUBPOENA

45. Paragraphs 1 through 44 are incorporated and re-alleged as if fully set forth herein.

46. The Auditor's audit of the County is made pursuant to constitutional and statutory authority.

47. The records subpoenaed as shown in Exhibit A are not too indefinite.

48. The requirement of the attendance of the County's designated records custodian is not too indefinite.

49. The information sought in the request for County Commission meeting minutes as shown in the subpoena is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

50. The testimony sought from the County's designated records custodian is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

WHEREFORE, the Missouri State Auditor requests that this Court enter judgment enforcing its subpoena attached as Exhibit A in the following respects:

I. That Nicole Brown personally appear before the State Auditor or her representatives at a location and time to be set forth by separate Order of this Court, to answer questions in connection with the audit of Clay County, Missouri.

II. That Nicole Brown and/or other responsible officials of Clay County, Missouri produce or make available to the State Auditor all records of Clay County Commission meeting minutes, both open and closed.

III. The County may make appropriate redactions for attorney-client privileged communications if a log is provided for each such redaction that contains sufficient information to determine whether the attorney-client privilege is properly invoked; and

IV. The County may make appropriate redactions for attorney work-product content if a log is provided for each such redaction that contains sufficient information to determine whether the work-product doctrine is properly invoked.

COUNT II - DECLARATORY JUDGMENT

51. Paragraphs 1 through 50 are incorporated and re-alleged as if fully set forth herein.

52. The Auditor is conducting an ongoing audit of the County, and such audit will require the examination of records and witnesses that will include information and records that are not open, public records.

53. In the Auditor's conduct of the audit of the County, the Auditor has access to all records that are related to an audit conducted under the Missouri Constitution and in accordance with statute.

54. The need to examine records as set forth herein, and particularly in paragraphs 52 and 53, has been and will be ongoing in nature.

55. The State Auditor has a legally protectable interest in performing her constitutionally and statutorily required duties in the manner provided by law.

56. A subpoena for closed meeting minutes of the Commission has been served and compliance has been refused.

57. From the foregoing, a justiciable controversy exists.

58. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is not entitled to access to records that are closed under the Sunshine Law.

59. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is not entitled to access to

records that are closed under the Sunshine Law absent a showing to the County as to how the content of such records is directly related to the receipt and expenditure of public funds.

60. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is prohibited by the Missouri Constitution from accessing certain records which include records closed under the Sunshine Law.

61. The County's refusal to provide access to closed meeting minutes is based upon the County's erroneous proposition that the State Auditor is prohibited by the Missouri Constitution from accessing certain records which include records closed under the Sunshine Law absent a showing to the County as to how the content of such records is directly related to the receipt and expenditure of public funds.

WHEREFORE, the Missouri State Auditor requests that this Court enter judgment in favor of the Auditor, award her fees and costs in this action, and make the following declarations of law:

I. The State Auditor is permitted access to records of an auditee without regard to whether such records may be closed under Chapter 610 (the Sunshine Law) or any other provision of law;

II. The Missouri Constitution does not deny the State Auditor access to any particular record or any particular category of records;

III. The State Auditor is not required to make a showing that the content of a record is related to the receipt and expenditure of public funds before a county is required to provide access to the record;

IV. With the exception of attorney-client privileged communications and attorney work product content, the County is not permitted to redact any information from any record on the basis that the information is not directly related to the receipt and expenditure of public funds;

V. The County is not permitted to withhold any record from review by the State Auditor's Office unless such a review by the State Auditor is specifically prohibited by law.

Respectfully submitted,

/s/ Joel E. Anderson

Joel E. Anderson, Mo Bar # 40962
Meghan Maskery Luecke, Mo Bar #64004
Missouri State Auditor's Office
301 W. High Street, Suite 880
Jefferson City, MO 65101
Telephone 573.751.4213
Facsimile 573.751.7984
Joel.Anderson@auditor.mo.gov

Attorneys for Plaintiff Missouri State Auditor

RULE 55.03 CERTIFICATE

The undersigned hereby certifies that the foregoing was filed electronically, the attorney shown thereon as the signer signed the original of the foregoing, and the original signed filing will be maintained by the filer for a period of not less than the maximum allowable time to complete the appellate process.

/s/ Joel E. Anderson
Joel E. Anderson, 40962

OFFICE OF MISSOURI STATE AUDITOR

SUBPOENA

To: Nicole Brown, Assistant County Administrator
1 Courthouse Square
Liberty, MO 64068

YOU ARE COMMANDED AND REQUIRED to appear personally before the State Auditor or her representative(s) at the Fletcher Daniels State Office Building, Room 502, 615 East 13th Street, Kansas City, MO 64106, at 10:00 a.m. on Monday, November 25, 2019, for purposes of providing testimony about and producing for examination, copying, and interrogation the records and subjects described in Exhibit A attached to this Subpoena.

ISSUED this 8th day of November, 2019, pursuant to Section 29.235.4(1) of the Revised Statutes of Missouri.

Nicole L. Galloway
Nicole Galloway
Missouri State Auditor

I served the foregoing subpoena by Leaving with Alison Cook, Public Services Receptionist, Commission Office *on this 8th day of November, 2019.*

November 8, 2019

Exhibit A

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 1 of 3

1. 2017 and 2018 open and closed Clay County Commission meeting minutes;

2. Confirmation that the county is securing all county email and former County Administrator Dean Brookshier's computer;

3. List of employees with take home cars along with their home address and work address;

4. 2017 & 2018 payroll data;

5. Description of legal and professional services provided to the county by the following firms in 2017 and 2018, including copies of contracts, memoranda of understanding, engagement letters, etc., for such services:

    Fisher & Phillips LLP
    Gaddy Law
    Graves Garrett
    Husch Blackwell LLP
    Husch Blackwell Strategies
    Johnston Law Firm
    Morgan Pilate
    Spencer Fane LLP
    Wyrsch Hobbs & Mirakian

6. A listing or copies of all records and user files on the former County Administrator Dean Brookshier's computer;

7. Year Ended December 31, 2018 annual audit reports:

    a. Compliance
    b. Financial Statements

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 2 of 3

8. Detailed financial information for 2019 financial transactions to-date in Excel (as previously provided for 2017 & 2018, if applicable), including:

    a. Expenditures
    b. List of Disbursements
    c. P Card Transactions
    d. Payroll

9. County bid policies and procedures in place from 2017 to present, including policies regarding selection of the evaluation team, performing evaluations and making recommendations.

10. List of all officials and employees currently bonded;

11. Documentation of any software problems encountered with assessment and property tax system/systems during 2017, 2018, and 2019 to-date, and if applicable, how and when these problems were resolved;

12. Policies and procedures effective from 2017 to present regarding the assessment appeals process;

13. Assessments for Ford Motor Company and any additions/abatements for 2017, 2018, and 2019 to-date;

14. Assessments and additions/abatements for all properties owned by the 3 county commissioners for 2017, 2018, and 2019 to-date;

15. Total county assessed valuations by type of property (residential, commercial, personal) for 2017, 2018, and 2019 to-date;

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A-page 3 of 3

16. Expense reports of the Tax Maintenance Fund for 2019 to-date;

17. Copies of the Collector's collection agreements with any cities effective from 2017 to present;

18. All written Parks Department cash handling procedures effective from 2017 to present (e.g. shelter houses, boat slips, camping, concessions/retail, etc.), excluding Jesse James Birthplace and Bank, which were previously provided;

19. A list of boat slips occupied and unoccupied, boat slip rental agreements, and report of revenues generated from each boat slip rental for 2018 and 2019 to-date;

This request for records includes all materials that exist in paper ("hard copy") or electronic form (including but not limited to records and data maintained on computers, tablets, smart phones, external electronic storage drives, thumbnail drives, remote servers or back up tapes). All information requested in the items above are subject to inspection, review and copying by the state auditor. Section 29.235.4(1), RSMo.

Where an attorney-client privileged communication or the attorney work product doctrine for imminent or pending litigation is asserted as a basis for redaction of any portion of any record requested, the county must provide a privilege log or statement noting the reason for each assertion of privilege or the work product doctrine. Such log must describe the nature of the redacted information in sufficient detail to permit the State Auditor's Office to assess the applicability of the attorney-client privilege or work product doctrine.

IN THE CIRCUIT COURT OF CLAY COUNTY MISSOURI

NICOLE GALLOWAY, AUDITOR OF THE STATE OF MISSOURI,	)	
Plaintiff,	)	
	)	No. 19AC-CV12168
v.	)	
CLAY COUNTY, MISSOURI, et al.,	)	
Defendants.	)	

FIRST AMENDED PETITION TO ENFORCE ADMINISTRATIVE SUBPOENAS AND FOR DECLARATORY JUDGMENT

The Missouri Constitution imposes a duty on the Missouri State Auditor (Auditor) to conduct all audits required by law. Mo. Const. Art. IV, Section 13. In conducting an audit, the Auditor is entitled by statute to inspect all records and examine witnesses. Pursuant to this authority, the Auditor is granted subpoena power to compel compliance with this authorized access, and criminal penalties are in place to punish conduct that interferes with the Auditor's performance of these duties. §§29.235; 29.250 RSMo.[1]

In December, 2018, the Auditor commenced an audit required by law of the county of Clay, Missouri (the County) pursuant to a citizen petition under §29.230.2. As part of this audit, the Auditor sought to review meeting minutes of the Clay County Commission (Commission). The Commission refused to produce any meeting minutes not open to the public (closed meeting minutes) whatsoever. On November 8, 2019, the Auditor served a

[1] Unless otherwise noted, all statutory references are to the Revised Statutes of Missouri, 2016, as amended.

subpoena for testimony and to compel production of meeting minutes. The County refused to produce the records and failed to appear at the audit deposition.

On November 22, 2019, the State Auditor served a second subpoena for additional records the County had not produced, and also required Defendant Nicole Brown to appear and submit to be examined upon oath. Ms. Brown refused to answer questions upon oath posed by authorized State Auditor's Office staff, and refused production of certain records in the subpoena.

The Auditor respects the Court's time. Until this citizen-requested audit of Clay County, the Auditor has never had to enforce a subpoena of an auditee. But the County's actions are unprecedented.

The Auditor here asks this Court to enforce the subpoena and/or enter a declaratory judgment as set forth below:

1. Nicole Galloway is the duly elected auditor of the State of Missouri.

2. Defendant Clay County, Missouri, (the County) is a political subdivision of the State of Missouri, and is a non-charter county of the first-class.

3. Defendant Jerry Nolte is a resident of Clay County, Missouri and is the duly elected presiding commissioner of Clay County, Missouri.

4. Defendant Luann Ridgeway is a resident of Clay County, Missouri, and is the duly elected eastern commissioner of Clay County, Missouri.

5. Defendant Gene Owen is a resident of Clay County, Missouri, and is the duly elected western commissioner of Clay County, Missouri.

6. Nicole Brown is an Assistant County Administrator and the designated custodian of records for Clay County.

7. The governing body of the County is the Clay County Commission (the Commission).

8. The Commission is responsible for oversight of county budgets, expenditure of funds, and other significant decisions that impact County funds and resources, County policy, and other subjects of the business of the County.

9. By letter dated August 27, 2018, the State Auditor's Office informed the County that sufficient signatures were certified by the Clay County Board of Election Commissioners to commence an audit of the County pursuant to §29.230.2.

10. By letter dated December 18, 2018, the State Auditor's Office notified the County of the commencement of the audit, along with a description of the audit objectives and the responsibilities of County management during the audit.

11. The letter referred to in paragraph 10 was signed by the Commission.

12. In the description of audit objectives and the responsibilities of County management outlined in the correspondence to the County referred to in paragraph 10, the County was notified that the methodology of the audit would include "reviewing minutes of meetings, written policies and procedures, financial records, and other pertinent documents; interviewing various personnel, as well as certain external parties; and testing selected transactions."

13. At the commencement of an audit, survey work is done to obtain sufficient knowledge of a county's personnel, programs, and operations to plan the audit; to consider

significance and risk in planning; to define audit scope and objectives; and to develop the methodology and detailed plan for addressing the audit objectives.

14. As part of the survey period of any audit, records of the governing body's meetings are routinely reviewed in all types of audits required of the Missouri State Auditor under Missouri law.

15. In the course of conducting an audit, auditors survey government records, interview government personnel, and accept information from other persons with relevant information about the entity's conduct in using government resources.

16. Information obtained during this survey period is used to establish audit objectives and procedures.

17. Some of the persons from whom information is accepted as referred to in paragraph 15 are persons who seek to report government waste, fraud, and abuse anonymously as provided in §29.221.

18. Records and information sought in the course of an audit are used to conduct the audit as authorized by the Missouri Constitution and the Revised Statutes of Missouri.

19. Records and information sought in the course of this audit of the County are used to conduct the audit as authorized by the Missouri Constitution and the Revised Statutes of Missouri.

20. It is necessary for the conduct of the audit for official records to be reviewed, and for relevant personnel to be interviewed, including records and interviews as shown in Exhibits A and B.

21. Revealing to the County, the auditee, the reasons why certain questions are asked and why certain records are sought to be reviewed would compromise the integrity of the audit.

22. The County demanded to be told why certain records were sought.

23. Commission meeting minutes are a record of significant decisions made and discussion leading to those decisions.

24. It is necessary for auditors to review all Commission meeting minutes, both open and closed.

25. During the months of December 2018 and January 2019, audit staff requested Commission meeting minutes.

26. All requests for records by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

27. All requests for records by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

28. All requests for records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

29. All requests for records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

30. All requests for closed records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by County personnel designated to receive and respond to such requests.

31. All requests for closed records of Commission meeting minutes by audit staff to the County from the commencement of the audit until the filing of this action were received by records custodian Defendant Nicole Brown.

32. In response to requests for Commission meeting minutes, the audit staff were directed to the County's website for open meeting minutes, but denied access to closed meeting minutes in their entirety.

33. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes unless the records were open to the public.

34. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes unless the records were open within the meaning of Chapter 610 (the Sunshine Law).

35. In response to requests for Commission meeting minutes, the County refused to provide access to closed meeting minutes.

36. The County refused to provide access to closed meeting minutes by claiming that the County is not required to provide access to records other than those of the County's accounts and transactions.

37. The County's website does not contain all open minutes of meetings of the Commission.

38. On January 31, 2019, the Commission filed suit in the Circuit Court of Cole County seeking a declaratory judgment and injunction related to their claim that the State Auditor's Office's request for closed meeting minutes was an unconstitutional act because such a request constituted an unconstitutional "performance audit."

39. In the County's suit, the County objected to releasing records that might contain attorney-client privileged information. In spite of this limited objection, the Commission produced no closed meeting records during the pendency of that case, redacted or otherwise.

40. On January 31, 2019, the State Auditor's Office served the Assistant County Administrator and records custodian with a subpoena to produce all Clay County Commission meeting minutes for the calendar years of 2017 and 2018.

41. On February 4, 2019, the Commission amended their petition to include, among other things, the subpoena referenced in paragraph 40.

42. On April 8, 2019, the Circuit Court of Cole County denied the Commission's request for an injunction, and on October 23, 2019, that same court dismissed the remainder of the Commission's case ruling (1) that there is nothing *per se* unconstitutional about a records request; (2) that issues with the content of requested records are to be litigated in an action to enforce an administrative subpoena (which had not been filed); and (3) the Auditor is not limited to performing financial post-audits of county accounts, and is statutorily authorized to conduct "performance" audits.[2]

[2] The Commission did not challenge the constitutionality of the statute authorizing performance audits.

43. On October 31, 2019, the State Auditor's Office requested records and information from the County, including the request for open and closed Commission meeting minutes. The County did not fulfill the request.

44. On November 8, 2019, the State Auditor's Office served Assistant County Administrator and Records Custodian Nicole Brown with a subpoena attached as Exhibit A and incorporated by reference herein.

45. The November 8 subpoena set an audit deposition and records production date of November 25, 2019.

46. In response to the request set forth in paragraph 43 and the November 8 subpoena, the County refused to produce any Commission meeting minutes that are closed under the Sunshine Law, redacted or otherwise.

47. On November 25, 2019, Nicole Brown failed to appear for her deposition.

48. The County did not challenge the authority of the Auditor to subpoena Nicole Brown for the November 25, 2019, deposition.

49. Nicole Brown refused to appear for the November 25, 2019, deposition upon less than two business-days' notice to the Auditor that she had a "planned vacation."

50. On November 25, 2019, Defendant County failed to produce any meeting minutes that are closed under the Sunshine Law, redacted or otherwise.

51. A review of County meeting minutes is necessary to properly conduct a lawful audit.

52. Testimony from the County's designated records custodian is necessary to properly conduct this audit of the County.

53. Testimony from the County's Assistant County Administrator is necessary to properly conduct this audit of the County.

54. On November 22, 2019, the Auditor issued the subpoena attached hereto as Exhibit B, and incorporated fully herein.

55. The November 22, 2019, subpoena (Exhibit B) commanded Defendant Brown to appear and submit to questioning by the Auditor's Office and to produce the records listed.

56. Defendant Brown refused to submit to questions posed by auditors under the November 22, 2019, subpoena (Exhibit B).

57. Defendant Brown failed to produce all records requested in the November 22, 2019, subpoena (Exhibit B).

COUNT I - ENFORCEMENT OF NOVEMBER 8, 2019 SUBPOENA

58. Paragraphs 1 through 57 are incorporated and re-alleged as if fully set forth herein.

59. The Auditor's audit of the County is made pursuant to constitutional and statutory authority.

60. The records subpoenaed as shown in Exhibit A are not too indefinite.

61. The requirement of the attendance of the County's designated records custodian (Nicole Brown) is not too indefinite.

62. The requirement of the attendance of the County's Assistant County Administrator (Nicole Brown) is not too indefinite.

63. The records sought in the request for County Commission meeting minutes as shown in the subpoena are reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

64. The testimony sought from the County's designated records custodian (Nicole Brown) is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

65. The testimony sought from the County's Assistant County Administrator (Nicole Brown) is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

WHEREFORE, the Missouri State Auditor requests that this Court enter judgment enforcing its subpoena attached as Exhibit A in the following respects:

I. That Nicole Brown personally appear before the State Auditor or her representatives at a location and time to be set forth by separate Order of this Court, to answer questions under oath in connection with the audit of Clay County, Missouri.

II. That Nicole Brown and/or other responsible officials of Clay County, Missouri produce or make available to the State Auditor all records of Clay County Commission meeting minutes, both open and closed.

III. The County may make appropriate redactions for attorney-client privileged communications if a log is provided for each such redaction that contains sufficient information to determine whether the attorney-client privilege is properly invoked; and

IV. The County may make appropriate redactions for attorney work-product content if a log is provided for each such redaction that contains sufficient information to determine whether the work-product doctrine is properly invoked.

V. The County is not permitted to withhold any record from review by the State Auditor's Office unless such a review by the State Auditor is specifically prohibited by law.

VI. In conducting an audit, the State Auditor and her authorized representatives have the power to subpoena witnesses and to take testimony under oath, and to assemble records and documents by subpoena or otherwise.

COUNT II - ENFORCEMENT OF NOVEMBER 22, 2019 SUBPOENA

66. Paragraphs 1 through 65 are incorporated and re-alleged as if fully set forth herein.

67. The Auditor's audit of the County is made pursuant to constitutional and statutory authority.

68. The records subpoenaed as shown in Exhibit B are not too indefinite.

69. The requirement of the attendance of the County's designated records custodian (Nicole Brown) is not too indefinite.

70. The requirement of the attendance of the County's Assistant County Administrator (Nicole Brown) is not too indefinite.

71. The records sought in the request for the records of the County Commission as shown in Exhibit B are reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

72. The testimony sought from the County's designated records custodian is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

73. The testimony sought from the County's Assistant County Administrator is reasonably relevant to the performance of an audit by the Missouri State Auditor under Missouri law.

WHEREFORE, the Missouri State Auditor requests that this Court enter judgment enforcing its subpoena attached as Exhibit B in the following respects:

I. That Nicole Brown personally appear before the State Auditor or her representatives at a location and time to be set forth by separate Order of this Court, to answer questions under oath in connection with the audit of Clay County, Missouri.

II. That Nicole Brown and/or other responsible officials of Clay County, Missouri produce or make available to the State Auditor all records of Clay County Commission as shown in Exhibit B.

III. The County may make appropriate redactions for attorney-client privileged communications if a log is provided for each such redaction that contains sufficient information to determine whether the attorney-client privilege is properly invoked; and

IV. The County may make appropriate redactions for attorney work-product content if a log is provided for each such redaction that contains sufficient information to determine whether the work-product doctrine is properly invoked.

V. The County is not permitted to withhold any record from review by the State Auditor's Office unless such a review by the State Auditor is specifically prohibited by law.

VI. In conducting an audit, the State Auditor and her authorized representatives have the power to subpoena witnesses and to take testimony under oath, and to assemble records and documents by subpoena or otherwise.

COUNT III - DECLARATORY JUDGMENT

74. Paragraphs 1 through 73 are incorporated and re-alleged as if fully set forth herein.

75. The Auditor is conducting an ongoing audit of the County, and such audit will require the examination of records and witnesses that will include information and records that are not open, public records.

76. In the Auditor's conduct of the audit of the County, the Auditor is entitled to all records that are related to an audit conducted under the Missouri Constitution and in accordance with statute.

77. In the Auditor's conduct of the audit of the County, the Auditor is entitled to require witnesses to answer questions under oath.

78. In the Auditor's conduct of the audit of the County, the Auditor is entitled to question witnesses.

79. The need to examine records, question witnesses, and require witnesses to be examined upon oath as set forth herein has been and will be ongoing in nature.

80. The State Auditor has a legally protectable interest in performing her constitutionally and statutorily required duties in the manner provided by law.

81. Two subpoenas for records of the Commission has been served and full compliance has been refused.

82. A justiciable controversy exists.

83. The County's refusal to provide access to records is based upon the County's erroneous proposition that the State Auditor is not entitled to access to records that are closed under the Sunshine Law.

84. The County's refusal to provide access to County records is based upon the County's erroneous proposition that the State Auditor is not entitled to access to records absent a showing to the County as to how the content of such records is directly related to the receipt and expenditure of public funds.

85. The County's refusal to provide access to records is based upon the County's erroneous proposition that the State Auditor is prohibited by the Missouri Constitution from accessing certain records which include records closed under the Sunshine Law.

86. The County's refusal to provide access to records is based upon the County's erroneous proposition that the State Auditor is prohibited by the Missouri Constitution from accessing certain records which include records closed under the Sunshine Law absent a showing to the County as to how the content of such records is directly related to the receipt and expenditure of public funds.

WHEREFORE, the Missouri State Auditor requests that this Court enter judgment in favor of the Auditor, award her fees and costs in this action, and make the following declarations of law:

I. The State Auditor is permitted access to records of an auditee without regard to whether such records may be closed under Chapter 610 (the Sunshine Law).

II. The Missouri Constitution does not deny the State Auditor access to any particular record or any particular category of records;

III. The State Auditor is not required to make a showing to the County that the content of a record is related to the receipt and expenditure of public funds before the County is required to provide access to the record;

IV. With the exception of attorney-client privileged communications and attorney work product content, the County is not permitted to redact any information from any record on the basis that the information is not directly related to the receipt and expenditure of public funds;

V. The County is not permitted to withhold any record from review by the State Auditor's Office unless such a review by the State Auditor is specifically prohibited by law.

VI. In conducting an audit, the State Auditor and her authorized representatives have the power to subpoena witnesses and to take testimony under oath, and to assemble records and documents by subpoena or otherwise.

Respectfully submitted,

/s/ Joel E. Anderson
Joel E. Anderson, Mo Bar # 40962
Meghan Maskery Luecke, Mo Bar #64004
Missouri State Auditor's Office
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Jefferson City, MO 65101
Telephone 573.751.4213
Facsimile 573.751.7984
Joel.Anderson@auditor.mo.gov

Attorneys for Plaintiff Missouri State Auditor

RULE 55.03 CERTIFICATE

The undersigned hereby certifies that the foregoing was filed electronically, the attorney shown thereon as the signer signed the original of the foregoing, and the original signed filing will be maintained by the filer for a period of not less than the maximum allowable time to complete the appellate process.

/s/ Joel E. Anderson
Joel E. Anderson, 40962

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

NICOLE GALLOWAY, AUDITOR OF THE STATE OF MISSOURI, Plaintiff,	)	Case No 19CY-CV12168
v	)	
CLAY COUNTY, MISSOURI, et al., Defendants.	) (	

JUDGMENT GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Now on this 23rd day of October, 2020, the Plaintiff appears by its attorney Joel E. Anderson and the Defendants appear by their attorney W. Joseph Hatley. The Court takes up the Plaintiff's Motion for Summary Judgment and the Defendants' Motion for Summary Judgment Arguments of Counsel are heard, and the Court being fully advised, finds as follows:

1. The State Auditor is authorized by the Missouri Constitution to conduct audits that are required by law. Audits required by Missouri Statute, including those specified in Chapter 29 of the Revised Statutes of Missouri (RSMo) are not limited by the Missouri Constitution to any particular type of audits.

2. The Missouri Constitution does not limit the Auditor's access to certain kinds of records or evidence in conducting an audit.

3. An audit under Section 29.235 RSMo that is required by law and performed in accordance with the provisions of Chapter 29 RSMo and performed in accordance with the provisions of Chapter 29 RSMo is a duty imposed on the Auditor that is related to the supervising and auditing of the receipt and expenditure of public funds as provided in Article IV, Section 13 of the Missouri Constitution.

4. Neither the Missouri Constitution nor Missouri Statutes require the Auditor to make a showing to any auditee as to how a particular record or set of records, or the testimony of witnesses is related to the receipt and expenditure of public funds prior to the duty to grant access to such records or witnesses during an audit.

5. Pursuant to Section 29.235 4(1), authorized representatives of the State Auditor may examine witnesses under oath in connection with a lawful audit without being licensed attorney

Wherefore, it is Ordered, Adjudged, and Decreed as follows:

a The Plaintiff's Motion for Summary Judgment is granted and the Defendants' Motion for Summary Judgment is denied

b The Defendants are Ordered to comply with both subpoenas (attached as Exhibit A and Exhibit B to Plaintiff's First Amended Petition) as follows:

i The Defendants are Ordered to produce all 2017-2019 meeting minutes, whether open or closed, redacted as specified in the subpoenas, and to the extent not already produced, within ten days of this Court's Order.

ii The Defendants are Ordered to produce the individual personnel performance appraisals of the persons and groups specified in the November 22, 2019 Subpoena within 10 days of this Court's Order

iii Defendant Nicole Brown is ordered to submit to an examination under oath by authorized audit staff at a reasonable time, whether or not such staff is licensed to practice law

James W. Van Amburg, Judge

IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

CLAY COUNTY COMMISSION,	)	
	)	
Appellant,	)	
	)	
v.	)	WD83580
	)	
NICOLE GALLOWAY, AUDITOR OF THE STATE OF MISSOURI,	)	Opinion filed: December 29, 2020
	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
THE HONORABLE JON E. BEETEM, JUDGE

Division One: Thomas N. Chapman, Presiding Judge,
Mark D. Pfeiffer, Judge and W. Douglas Thomson, Judge

This matter involves the issuance of a subpoena for closed session minutes of the Clay County Commission ("Commission") by Nicole Galloway, Auditor of the State of Missouri ("Auditor"). The Commission claims the minutes contain confidential attorney-client communications. The Commission appeals the trial court's judgment granting the Auditor's motion to dismiss the Commission's amended petition, which sought declaratory and injunctive relief, for failure to state a claim upon which relief may be granted. On appeal, the Commission does not challenge the trial court's dismissal of its amended petition but, instead, claims that the trial court

erred in including language in its judgment which they claim could be construed as ruling on the substantive merits of the Auditor's subpoena. We affirm.

Factual and Procedural History

The material facts are not in dispute. In August 2018, the Auditor notified the Commission that she would be performing an audit of Clay County, as requested by the requisite number of Clay County voters. In December 2018, while conducting the audit, the Auditor requested access to closed session minutes for the calendar years 2017 and 2018.

On January 31, 2019, the Commission filed a petition for declaratory relief, preliminary and permanent injunctions, and other relief ("Petition"). In the Petition, the Commission alleged that the closed session minutes requested by the Auditor contained attorney-client communications between the County and its attorneys. In count one, the Commission sought a declaratory judgment declaring that the Auditor does not have authority to access attorney-client communications between the County and its attorneys or the closed session minutes. In count two, the Commission sought injunctive relief alleging the County would be irreparably harmed by the exposure of the attorney-client communications. In count three, the Commission sought an accounting of the Auditor's charges. In count four, the Commission sought a determination that the Auditor's decision to seek attorney-client communications should be reversed or enjoined.

On the same date that the Commission filed the Petition, the Auditor served a subpoena ("Subpoena") on the assistant county administrator to produce all minutes of meetings of the Commission for the calendar years 2017 and 2018.

On February 4, 2019, the Commission filed an amended petition for declaratory relief, preliminary and permanent injunctions, and other relief ("Amended Petition"). The Amended Petition added the allegation that the Auditor served the Subpoena for the closed session minutes but otherwise sought the same relief sought by the Petition. On the same day, the parties filed a joint stipulated motion requesting the Subpoena be stayed during the pendency of the action.

On February 11, 2019, the Auditor moved to dismiss the Amended Petition on "on the ground that such claims are not justiciable, there is no reasonable likelihood of success on the merits, the Commission has failed to state a claim, and the Commission lacks standing." Therein, the Auditor alleged that the Commission's filing was a preemptive lawsuit claiming what *might* be at stake if it were to voluntarily comply with the Subpoena because the Auditor had not moved to enforce compliance with the Subpoena and the Subpoena was not self-enforcing.

On February 14, 2019, the Commission sought a preliminary injunction to enjoin the Auditor from taking any action to enforce the Subpoena for closed session minutes. On February 15, 2019, the trial court granted the joint stipulation motion to stay the Subpoena.

On March 26, 2019, a hearing was held on the Auditor's motion to dismiss and the Commission's motion for preliminary injunction. On April 8, 2019, the trial court

denied the Commission's motion for a preliminary injunction finding that "because enforcement of administrative subpoenas requires review by a circuit court, the Petitioners appear to have an adequate remedy at law. Accordingly, the Petitioners fail to demonstrate a likelihood of success on the merits and the request is denied."

On October 23, 2019, the trial court entered its order and judgment ("Judgment") granting the Auditor's motion to dismiss. The trial court found, in pertinent part:

> [1] The Commission's primary complaint is that the State Auditor requested closed meeting minute records, and such a request is unconstitutional because it is indicative of a "performance audit" and not restricted to a financial post-audit of transactions.
>
> [2] If there is content in such records that should not be disclosed, such an issue is properly raised in a proceeding to enforce an administrative subpoena.
>
> [3] THEREFORE, this Court finds that the Commission has failed to state a claim upon which relief may be granted as a matter of law, and this case is hereby dismissed with prejudice.[1]

On November 11, 2019, the Commission filed a motion to alter or amend the Judgment ("Motion to Amend") pursuant to Rule 73.01(d). The Commission requested that the trial court clarify that its judgment does not impair the Commission's right to challenge any subpoena issued by the Auditor in a subsequent proceeding by the Auditor to enforce her subpoenas. The Commission submitted a proposed judgment adding the following language after paragraph 2:

[1]The Judgment does not contain numbered paragraphs. The paragraphs are enumerated here for clarity of the analysis.

> Whether the Auditor is acting within the limits of her constitutional authority by requesting specific records is to be determined in a proceeding to enforce an administrative subpoena, not in this case. To be clear therefore, this judgment does not determine whether the Commission must produce any particular records.

Notably, the Commission's proposed judgment did not reflect any change to the dismissal of the case with prejudice. As the trial court did not rule on the Motion to Amend, it was deemed denied by operation of law after 90 days pursuant to Rule 78.06.[2] The Commission appeals.

Standard of Review

"A judgment sustaining a motion to dismiss for failure to state a claim upon which relief can be granted is reviewed de novo." *Smith v. Humane Society of United States*, 519 S.W.3d 789, 797 (Mo. banc 2017). "'A motion to dismiss for failure to state a claim' is solely a test of 'the adequacy of a plaintiff's petition.'" *Id.* (citation omitted). In reviewing a dismissal for failure to state a claim for relief, the appeals court should affirm the lower court if the dismissal is supported by any ground, whether or not the trial court relied on that ground. *Dujakovich v. Carnahan*, 370 S.W.3d 574, 577 (Mo. banc 2012).

Analysis

For its sole point on appeal, the Commission claims that the trial court erred in including language in its Judgment that could be construed as ruling on the substantive merits of the Auditor's subpoena for closed session minutes, because its order of dismissal had to be limited to the grounds asserted in the Auditor's motion

[2]All rule references are to Missouri Rules of Civil Procedure (2019), unless otherwise indicated.

to dismiss, in that the motion to dismiss the Commission's claims for declaratory and injunctive relief was limited to an argument that those claims were not justiciable. Notably, the Commission is not challenging the dismissal of the action.

Preliminarily, the Commission's point violates Rule 84.04(e), which requires the argument include the applicable standard of review. "'Compliance with Rule 84.04 is mandatory.'" *Wynn v. BNSF Railway Co.*, 588 S.W.3d 907, 913 (Mo. App. W.D. 2019) (citation omitted). "'A party's failure to comply with Rule 84.04 preserves nothing for appellate review.'" *Id.* (citations omitted). Nonetheless, we review the merits of the Commission's claim *ex gratia.*

(a) In the motion to dismiss, the Auditor expressly asserted that the Amended Petition should be dismissed for failure to state a claim upon which relief may be granted

The Commission claims that the trial court improperly dismissed the Amended Petition on grounds not raised in the Auditor's motion to dismiss. We disagree.

We will affirm a judgment of dismissal "if it can be sustained on any ground supported by the motion to dismiss," regardless of whether the trial court relied on that ground. *Basye v. Fayette R-III School Dist. Bd. of Educ.*, 150 S.W.3d 111, 114 (Mo. App. W.D. 2004); *Kinder v. Holden*, 92 S.W.3d 793, 805 (Mo. App. W.D. 2002). "In fact, 'if the court correctly dismissed the [action], the ground upon which the dismissal is based is immaterial.'" *Kinder*, 92 S.W.3d at 805 (citation omitted). "[W]e 'must affirm the trial court's dismissal if any ground asserted in the defendant's

motion is valid.'" *I.R. Kirk Farms, Inc. v. Pointer*, 876 S.W.2d 283, 285 (Mo. App. W.D. 1994) (citation omitted).

Here, the trial court dismissed the action finding that the Commission failed to state a claim upon which relief may be granted. The Commission claims that the Auditor's motion to dismiss was limited to an argument that the Commission's claims were not justiciable and, therefore, the trial court improperly dismissed on the ground that the Amended Petition failed to state a claim. The record does not support the Commission's argument. In its motion to dismiss, the Auditor moved for dismissal of "all claims on the ground that such claims are not justiciable, there is no reasonable likelihood of success on the merits, ***the Commission has failed to state a claim***, and the Commission lacks standing." The Commission fails to even acknowledge or address this fact in its brief. The Commission cites *Continent Foods Corp v. National-Northwood, Inc.*, 470 S.W.2d 315 (Mo. App. 1971), only for the statement that trial courts may not dismiss a petition for reasons not raised in the motion to dismiss. Where, as here, the ground relied on by the trial court was raised in the motion to dismiss, *Continent Foods Corp*. has no application. Thus, the trial court's dismissal of the action was properly based on a ground asserted in the Auditor's motion to dismiss.

(b) The Judgment expressly provides that a challenge to the merits of the Subpoena should be made in an action to enforce the Subpoena and, thus, does not support the conclusion that the Judgment foreclosed the Commission's ability to challenge a similar subpoena in a future proceeding

The Commission argues that the court's conclusion that the allegations in the Amended Petition did not state a claim could be read as ruling on the merits of the Amended Petition. The Commission claims that its concern is that the Judgment could be construed by a subsequent court as an order on the substantive merit of the Commission's objections to the Subpoena. Ultimately, the Commission requests that this court issue "a simple opinion holding that the dismissal of the Commission's [action] did not adjudicate the merits of the Commission's objections to the Auditor's subpoena[.]" This reading of the Judgment is uncontested by the Auditor on appeal. The Auditor states,

> The language from the judgment directly addresses and affirms the right of the Commission to challenge any records request from the Auditor in an appropriate proceeding. . . . Because the trial court explicitly held that any challenge to the compulsory production of records is to be made in an action to enforce an administrative subpoena, there is no reasonable reading of the court's judgment that would suggest that the trial court was ruling that the Commission would be foreclosed from challenging the authority of the Auditor to obtain specific records in another proceeding.

However, the Auditor maintains that this court should decline to issue an opinion requested by the Commission because the trial court offered no such ruling on the merits directly or by implication in the first place.

We agree that the Judgment did not adjudicate the merits of the Commission's objections to the Subpoena. Instead, the trial court ruled that such objections should be addressed in an action to enforce a subpoena. At the time of such an enforcement action, *any* appropriate challenge to the subpoena may be made.[3] Accordingly, the

[3]The Commission challenged the Auditor's constitutional power to obtain certain records. The trial court found there was nothing *per se* unconstitutional about the records request. We do not

Commission is not foreclosed from challenging the authority of the Auditor to obtain specific records in future proceedings. We find the language of the Judgment is clear and, therefore, the trial court did not err in denying the Commission's Motion to Amend.

(c) The Commission's argument that the Judgment of dismissal should have been entered "without prejudice" was not raised with the trial court and, therefore, is not preserved for our review

The Commission requests that we enter an order pursuant to Rule 84.14 that the trial court should have entered, dismissing the suit ***without*** prejudice. Rule 78.07(c) requires "In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review." The Commission filed a motion to amend but did not include its claim that the Judgment should be entered "without prejudice." In fact, *the proposed judgment submitted by the Commission* with its motion to amend *specifically stated the Judgment should be entered with prejudice*. Thus, the claim is not preserved for our review. Moreover, in light of our determination that the Judgment does not foreclose the Commission from challenging the authority of the Auditor to obtain specific records in another proceeding where the Auditor seeks to enforce a subpoena, we fail to see how a ruling without prejudice is necessary.

---

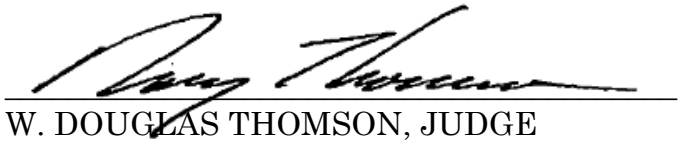
determine whether the trial court correctly found that the Auditor has such power because, like *all* challenges made against such a subpoena, it should be made in an appropriate enforcement action.

Nonetheless, such a designation triggers an inquiry of our ability to review the matter. Upon review, we find that whether the Judgment was entered with or without prejudice is of no consequence in this case because either designation results in the same outcome: that a challenge to such a subpoena should be made in an enforcement proceeding and not the declaratory relief action chosen by the Commissioner.

Point is denied.

Conclusion

We affirm the trial court's judgment.



W. DOUGLAS THOMSON, JUDGE

All concur.

OFFICE OF MISSOURI STATE AUDITOR

SUBPOENA

To: Tom Salisbury, Interim County Administrator
1 Courthouse Square
Liberty, MO 64068

YOU ARE COMMANDED AND REQUIRED to appear personally before the State Auditor or her representative(s) at the Fletcher Daniels State Office Building, Room 502, 615 East 13th Street, Kansas City, MO 64106, at 10:00 a.m. on Monday, March 23, 2021, for purposes of providing testimony about and producing for examination, copying, and interrogation the records and subjects described in Exhibit A attached to this Subpoena.

In lieu of appearance, physical access to the records described in Exhibit A may be granted for State Auditor staff on or before the appearance date listed above. Alternatively, records may be shipped to the Missouri State Auditor to the attention of Kelly Davis at 301 W. High St., Room 880, Jefferson City, MO 65102, to be received no later than the appearance date listed above.

ISSUED this 10th day of March, 2021, pursuant to Section 29.235.4(1) of the Revised Statutes of Missouri.

Nicole Galloway
Missouri State Auditor

OFFICE OF MISSOURI STATE AUDITOR

EXHIBIT A

The full personnel files and the 2018 timesheets and 2018 payroll disbursement data (i.e. listing of payments made to these individuals in 2018) for the following individuals:

a. Laurie Portwood
b. Nicole Brown
c. Brad Garrett

This request for records includes all materials that exist in paper ("hard copy") or electronic form (including but not limited to records and data maintained on computers, tablets, smart phones, external electronic storage drives, thumbnail drives, remote servers or back up tapes). All information requested in the items above are subject to inspection, review and copying by the state auditor. Section 29.235.4(1), RSMo.

Where an attorney-client privileged communication or the attorney work product doctrine for imminent or pending litigation is asserted as a basis for redaction of any portion of any record requested, the county must provide a privilege log or statement noting the reason for each assertion of privilege or the work product doctrine. Such log must describe the nature of the redacted information in sufficient detail to permit the State Auditor's Office to assess the applicability of the attorney-client privilege or work product doctrine.

IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
DIVISION 4

STATE OF MISSOURI ex rel Sheriff Paul Vescovo, III	)	
Relator,	)	
vs.	)	**Case No. 19CY-CV04353**
CLAY COUNTY, Missouri, et al	)	
Respondents.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Background/Parties

1 Relator, Paul Vescovo, III, is an individual residing in Clay County, Missouri, and is the duly elected Sheriff of Clay County, Missouri, operating under the authority of Chapter 57 of Missouri Revised Statutes

2 Respondent Clay County, Missouri is a political subdivision of the State of Missouri and is a county of the first class authorized and empowered to act as a legal subdivision of the state under Article VI of the Missouri Constitution and Chapters 49, 50 and 67 of the Missouri Revised Statutes

3 The Clay County Commission ("Commission") is the general governing authority of Clay County, Missouri The Commission is comprised of three (3) commissioners, Jerry Nolte, Luanne Ridgeway, and Gene Owen

4 Respondent Jerry Nolte ("Nolte") is an individual residing in Clay County, Missouri sued in his official capacity as the duly elected Presiding Commissioner of Clay County

5 Respondent Luanne Ridgeway ("Ridgeway") is an individual residing in Clay County, Missouri sued in her official capacity as the duly elected Eastern Commissioner of Clay County, Missouri

6 Respondent Gene Owen ("Owen") is an individual residing in Clay County, Missouri sued in his official capacity as the duly elected Western Commissioner of Clay County, Missouri

7 The Chief Budget Officer of Clay County is Laurene Portwood ("Portwood"), who also holds the title of Assistant County Administrator

8 The budget officer for the Sheriff's Office is Captain Steven K Siercks, who also holds the title of Administrative Division Commander

9 The Detention Division Commander for the Sheriff's Office is Captain Cathy Compton

10 As the duly elected Sheriff of Clay County, Relator has many duties, statutory and legal, for which he and The Office of the Sheriff of Clay County are responsible, including

A To be the "jailer" for the county and to receive and care for all persons apprehended by the other officers of the county, including the duty to care for all inmates and prisoners humanly RSMo § 221 020,

B To be the conservator of peace within the county and to commit all offenders to jail for failure to recognize the peace RSMo § 57 100,

C To regularly patrol and police all county roads and highways RSMo § 57 113,

D To enforce all laws designed to safeguard the highways and citizens of the county RSMo § 57 113,

E To suppress assaults, batteries, riots, etc , and to apprehend and commit all felons to jail RSMo § 57 100, and

F To execute all process directed to the Sheriff RSMo § 57 100

11 As a separate office and department of Clay County, all salaries, administration, operating, and other expenses necessary to carry out these duties and obligations of the Sheriff's Office are derived from County funds, with the payment of such expenditures authorized by the County Treasurer's Office in accordance with the annual County budget

12 While a separately elected office, the Sheriff's office budget is set and controlled by the Commission, pursuant to Missouri's budget statutes

13 The Sheriff's office total budget is comprised of several components, including but not limited to an "Operating Budget," covering "contractual and commodities" expenses for operating the Sheriff's Office

14 The Sheriff's Operating Budget is separate and apart from the budget for the Sheriff's office salaries and compensation for staff and officers

15 For the 2019 budget year, the County Budget Office, and Commissioner Ridgeway decided to break down the Sheriff's Operating Budget into five (5) basic lines or "silos," the term used by the County Budget Office The five "expense line items," are as follows

A Field Operations,

B Civil Process & Court Security,

C Detention,

D Administration, and,

E 911 Emergency Management

16 The Sheriff's Operating Budget for the years 2016 to 2019 are as follows

2016	**2017**	**2018**	**2019**
$2,527,186	$2,578,366	$2,114,743	$1,788,829

TE-1

17 Pursuant to state law and statutes, the Commission and/or other authorized agents of the County enter into contracts, binding Clay County, which support the Sheriff's Operating Budget Request each year, and said contracts establish term and supply pricing and minimum estimates of County expenditures for the Sheriff's office and the County

18 A significant portion of the Sheriff's Detention portion of his Operating Budget are contracts for food for the inmates, (*TE- 20*) and for healthcare for the inmates, (*TE-24, 25, 26*) These contracts cover the 2019 budget year and are contractual obligations of Clay County

19 The Budget Process and Requisition and Payment Process is a system of checks and balances, ensuring that expenditures are made within an approved budget, reviewed by multiple parties and permit individual offices, such as the Sheriff's office, to enable them to meet their legal obligations to the citizens of Clay County

20 Within the Budget Process and Requisition and Payment Process the Sheriff's office acts as proposer of the budget and a contract administrator of all expenditures relevant to the Sheriff's office's budget The Sheriff has no authority to enter into contracts to bind the County or to pay or not to pay specific requisitions The Sheriff's office's role is best described as a "contract administrator" for the Sheriff's budget

21 On July 27, 2018 the Sheriff's office submitted its 2019 Operating Budget Request using the account number of 279/556, as historically required by the County's budget officers *TE-3*

22 The Sheriff's 2019 Operating Budget Request was in conformity with §50 540 and was based on the Sheriff's office's expenditure estimates based on historical information, as well as other anticipated or requested expenditures and including the various contracts for services and

commodities entered into by the County by way of written contracts, approved and signed by the then County Administrator and current Commissioners

23 The significant contracts which underlie and support the Sheriff's 2019 Operating Budget Request include but are not limited to contracts for food, healthcare, and related services and commodities *TE-24, 25, 26, and 20*

24 In mid-August 2018, representatives of the Sheriff's office, including Captain Siercks, met with representatives of the Clay County Budget office, including Chief Budget Officer Portwood, to discuss the Sheriff's budget request for 2019 and to answer any questions from Chief Budget Officer Portwood

25 In late November 2018, the County Budget Office filed its "2019 County Proposed Budget" online for officeholders to review *TE-4* The Proposed Budget was Clay County's only response to the Sheriff's 2019 Operating Budget Request and it contained the following

A Without notice to the Sheriff, the Chief Budget Officer for Clay County "reorganized" the Sheriff's 2019 Operating Budget Request into five (5) separate line item accounts for "contracts" and "commodities" for "Field Operations," "Civil Process & Court Security," "Detention," Administration," and "911 Emergency Management " *TE-4, 2*

B The 2019 County Proposed Budget set out columns and numbers for "2017 Actual," "Modified 2018 Budget," "Projected 2018 Expenditures," "2019 Amended Request," and "2019 Proposed " The "2019 Amended Request" was made to appear as though this was the Sheriff's Office's amended request for the Sheriff's 2019 Operating Budget, when in fact it was not prepared by the Sheriff's office

C Neither the Sheriff's 2019 Budget Request nor the requested amounts were contained in the County's 2019 Proposed Budget *TE*-4

26 Following the receipt of the County's 2019 Proposed Budget, (*TE-4*), the Sheriff's office sent written communications to Chief Budget Officer Portwood, giving the County's Budget Office notice that the County's proposed budget for the Sheriff's Operating Budget failed to meet

the funding necessary for the Sheriff's Detention Division by some $1 4 million in anticipated detention costs Specific written communications included

A An email from Captain Siercks to Chief Budget Officer Portwood dated December 5, 2018, (*TE-9*),

B A letter from Sheriff Vescovo to the County Commission and Budget Team dated December 6, 2018, (*TE-17*) Relator's offices put the Commission and Budget Team on notice that the 2019 County Proposed Budget did "not come anywhere near meeting the funding necessary for the two biggest ticket items in the Sheriff's Detention Budget ", and

C An email from Captain Cathy Compton to Commissioner Ridgeway putting the Commission on notice that the proposed budget fails to meet the 2019 funding necessary to pay the detention contracts for food and healthcare *TE-54*

27 The only response the Sheriff's office received to these communications and concerns was Chief Budget Officer Portwood's email response of December 5, 2018, "I recommend that you review the complete Sheriff's budget and be prepared to discuss with the Commission where other funds may be reallocated within the law enforcement funds " *TE-9*

28 From early December 2018 through the adoption of the County's 2019 Budget on January 28, 2019, Chief Budget Officer Portwood, Commissioner Ridgeway and the Clay County Budget Office knew that the budget for the Sheriff's Operating Budget failed to provide funds to meet the Detention and Administration line items in the 2019 Sheriff's Operating Budget and therefore failed to present a complete financial plan for the ensuring 2019 budget year *TE-18, 19*

29 On January 28, 2019, the Commission adopted the County's 2019 Budget with a two to one vote, with Commissioners Ridgeway and Owen voting in favor of the Budget and Commissioner Nolte voting against the Budget *TE-12*

30 The Commission's adopted 2019 Budget made cuts to the Sheriff's 2019 Operating Budget Request, including an over 60% reduction of funds requested for contract and commodities

expenditures underlying the following "re-organized" sub-accounts of the Sheriff's 2019 Operating Budget

Account No.	Description	Requested Budget	Adopted Budget	Difference
279-554-301	Civil Process & Court Security Commodities	$231,839	$68,553	$163,286
279-555-209	Detention Contractual	$1,579,410	$532,571	$1,046,839
279-555-301	Detention Commodities	$179,375	$164,478	$14,897
279-556-209	Administration Contractual	$445,114	$214,896	$230,218
279-556-301	Administration Commodities	$365,435	$66,368	$299,067
	Total	$2,801,173	$1,046,866	$1,754,307

TE-2, 12

31 The County Commission approved the 2019 Sheriff's Operating Budget at $1,788,829 00, against the $3,177,273 Sheriff's 2019 Operating Budget Request for a deficiency of $1,388,444 00 *TE-2, 12*

32 The County's approved Budget for 2019 shorted the anticipated need for Inmate Food Service in the amount of $319,000 and for Inmate Medical Care in the amount of $436,152 for a shortage of $755,152 needed to provide for inmate food and healthcare *TE-14* This is the amount needed for the County to fulfill its contractual obligations pursuant to the County's contracts with these providers of goods and services *TE-14* This Court heard no evidence as to why this was done, and specifically finds that, based on the testimony of Portwood, there was no reason

33 The Sheriff's Requested budget for contracts and commodities for Detention, which includes but is not limited to the amounts needed to meet the County's contracts with these providers of goods and services for food and healthcare, was $1,758,785 and the County's 2019 Budget for Detention contracts and commodities was $697,049 *TE-2, 55, 56*

34 On June 14, 2019, the Sheriff's office put the Clay County Commission on notice that because of the "inadequate funding" for Detention accounts for Inmate Medical Care and Inmate Food Service that additional funds were needed to "fulfill the County Commission-approved contracts for the remainder of 2019 and to adequately care for the custody of the inmates confined to the Clay County Detention Center "

35 The Sheriff's office requested $755,152 in additional funding that would be needed for contracted Inmate Medical Care ($436,152) and for contracted Inmate Food Service ($319,000) *TE-14*

36 On June 20, 2019, Chief Budget Officer Portwood responded to the REQUEST FOR OFFICIAL ACTION by stating "This item should not be placed before the Commission due to pending litigation " TE-15

37 On June 24, 2019, after the Sheriff's office asked for a clarification, Chief Budget Officer Portwood responded by stating "Per Counsel's advice, matters pertaining to pending litigation should not be placed before the commission "

38 Chief Budget Officer Portwood refused to consider the Sheriff's office's REQUEST FOR OFFICIAL ACTION *TE-15*

39 This Court specifically finds that Chief Budget Officer Portwood's testimony was at best not credible

40 As of the date of trial, the following invoices from the vendor providing medical and dental care for inmates at the Clay County Detention Center, Advanced Correctional Healthcare, Inc have remained unpaid

Date	Invoice #	Amount
7/1/2019	87098	$72,692 92

8/1/2019	88132	$72,692 92
	Total	**$145,385.84**

TE-50

41 As of the date of trial, the following invoices from the vendor providing food for inmates at the Clay County Detention Center, Trinity Services Group, Inc , have remained unpaid

Date	Invoice #	Amount
6/28/2019	3022400047	$4,267 67 (incl partial payment)
6/28/2019	3022400048	$96 08
7/5/2019	3022400055	$9,248 73
7/12/2019	3022400056	$9,168 95
7/12/2019	3022400057	$149 79
7/19/2019	302240059	$9,142 43
7/19/2019	3022400061	$383 15
7/26/2019	3022400062	$9,126 32
7/26/2019	3022400063	$125 24
8/2/2019	3022400065	$8,730 01
8/2/2019	3022400067	$1,028 96
8/9/2019	3022400068	$8,742 90
8/9/2019	3022400070	$210 95
	Total	**$60,421.18**

TE-51

42 Relator testified it is his belief Chief Budget Officer Portwood proposed, and Commissioners Ridgeway and Owen voted for the cuts in the Sheriff's Operating Budgets in 2018 and 2019 as retaliation for the Sheriff taking the complaint by the County Clerk of the tampering with public records by Clay County's Chief Budget Officer, Laurene Portwood *Testimony of Sheriff Vescovo*

43 Respondents Clay County, Commissioners Ridgeway and Owen did not offer any explanation for the decreases in the Sheriff's Operating Budget for the years of 2018 and 2019

CONCLUSIONS OF LAW

1 None of the parties have contested jurisdiction or venue in this matter, and the Court concludes it has jurisdiction and venue is proper pursuant to the relevant Missouri rules, statutes, and Article V, section 14, of the Missouri Constitution as interpreted by the Missouri Supreme Court *See e g* Supreme Court Rules 94 01, 94 03, RSMo §§ 536 150, 508 010, *J C W ex rel Webb v Wyuciskalla*, 272 S W 3d 249, 254 (Mo Banc 2009)

2 The procedure for the preparation and execution of Clay County's annual budget is set out in Missouri's County Budget Law, RSMo §§ 50 525, *et seq* "The purpose of the County Budget Law is succinctly stated The annual budget shall present a complete financial plan for the ensuing budget year " RSMo § 50 550, *Allen v Butler County*, 743 S W 2d 527, 528 (Mo App 1987)

3 To this end, "all offices, departments, courts, institutions, commissions or other agencies," RSMo § 50 640, are to "prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenue for the next budget year " RSMo § 50 540

4 The County Budget Officer compiles each office and agency budget request, and then prepares a budget document transmitted to the Clay County Commission RSMo § 50 540 4

5 If the County Budget Officer recommends a decrease in the estimate of any County office or department in the proposed budget to the Commission, special notice and opportunity to be heard by the Commission must be given to the office or agency before adoption of the budget RSMo § 50 540 5

6 The Commission then has the authority to approve the proposed budget, including any increases or decreases, and to "revise, alter, increase, or decrease the items contained in the budget and eliminate any item or add new items " RSMo § 50 610

7 However, the County Budget Laws mandate that the final budget adopted by the Commission "shall contain adequate provisions for the expenditures necessary for the salaries, office expenses and deputy and clerical hire of all county officers and agencies " RSMo § 50 550

8 Further, all contracts "imposing any financial obligation on the county" must be accompanied by "a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation incurred and unless the contract or order bears the certification of the accounting officer so stating " RSMo § 50 660 *Also see Allen*, 743 S W 2d at 528

9 Mandamus is an appropriate remedy to compel a county commission to budget expenses within the requirements of the law *Allen*, 743 S W 2d at 528

10 In order to issue a writ of mandamus, this Court must find (i) "an existing, clear, unconditional legal right in the relator," and (ii) "a corresponding present, imperative, unconditional duty on respondent " *State ex rel St Joseph Hosp v Fenner*, 726 S W 2d 393, 395 (Mo App 1987)

11 The Court finds both elements are satisfied here Specifically (1) Relator has a clear, unequivocal and specific right to have Respondents appropriate and set aside funds for payment of the County's approved contracts as requested and submitted in Relator's 2019 Operating Budget Request and/or directly pay the County's approved contracts underlying the Sheriff's accounts making up the Sheriff's 2019 Operating Budget, and (2) Respondents have the

present, imperative, and unconditional duty to pay the County's approved contracts as requested and submitted in Relator s 2019 Operating Budget Request

12 The county commission and its members are "agents of the county with no powers except those granted and limited by law" *Allen*, 743 S W 2d at 528 "[L]ike all other agents, it must pursue its authority and act within the scope of its powers" and "cannot bind a county by an act contrary to prescribed procedure or to a statutory restriction upon [its] power" *Id*

13 The Missouri Supreme Court has made clear that "[o]nce appropriations are fixed and the Appropriation Order entered, the Commission may not control the spending decisions of [a County officeholder] made within appropriations to that office" *Kuyper v Stone County Commission*, 838 SW2d 436, 440 (Mo 1992) The Court further stated that "within that Fiscal Year, an [officeholder] may expend funds appropriated to his or her office as he or she sees fit, provided the expenditures are within the limits and for the purposes set out in the Appropriation Order" *Id*

14 While the legislature generally vests a county commission with ultimate authority over the "county's coffers," it has also limited this authority by requiring minimum budget appropriations under certain circumstances *See State ex rel Hunter v Lippold*, 142 S W 3d 241, 245-246 (Mo App W D 2004), *Hunter v County of Morgan,* 12 S W 3d 749, 760–61 (Mo App W D 2000)

15 As the court noted in *Allen*, "[a]n express restriction upon such power is the County Budget Law" itself 743 S W 2d at 528 That is, the same laws from which Respondents' discretionary budgeting power is derived also impose fundamental statutory limitations on that power by requiring that

A "the annual budget shall present a complete financial plan for the ensuing budget year [and] shall set forth all proposed expenditures for the administration, operation and maintenance of all offices " RSMo § 50 550, and

B all contracts "imposing any financial obligation on the county" be accompanied by "a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation incurred " RSMo § 50 660

16 These statutory restrictions are "mandatory and not merely directory " *Allen*, 743 S W 2d at 529 That is, by use of the word "shall" in § 50 550, the legislature created a clear, non-discretionary duty on the Commission to adopt a budget with adequate provisions for necessary expenditures of Relator's office *State ex rel Hunter*, 142 S W 3d at 245-246 Likewise, § 50 660 creates a clear, non-discretionary duty to, *at a minimum*, appropriate and/or set aside all funds required to make payments due under written and approved county contracts *Id*

17 Further, "although a writ of mandamus may not be used to control the exercise of discretion in good faith, it will lie where a supposed discretion has been exercised arbitrarily, capriciously or in bad faith, in those circumstances it being regarded that the field of discretion was abandoned " *State ex rel Kopper Kettle Restaurants, Inc v City of St Robert*, 424 S W 2d 73, 80–81 (Mo App 1968)

18 The County Commission, either by and through its Budget Officer or on its own, cannot on the one hand purposefully underfund a specific line item for services that are mandatory due to the County Commission's own contractual obligations, and one the other hand intentionally restrict the authority of the Sheriff by a county ordinance to move monies within his overall budget, and then suggest that the Sheriff use other funds at his discretion

19 The credible and competent evidence is that Respondents Clay County and Commissioners violated these clear, non-discretionary duties by knowingly failing to budget and appropriate enough money in the 2019 Adopted Budget to make payments on the County's obligations under the various contracts underlying Relator's Detention Contractual and Commodities and Administration Contractual and Commodities accounts

20 The credible and competent evidence is that Chief Budget Officer Portwood was aware that the 2019 Proposed Budget she submitted to the Commission in November 2018 did not present a complete financial plan or set forth all expenditures necessary for Relator to meet his legal duties as the lawfully elected Sheriff of Clay County, in that it failed to provide enough funds in Relator's Detention Contractual and Commodities and Administration Contractual and Commodities accounts to cover payments that would need to made to vendors under contracts entered into by the County, including inmate food, healthcare and other goods and services at the Clay County Detention Center

21 The credible and competent evidence is that Chief Budget Officer Portwood also failed to give Relator the special notice required by § 50 540(5)(1) when she submitted the 2019 proposed Budget to the Commission in November 2018

22 The credible and competent evidence is that Respondents Ridgeway and Owen voted to pass the 2019 Adopted Budget in January 2019, knowing that it did not present a complete financial plan or set forth all expenditures necessary for Relator to meet his legal duties as the lawfully elected Sheriff of Clay County, in that it failed to appropriate enough funds in Relator's Detention Contractual and Commodities and Administration Contractual and Commodities accounts to cover payments that would need to made to vendors under contracts entered into by

the County, including inmate food, healthcare and other goods and services at the Clay County Detention Center

23 The credible and competent evidence is that due to Respondents' failure to meet their statutory obligations under RSMo §§ 50 550 and 50 660, Relator's office ran out of budgeted funds necessary to fulfill the Sheriff's duties and obligations of providing food, medical care, clothing and other goods and services necessary for the custody and care of inmates confined to the Clay County Detention Center in June 2019

24 The credible and competent evidence is that all attempts by Relator to have Respondents appropriate additional funds necessary to make payments on the County's obligations under the various contracts underlying Relator's Detention Contractual and Commodities and Administration Contractual and Commodities accounts through the County budget administrative process have been fruitless, including Chief Budget Officer Portwood's, and the Clay County Commission's, refusal to place the issue on the Commission's agenda [1]

25 The credible and competent evidence is that the intent of Respondents' manipulation of the budgeting process and failure to meet their statutory obligations under RSMo §§ 50 550 and 50 660, as set out herein, is to force Relator to use statutory funds and/or money budgeted for other purposes to pay the County's obligations under the various contracts underlying Relator's Detention Contractual and Commodities and Administration Contractual and Commodities accounts *See e g*, RSMo §§ 50 535 2, 50 565 4, 488 5026 3

26 The credible and competent evidence also shows that pursuant to the Appropriation Order passed with the 2019 Adopted Budget, 2019-ORD-02a, the Sheriff is only authorized to make expenditures "solely for the purposes and objects described in each expense line" of the

[1] It is unclear from the record why Presiding Commissioner Nolte chose not to either place this issue on the agenda, or take it up during an open session of the Commission meeting

budget, and "not authorized to expend sums in excess of the amounts of each expense line item shown for that particular purpose and object" *TE-12, at pg 21*

27 The credible and competent evidence is that Respondent's actions were "arbitrary, capricious or in bad faith" to the extent they intentionally manipulated the budgeting process in order to force Relator, after the fact, to divert discretionary or other funds designated for another purpose to fulfill the County's known contractual obligations related to such critical expenditures as food, healthcare, and clothing for inmates at the County jail

28 The Court finds there is no legal authority which requires Relator to use discretionary funds or funds appropriated for another purpose to pay the County's obligations under the various contracts underlying Relator's Detention Contractual and Commodities and Administration Contractual and Commodities accounts, and, more importantly, would violate the Appropriation Order passed by the Commission with the 2019 Adopted Budget

29 As to Count I, the Court finds Respondents, individually and collectively, have an affirmative and ministerial duty and a mandatory obligation imposed by law to

A To immediately transfer, sequester and set aside the additional amount of $436 152 from the Clay County Clay County General Fund Budget to Account numbers 279-555-209 and 279-555-301 to cover the financial obligations of the County for the contracted Inmate Healthcare Services with Advanced Correctional Heath Care (#2019-125),

B To immediately transfer, sequester and set aside the additional amount of $319,000 from the Clay County Clay County General Fund Budget to Account numbers 279-555-209 and 279-555-301 to cover the financial obligations of the County for the contracted Inmate Food Service with Trinity Services Group Inc , (#2018-401), and

C To immediately transfer, sequester and set aside the additional amount of $230,218 from the Clay County General Fund Budget to Account numbers 279-556-209 and 279-556-301 to cover the financial obligations of the Office of the Sheriff for Administration

30 As to Count II, the Court denies the relief requested

31 As to Count III, Missouri statutes provide authority for Relator to pay for attorneys' fees from his budget

> The sheriff of any county may employ an attorney at law to aid and advise him in discharge of his duties and to represent him in the court The sheriff shall set the compensation for an attorney hired pursuant to this section within the allocation made by the county commission to the sheriff's department for compensation of employees to be paid out of the general revenue fund of the county

RSMo § 57 104 1

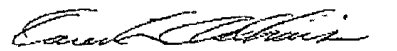
32 By the clear terms of the statute, the Sheriff may pay his attorneys from "the allocation made by the county commission to the sheriff's department for compensation of employees " *Id*

33 This Court has no authority to require Clay County to compensate Relator's attorneys over and above that which has been allocated by the Commission for Sheriff's office employees and/or attorneys for this budget year

34 Therefore Count III is denied

IT IS THEREFORE ORDERED ADJUDGED AND DECREED· That the Clay County Commission allocate and budget and additional $755,152 00 into Fund 279 Department 555 to be used by the Sheriff to satisfy the existing contracts for the food and health care of Detainees in the Clay County Detention Center for the remainder of 2019 Additionally, the Clay County Commission is Ordered to allocate and budget an additional $230,218 00 for the Administrative costs of the operation of the Detention Center into Fund 279 Department 555 That the Writ of Mandamus is hereby issued

Dated August 29, 2019



Daren L Adkins, Assigned Judge

In the Missouri Court of Appeals Western District

STATE OF MISSOURI EX REL SHERIFF PAUL VESCOVO, III,	**WD83130**
Appellant-Respondent,	**CONSOL. WITH: WD83172 and WD83196**
v.	
CLAY COUNTY, MISSOURI, ET AL.,	**OPINION FILED:**
Respondents-Appellants.	**DECEMBER 5, 2019**

Appeal from the Circuit Court of Clay County, Missouri
The Honorable Daren Lee Adkins, Judge

Before Special Division: Alok Ahuja, Presiding Judge, Gary D. Witt, Judge, Anthony Rex Gabbert, Judge

INTRODUCTION

In this consolidated appeal, we consider the cross-appeals of Appellant-Respondent Sheriff Paul Vescovo, III and Respondent-Appellants Clay County, Missouri and Clay County, Missouri Commissioners Gene Owen and Luann Ridgeway (the "County"). Respondent Jerry Nolte, also a Clay County, Missouri Commissioner, appeared as a defendant below and appears before us now solely as a respondent.[1] This appeal arises from an action before the Circuit Court

[1] All three members of the Clay County Commission were named as defendants in the Sheriff's lawsuit, in their official capacities. Commissioner Nolte appeared through separate counsel from the County and the other Commissioners, and participated extensively in proceedings both here and in the circuit court. Commissioner Nolte took a position largely aligned with the Sheriff, and contrary to the position of the majority of the Commission of

of Clay County, Missouri where Sheriff Vescovo sought a writ of mandamus, declaratory relief, and attorney's fees. Sheriff Vescovo raises one point on appeal, claiming the circuit court erred in not awarding him attorney's fees. The County raises one point on appeal, claiming the circuit court erred in issuing its writ of mandamus. We affirm the issuance of the writ of mandamus, reverse the denial of attorney's fees by the trial court but deny the Sheriff's motion for attorney's fees for the appeal, and remand for further proceedings.

BACKGROUND

The facts, in the light most favorable to the judgment, are as follows. Sheriff Vescovo is the duly elected Sheriff of Clay County, Missouri. Clay County, Missouri, a first class county under state law, is a political subdivision of the State of Missouri. The Clay County Commission is the governing authority of Clay County, and it is comprised of three elected commissioners: Jerry Nolte, Luanne Ridgeway, and Gene Owen. Commissioners Nolte, Ridgeway, and Owen were sued in their official capacities. Laurene Portwood, who is not a party to this appeal but figures prominently in the relevant events, is both the Chief Budget Officer of Clay County and the Assistant County Administrator.

Sheriff Vescovo has many legal duties, largely prescribed by statute, which include the duty to be the "jailer" for Clay County. As jailer, he is responsible for the custody and humane care of all inmates and prisoners. He is also charged with keeping the peace, patrolling and policing county roads and highways, committing offenders to jail, enforcing public safety laws,

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which he is a member. We have serious reservations whether a single legislator, who took a minority position on a challenged legislative action, and who is sued solely in his or her official capacity, has standing to litigate his or her minority position, independently from and in opposition to the legislative body of which the legislator is a part. We need not ultimately resolve that issue here, however, since we have no similar concerns regarding the Sheriff's standing, and Commissioner Nolte raises no new issues not already presented by the Sheriff. Additionally, none of the parties objected to his participation in this litigation or raised arguments challenging his standing.

providing courthouse security, and serving process. Although he is a separately elected official, and he presides over a separate office and department, his budget is explicitly set and controlled by the Clay County Commission, pursuant to state law.

As part of the budgeting process, Sheriff Vescovo's office, along with other county departments, presents a proposed department budget to the County's Chief Budget Officer, Laurene Portwood. Portwood then compiles and presents the various proposed budgets to the Commissioners as a proposed budget for the county as a whole, making adjustments as deemed necessary in light of the needs of the County. The Sheriff's budget includes an operating budget, which is separate from the budget used to pay personnel. The Sheriff's operating budget for the years 2016 and 2017 was approximately $2.5 million. His operating budget in 2018, which was cut for reasons discussed below, was $2.1 million. In 2019, he requested $3.1 million. This proposed operating budget was based on estimated expenditures calculated in part from historical information regarding prior years' actual expenditures. Throughout these years, the County's revenues increased each year.

A sizable portion of the Sheriff's proposed operating budget for 2019 was for operation of the county jail, including monies to fulfill contractual obligations with vendors providing inmate food, healthcare, and other commodities. The contracts establish term and supply pricing and estimates of the expenditures the County should expect to make under the contracts. The contract for inmate food sets forth a per meal price. The healthcare contract includes fixed fees for onsite medical personnel. As required by state law, vendor contracts were entered into and approved by the Commission. Chief Budget Officer Portwood, pursuant to authority granted to her by the Commission, personally signs many of the County's contracts, including the contract

for inmate food. Sheriff Vescovo possesses no authority to enter into contracts on behalf of the County or his department.

During the 2019 budgeting process, Sheriff Vescovo presented his proposed operating budget to Chief Budget Officer Portwood in late-July, 2018. In August of 2018, representatives of the Sheriff's office met with Portwood to discuss the proposed budget and address any concerns. When she compiled and made her proposed budget for the County available for departments to review in November of 2018, Portwood had unilaterally reduced the Sheriff's proposed operating budget, including by significantly reducing portions of the budget dealing with vendor contracts for operation of the jail including for inmate food and healthcare. In addition to reducing Sheriff Vescovo's operating budget, Portwood also reorganized his budget into five line-items or "silos", a change from how his budget was organized in previous years. These silos included Field Operations, Civil Process & Court Security, Detention, Administration, and 911 Emergency Management. In reducing his proposed budget, Portwood did not contact Sheriff Vescovo directly to provide notice of her reductions or give his office any opportunity to discuss the proposed reductions with her or with the Commission.[2] Sheriff Vescovo's office first learned of the reductions when the 2019 County Proposed Budget was posted online for officeholders to review.

Sheriff Vescovo's own budget officer, Captain Siercks, emailed Portwood on December 5, 2018 to express his concerns that the 2019 budget did not sufficiently fund, among other

[2] The County Budget Law, Mo. Rev. Stat. §§ 50.525 – 50.745 (2016), sets forth detailed procedures regarding how county budgets are to be adopted. Section 50.540.5(1) states that in class one counties, if the budget officer recommends "any decrease or reduction" in a department's proposed budget, the budget officer "shall give special notice to the officer or agency of the decrease or reduction and the officer or agency is entitled to be heard thereon by the county commission."

things, the operation of the jail. Portwood responded with the recommendation that the Sheriff "be prepared to discuss with the Commission where other funds may be reallocated within law enforcement funds." Sheriff Vescovo followed up with a letter on December 6, 2018, which again stated that the 2019 budget was grossly insufficient to fund the jail's biggest expenses: inmate food and healthcare. Commissioner Ridgeway was also emailed by Sheriff Vescovo's office and given notice that the 2019 budget did not adequately fund the contracts for inmate food and healthcare. Neither Sheriff Vescovo's letter nor the email to Commissioner Ridgeway received responses.

On January 28, 2019, consistent with the Budget Officer's recommendations, the Commission adopted a 2019 Operating Budget giving the Sheriff $1,788,829, over $1.3 million less than the $3,177,273 he requested.[3] Commissioners Owen and Ridgeway voted in favor of the budget. Commissioner Nolte voted against the budget. The appropriations ordinance approving the budget also adopted line items, similar to the silos present in Portwood's proposed budget, and it contained the following language: "Limits on Expenditure Authority. Each Expenditure Authority is not authorized to expend sums in excess of the amounts of each expense line item shown in 2019 – ORD-01 for that particular purpose and object." This language prevented the Sheriff from moving funds between expense line items in his budget. This prohibited him from transferring funds to address critical shortfalls in the areas of inmate food and healthcare. The adopted budget left a budget shortage of $755,152 for inmate food and

[3] This was over $700,000 less than the Commission budgeted for his office in 2016 and 2017 and over $300,000 less than the Commission budgeted for his office in 2018.

healthcare, roughly 60% less than required to satisfy the historical amounts necessary to cover these vendor contracts.[4]

Sheriff Vescovo filed a Petition for Writ of Mandamus, Declaratory Judgment, and Attorney's Fees in the Clay County Circuit Court on April 19, 2019. He requested both a preliminary and permanent writ ordering the County to provide an additional $1,754,307 to allow his department to cover various contractual obligations, including payments to vendors for inmate food and healthcare. His second claim requested a declaratory judgment that the under-funding of his office in 2018 was illegal and damaging to his office, and restitution of the reduced amounts and attorney's fees. His third claim requested reimbursement of his attorney's fees.

A hearing was held on June 10, 2019 where the parties argued a motion to dismiss filed by the County and the Sheriff's request for a preliminary writ. At the hearing, the County argued that the Sheriff had not exhausted all administrative remedies prior to filing suit, namely, he had failed to properly bring the matter before the Commission with a request that they amend his budget. The court declined to enter the preliminary writ, noting that the vendor contracts for the jail were not yet in arrears and that the Sheriff still had alternative remedies available to him as suggested by the County. Nonetheless, the motion to dismiss was denied, the matter was set for a bench trial beginning in August, and discovery commenced on an expedited schedule.

In light of the County's defense that the Sheriff had not brought the matter before the Commission, a request was promptly made. On June 14, 2019, the Sheriff's office informed the Commission that because his budget for the jail was inadequately funded, additional funds were

[4] While the number of inmates confined in the jail on any given day can vary, the overall jail population has remained fairly consistent over the relevant period of time.

needed to satisfy vendor contracts for inmate food and healthcare. He requested that the matter be placed on the agenda for the next County Commission meeting, and he included a request for official action transferring $755,152 from the County's general fund to the Sheriff's fund for the purpose of paying vendor contracts. Portwood responded with an email stating that "[p]er counsel's advice, matters pertaining to pending litigation should not be placed before the commission." The Commission has granted to Portwood the authority to place items or refuse to place items on its agenda.

A bench trial commenced on August 7, 2019. The parties first presented arguments regarding a motion for sanctions filed by Commissioner Nolte against the County. The Sheriff requested that the County produce emails and various other communications regarding the Sheriff's budget, with an apparent agreement that the County would comply with such request prior to the first deposition of the County's official representative, Portwood. Commissioner Nolte claimed that all of nine emails were produced prior to that first deposition. At the deposition, it was revealed that over 8,000 potentially relevant emails had come up in searches of the County's email server. After the first deposition, and before a second deposition was conducted, an additional 8,390 emails were produced. Counsel's review of the 8,390 emails revealed that some emails had been sent to or from personal email addresses. There were personal email addresses for Commissioner Ridgeway and Portwood, as well as members of Portwood's staff. Searches for personal email addresses appearing within the 8,390 produced emails suggested there were hundreds of emails sent to and from personal email accounts addressing the Sheriff's budget which were not produced by the County.

At Portwood's second deposition, she testified that she was not aware of people using personal email accounts for County business and that they had not bothered to include any

emails to and from personal email accounts in their search for relevant communications. At her third deposition, she again stated that she had not searched for personal emails relevant to the discovery request. At the court hearing, the County argued that it was unable to account for emails not on its servers, counsel had failed to send "Golden Rule" letters in accordance with local rules, and that subpoenas would be necessary as individuals' personal emails were sought as opposed to County emails. Noting that Portwood, the County's representative for the depositions, made no effort to locate personal emails despite her awareness of the issue, and the case's expedited timeline rendered strict adherence to the local rules impractical, the court issued sanctions, forbidding the County from presenting any evidence, making statements, or cross-examining witnesses during the trial. The Sheriff and Commissioner Nolte then commenced with their cases, calling Captain Siercks to testify.

After Captain Siercks testified at some length, the court reconsidered its earlier discovery ruling. The County assured the court that it could locate and produce the missing emails and other additional communications during the following week. The parties agreed to continue the trial to a later date on the belief that the remaining emails would be produced. Provided it complied with the discovery requests before the next trial date, the County would be allowed to fully participate in the proceedings.

The trial recommenced on August 19, 2019. Captain Siercks testified further, as did Captain Cathy Compton, the officer responsible for running the jail. They testified that, by the time of trial, the Sheriff no longer had the funds in his office budget necessary to pay sums currently owing on the vendor contracts for the jail's operation. Sheriff Vescovo was also called to testify concerning, among other things, the circumstances surrounding the County's otherwise unexplained decision to drastically cut his budget. He testified that in 2016 and 2017 his

operating budget was roughly $2.5 million. In 2018, his operating budget was cut to $2.1 million and in 2019 it was further cut to $1.788 million. The decision to cut his 2018 budget occurred after he began investigating a report of possible altering of official documents by county staff.

Sheriff Vescovo testified that in January of 2017, he received a report from the County Clerk that a number of official county documents, specifically financial warrants, had the signatures of the County Commissioners cut out of them. The Sheriff's investigation led him to believe that individuals in Portwood's department were involved. Concerned about a possible conflict of interest, Sheriff Vescovo decided to refer the matter to an outside agency to complete the investigation. The Missouri Highway Patrol took over the investigation, and several county employees were indicted including Portwood herself. Portwood later entered into a deferred prosecution agreement. It was after this investigation was initiated by the Sheriff that his budget was first cut.

Portwood was also called to testify. In regards to the process of creating the 2019 budget, Portwood stated that she knew that the detention line in the Sheriff's operating budget was insufficient to cover the expected costs of inmate food and healthcare at the time she prepared the proposed budget to submit to the Commission. She testified that she personally signed the contract for inmate food on or about December 7, 2018, one day after she received the Sheriff's letter informing her that the proposed budget was insufficient to cover items such as inmate food and healthcare.

Portwood also testified at length regarding text messages that she exchanged with various people which were entered into evidence. Because of redactions, it was largely unclear who she was exchanging messages with, but at various points she referred to the other party to the communications as "Commissioner," and she testified that some of the messages could have

been exchanged with Commissioner Ridgeway. In one text message exchange, she was directed to organize the Sheriff's budget into the "silos" discussed above. Another text message sent on July 18, 2019 apparently referenced Sheriff Vescovo's attempt to place the matter of his detention funding before the County Commission. The other party texted that they "red-flagged" the Sheriff's attempt, but then noticed that Portwood and her staff were "handling it." As to Sheriff Vescovo's June 14 request that the matter of his budget shortfall be placed before the Commission, Portwood testified that in rejecting his request, she did so on advice of counsel and did not contact the County Commissioners about it. She also discussed how, per county ordinance, she has the authority to sign some contracts binding the County including the contracts for inmate food and healthcare. Portwood also testified that she had a practice of meeting with Commissioner Ridgeway privately, outside of county offices, including meeting in parks.

After the close of evidence, the court took the matter under advisement. It later issued its Findings of Fact, Conclusions of Law, and Judgment, finding for the Sheriff on Count I and issuing a writ of mandamus ordering the County to transfer various funds, stating, in pertinent part as follows:

> As to Count I of Relator's Petition for Writ of Mandamus, said Petition for Writ of Mandamus is granted That the Clay County Commission is ordered to allocate and budget an additional $755,152.00 into Fund 279, Department 555/209 to be used by the Sheriff to satisfy the existing contracts for the food and healthcare of detainees in the Clay County Detention Center for the remainder of 2019 Additionally, the Clay County Commission is ordered to allocate and budget an additional $230,218.00 for the administrative costs into Fund 279, Department 556/209 That the Writ of Mandamus is hereby issued.

The court's findings of fact set forth much of what was discussed above. In addition, the court found that "Chief Budget Officer Portwood's testimony was at best not credible." The court

noted that the County provided absolutely no explanation for its decision to cut the Sheriff's budget, and the court specifically found that the County's actions were "arbitrary, capricious or in bad faith." The court denied the relief requested in Counts II and III. As to Count III, the court concluded that it did not have the legal authority to order the County to pay the Sheriff's legal fees.

After the court's judgment issued, the parties timely commenced this appeal. Additional facts will be set forth as needed.

DISCUSSION

We begin our analysis by first addressing the County's one point on appeal. The County claims that the court erred in issuing its writ in that writs of mandamus may only be used to compel non-discretionary, ministerial duties. The County argues that budgeting is inherently discretionary under Missouri law, and as such, the County cannot be compelled by a writ of mandamus to budget in any particular way. The County further argues that the Sheriff has not identified a statute which gives him the right to any particular appropriation of funds. We note that the County solely argues that the circuit court erred as a matter of law. The County does not challenge the court's factual findings in any respect.

As a preliminary matter, we note that if the circuit court had ultimately *denied* permanent mandamus relief, the court's failure to issue a preliminary writ of mandamus may well have deprived this Court of appellate jurisdiction over the court's final judgment. *See*, *e.g.*, *Bartlett v. Mo. Dep't of Ins.*, 528 S.W.3d 911, 913-14 (Mo. banc 2017). However, "[w]hen a permanent writ is granted after a hearing on the merits, the aggrieved party may seek review through

appeal," even if a preliminary writ was not issued. *State ex rel. Mo. Clean Energy Dist. v. McEvoy*, 557 S.W.3d 473, 481 (Mo. App. 2018).[5]

Because no party has questioned the circuit court's factual findings, we only review the court's legal determinations. "[W]e review questions of law, including questions of statutory interpretation, *de novo*." *Chastain v. Kansas City Mo. City Clerk*, 337 S.W.3d 149, 155 (Mo. App. 2011) (citation omitted). With legal questions, we review "the trial court's determination independently, without deference to that court's conclusions." *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012) (citation omitted).

"The remedy of a writ of mandamus is only appropriate where a party has a clear duty to perform a certain act." *State ex rel. Scherschel v. City of Kan. City*, 470 S.W.3d 391, 397 (Mo. App. 2015) (citation omitted). "A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to a thing claimed." *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 725 (Mo. banc 2007) (citation omitted). "Whether a petitioner's right to mandamus is clearly established and presently existing is determined by examining the statute or ordinance under which petitioner claims the right." *Scherschel*, 470 S.W.3d at 397.[6]

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[5] We also find it significant that the reason the court decided not to enter a preliminary writ is because the County claimed that the Sheriff still had alternative administrative remedies available to him. Specifically, the County claimed that the Sheriff had not gone before the Commission to request the appropriation of additional funds. And yet, when the Sheriff did just that, after the initial hearing but before trial, the County refused to place his request on the Commission's agenda, depriving him of the alternative remedy the County claimed he could have and should have sought.

[6] We emphasize that in this Court the County has not asserted a number of procedural objections to the Sheriff's right to mandamus relief, even though it asserted many of these objections in the trial court. These issues include: whether the Sheriff is the proper party to enforce the County's contractual obligations to the vendors who supply inmate food and health care, although he is not himself a party to the contracts; whether mandamus relief is precluded because the relevant vendors would have an adequate remedy at law through an action for breach of contract; and whether rights under a contract (as opposed to rights derived from statutes or case decisions) are enforceable through mandamus. Because the County has chosen not to address these issues here, and because these issues do not implicate the circuit court's subject-matter jurisdiction, we do not address these issues, and our opinion should not be read to implicitly decide them.

The "primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *Young v. Boone Elec. Coop.*, 462 S.W.3d 783, 791 (Mo. App. 2015) (quoting *In re Boland*, 155 S.W.3d 65, 67 (Mo. banc 2005)). "It is presumed that the General Assembly legislates with knowledge of existing laws." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 667 (Mo. banc 2010) (citation omitted). "Under the doctrine of *in pari materia*, statutes relating to the same subject matter should be construed to achieve a harmonious interpretation." *Roesing v. Dir. of Revenue*, 573 S.W.3d 634, 639 (Mo. banc 2019) (citation omitted). We "look beyond the plain meaning of the statute *only when* the language is ambiguous or would lead to an absurd or illogical result." *Young*, 462 S.W.3d at 791 (citation omitted).

The parties rely heavily on the provisions of the County Budget Law. Mo. Rev. Stat. §§ 50.525 – 50.745 (2019). The County argues that the County Budget Law gives commissioners and the County considerable discretion in setting the Sheriff's budget. It points to § 50.540, which allows the budget officer to make changes to the proposed budget as deemed necessary. It also cites § 50.610, which allows the county commission to make additional changes as it sees fit. As to the provisions of § 50.660, relied on by the court below, the County argues that this simply sets forth the conditions under which a contract with a county is actually binding on the county. The Sheriff argues that § 50.550 mandates that the County appropriate adequate funds for the Sheriff to carry out his lawful duties, and he argues that § 50.660 requires the County to budget funds to satisfy contractual obligations, including those obligations to fund inmate food and healthcare.

Notwithstanding whatever budgetary discretion the commissioners may lawfully have, we first note that Missouri courts have held that mandamus can lie to compel county officials to budget for certain expenditures. In *State ex rel. Hunter v. Lippold*, we affirmed the issuance of a writ of mandamus which ordered a county to appropriate funds for a university extension program. 142 S.W.3d 241 (Mo. App. 2004). While *Hunter* acknowledged that the County Budget Law vests a county commission with "ultimate authority" over the "county's coffers," *Id.* at 245, it held that other statutory provisions nonetheless compelled the county to fund certain programs at certain levels. *See also, State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471 (Mo. banc 1992) (issuing a writ of mandamus ordering county officials to reinstate appropriations for capital improvements to a county courthouse citing statutory provisions under the County Budget Law). The County nonetheless contends that in the present case, unlike in *Hunter*, there is not a statutory provision which dictates that any particular amount must be appropriated to the Sheriff.

The overarching purpose of the County Budget Law is set forth in § 50.550.1, which states that "[t]he annual budget *shall* present a complete financial plan for the ensuing budget year." (emphasis added). Section 50.550 uses the word "shall" repeatedly. As explained in *Hunter*, the "word 'shall' is usually used to express compulsion, obligation or necessity." 142 S.W.3d at 243. Section 50.550.1 goes on to state that the budget "*shall* set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions…" (emphasis added). Section 50.550.2 states that the "budget *shall* contain adequate provisions for the expenditures necessary for the…salaries, office expenses and deputy and clerical hire of all county officers and agencies." (emphasis added).

The above provisions, and their repeated use of the word "shall," clearly mandate that the County not only adopt a budget, but that it do so with consideration of the needs of the county and its various departments including the duties of the various elected officials of the county. The language of § 50.550.2 is of particular note, in that it requires the budget to have "adequate provisions" for necessary expenditures for various officers and agencies.

The County Budget Law says nothing about what constitutes adequate provisions, and it also says little about the duties of the Sheriff's office. Missouri law does set forth his duties in other places, however. The Sheriff is charged with, among other things, being the jailer for the county, acting as the conservator of peace who commits offenders to jail, patrolling and policing county roads, providing courthouse security, and serving process. *See generally* § 221.020 and Chapter 57, respectively. Considering these provisions *in pari materia*, we thus read § 50.550 as requiring the County to adopt a budget adequately providing for those expenditures which are necessary for Sheriff Vescovo to carry out those duties prescribed by statute. In other words, the County must consider what, exactly, a department is lawfully required to do and then determine what level of funding is adequate for the department to carry out its duties.[7]

Elsewhere, the County Budget Law sets forth detailed procedures regarding how county budgets are to be adopted. Section 50.540 requires county departments to "prepare and submit to the budget officer estimates of its requirements for expenditures and its estimated revenues for

[7] This opinion should in no way be construed as suggesting that counties must simply accept whatever budgets are proposed by department heads as "adequate provisions." Good faith disagreements will certainly arise between county commissions and department heads regarding what is necessary for a department to carry out its lawful functions, and where good faith disagreements occur, mandamus certainly will not lie. Additionally, § 50.550's requirement that the budget present a "complete financial plan," certainly includes considering a county's anticipated revenues. Section 50.550(3) explicitly requires as much, and where a county budgets less than requested by department heads in order to balance expenditures with revenues as both prudence and the law requires, mandamus would again be inappropriate.

the next budget year" with comparisons to the prior budget year. It goes on to state that the budget officer, after reviewing the estimates, shall alter, revise, increase or decrease funding as deemed necessary "in view of the needs of the various spending agencies and the probable income for the year." At § 50.540.5(1) we note that in class one counties, if the budget officer recommends "any decrease or reduction" in a department's proposed budget, the budget officer "shall give special notice to the officer or agency of the decrease or reduction and the officer or agency is entitled to be heard thereon by the county commission." The County Commission, after holding public hearings regarding the proposed budget, "may revise, alter, increase or decrease the items contained in the budget and may eliminate any item or add new items." Section 50.610.

The County claims that §§ 50.540 and 50.610 in particular provide the necessary discretion for the County to budget for the Sheriff however it sees fit. However, § 50.540 limits that discretion, stating that the officer may adjust funding as deemed necessary "in view of the needs of the various spending agencies…," and it sets forth mandatory procedures which must be followed if and when the budget officer reduces a department's proposed budget. Section 50.610 does not have such limiting language, but as it is part of the larger statutory framework that is the County Budget Law, we read it as limited by the aforementioned language present in § 50.550. Section 50.550 thus imposes a duty to consider departments' necessary expenditures even where other sections appear to give the County's officers or commissioners discretion to make adjustments to the budget. Nonetheless, although we hold that the County has a duty to provide adequate funding for the Sheriff to operate his department, neither statute nor case law sets forth what amount of funding he is specifically entitled to. As such, the statutes analyzed do not

provide either party with a definite right or duty for any particular amount of funds to be appropriated in any particular way. Therefore, the law does not, by itself, support mandamus.

In the present case, however, certain facts do support mandamus in conjunction with the statutory framework discussed above. First, because determining what constitutes "adequate provisions" under the law is a fact-intensive and highly subjective inquiry, in most instances courts cannot, and indeed should not, endeavor to determine what amounts should be appropriated to a department-head seeking mandamus. But here, unique facts provide the court with the necessary basis to find that mandamus is necessary and arrive at the sums. Sheriff Vescovo relies on vendors who are contracted to provide various services essential to running the county jail. The Commission does not dispute that these are valid enforceable contracts entered into by the Commission. In fact, Portwood personally signed some of these vendor contracts which bound the County while the budget process was ongoing. Once the County was bound by the vendor contracts, the amount due on those contracts became the minimum sum necessary to adequately fund those lines within the Sheriff's department's budget.[8] By the time of trial, the County was in arrears on its financial obligations under the contracts administered by the Sheriff, and - because of the inadequate appropriations - there were no funds available in the Sheriff's

[8] The County has argued repeatedly that because the contracts at issue are term and supply contracts with indefinite amounts owed, they could not adequately budget for those contracts at the beginning of the year. And yet, the Sheriff presented prior years' figures as part of his proposed budget which showed that the 2019 budget would be insufficient. Simple math can calculate cost estimates for services such as inmate food, where a per meal price is set forth in the contract. Furthermore, the circuit court found that the contracts provided estimates of the minimum expenditures due. The County acknowledged that the number of inmates had remained consistent over the relevant period, that the vendor contracts had not changed significantly from year to year and fail to explain why they were able to budget sufficiently for these amounts in prior years but suddenly were unable to budget for these contracts at the beginning of 2019. The County's argument that the unpredictability of the contracts rendered budgeting impossible was not found credible by the trial court.

operating budget to pay these contractual obligations. The vendor contracts appropriately served as the basis for the sums of money ordered appropriated by the court below.[9]

Second, the County has provided no justification whatsoever to explain the decision to underfund the Sheriff. The cuts were not the result of overall county revenue shortfalls, quite the opposite. It was undisputed at trial that revenues have been increasing in Clay County for years, and other departments saw funding increases while the Sheriff's budget was being drastically cut. There was no argument that some unexpected or exceptional expenditures in other areas of the County's budget required cuts to be made in the Sheriff's budget. The Sheriff's budget request was based off of prior years' figures, and there was no evidence that there was a sudden jump in costs from unforeseen events such as a rising inmate population, or an increase in food or medical costs. Similarly, the County has not offered any arguments that the vendor contracts were in some form or fashion unreasonable or unnecessary. They have not argued that the services were anything but essential, or that the costs for those services were unreasonable. The inmates were not, by any account, dining on expensive meals or having unnecessary elective dental or medical procedures.

Third, the evidence established that the County knowingly underfunded the Sheriff in a manner calculated to make it impossible for the Sheriff to carry out his lawful duties for reasons that are as disturbing as they are indefensible. The Commission delegated significant authority over the Sheriff's budget to an administrator who had been investigated by the Sheriff and who had signed a deferred prosecution agreement in regards to allegations that she improperly altered

[9] A small amount of the monies ordered appropriated by the court were not connected to vendor contracts, and were instead intended to fund some of the administrative overhead associated with running the county jail. As no party has questioned the propriety of these specific sums, and they make up a relatively small portion of all of the funds at issue, we do not disturb the circuit court's ruling as to those sums.

official County documents. The evidence overwhelmingly established that the County was distinctly aware that the Sheriff's budget was not adequate to fund the contractual obligations throughout the budgeting process. Both Portwood and Commissioner Ridgeway received letters and emails from the Sheriff's office informing them of critical funding shortfalls throughout the entire operating budget, and in particular for the jail. At the same time, Portwood was personally signing the same vendor contracts the County was refusing to fund. She even signed the contract for inmate food one day after the Sheriff sent a letter pointing out that his then proposed budget would have insufficiently funded his department, in particular the operation of the county jail in regard to the obligations contained in that same vendor contract.

While Portwood was signing vendor contracts, the County was also crafting an appropriations ordinance which arranged the Sheriff's budget into various line items that made it impossible for him to move funds around to satisfy contractual obligations, and the line item for the jail grossly underfunded the vendor contracts for food and healthcare, which the County had entered into. Text messages introduced in evidence revealed that Portwood discussed the creation of these line items with an unknown party, though in some messages she referred to the other party as "Commissioner." At the same time, the County refused to place the matter of the Sheriff's budget shortfall before the Commission, despite the law's clear requirements to do so.[10] These tactics continued into litigation, with the County first arguing that the Sheriff should have brought the matter before the Commission. We find it noteworthy that the County invoked advice of counsel when it blocked the Sheriff's access to the Commission within days of trial

[10] Section 50.540.5(1), discussed *supra*, states that in class one counties, if the budget officer recommends "any decrease or reduction" in a department's proposed budget, the budget officer "shall give special notice to the officer or agency of the decrease or reduction and the officer or agency is entitled to be heard thereon by the county commission."

counsel's argument that administrative remedies had not been exhausted. Additionally, the County failed to comply with discovery requests throughout the proceedings below, and Portwood's testimony was found by the circuit court to be at best, not credible.

Finally, the County has made no attempt to rebut the alarming assertions made by Sheriff Vescovo, leaving us with no reason to discredit the circuit court's conclusion. He testified that his budget was first cut after he initiated an investigation into criminal conduct in the County's budget office. This investigation eventually led to criminal charges against Portwood and a deferred prosecution agreement. The circuit court's conclusion that the County's decision to cut the Sheriff's budget was retaliation against a law enforcement officer for engaging in a fruitful investigation into criminal behavior of Portwood and others is supported by the record. Despite the County's impassioned argument that these facts are irrelevant and that the law does not allow a writ to issue here, we cannot overlook facts as egregious as these.

Ultimately, to the extent the County had discretion in determining the level of expenditures necessary for the Sheriff to fulfill his statutory duties, the County exercised that discretion when it executed the vendor contracts. And yet the County appropriated less than the minimum sum necessary to fund these contracts and did so in bad faith. With Portwood having admitted that, at the time she submitted the proposed budget to the Commission she was aware that the Sheriff's budget was insufficient to meet the obligations required by the contracts, and having also provided absolutely no explanation for why this was necessary, unavoidable or even explainable, the County conceded that its budget did not provide adequate funding for the Sheriff to perform his statutory duties. Throughout this litigation the County has taken no efforts to amend its budget to provide the required funding necessary to meet the obligations of the contracts it entered into and provided no rational basis for its actions in making the cuts to the

Sheriff's budget or for its stubborn refusal to remedy the problems it created. The County exceeded its discretion by deliberately, unreasonably and in bad faith, providing inadequate provisions to a department. Mandamus under these unique facts was therefore appropriate.[11] Point I is denied.

We next turn to Sheriff Vescovo's point on appeal. He argues that the circuit court erred in denying his request for attorney's fees. The circuit court found that the Missouri statutes cited by the Sheriff below provide authority for the Sheriff to pay his attorney's fees from monies allocated by the County to his budget for compensating employees, and that the court lacked authority to require the County to compensate the Sheriff's attorneys beyond what was allocated by the Commission to the Sheriff for salaries. The Sheriff argues that Section 57.104 RSMo. imposes a non-discretionary duty on the County to pay the Sheriff's necessary expenditures, and that the court therefore had authority to award fees. He further argues that if we were to find that there was no statutory authority for ordering payment of attorney's fees, fees should nonetheless be awarded due to the special and unusual circumstances of this case. In addition to arguing that the court erred in not awarding fees in his brief, Sheriff Vescovo also filed a motion for attorney's fees with this Court, requesting both fees incurred below as well as his fees incurred in litigating this appeal. We will address his motion in our analysis of this point.

"Whether a trial court has authority to award attorneys' fees is a question of law which we review *de novo*." *St. Louis Title v. Talent Plus Consultants*, 414 S.W.3d 24, 26 (Mo. App. 2013). "Missouri follows the 'American Rule' which generally provides that, absent statutory

[11] We note that the trial court's Judgment did not order the expenditure of funds but merely ordered the County to transfer funds within the County's total budget into certain line items in the Sheriff's budget. The expenditure of those funds will be made through the normal process for payment of invoices.

authorization or contractual agreement, with few exceptions, each party must bear the expense of its attorney's fees." *KC Air Cargo Servs. v. City of Kansas City*, 581 S.W.3d 685, 691 (Mo. App. 2019) (citation omitted). [12]

Sheriff Vescovo first argues that a statute, § 57.104, gives the circuit court authority to award fees. Section 57.104 states, in relevant part, that the sheriff may employ an attorney, and that he "shall set the compensation for an attorney hired pursuant to this section within the allocation made by the county commission to the sheriff's department for compensation of employees to be paid out of the general revenue fund of the county." While the statute plainly allows for an attorney to be hired and paid by the sheriff, we do not read it as granting courts the authority to award fees. The statute clearly states that the sheriff "shall" set compensation for an attorney "within the allocation made by the county commission." It, therefore, empowers a sheriff to hire attorneys and pay them within the budget already provided by a county commission. The statute, however, says nothing about mandating additional appropriations to cover attorney's fees not contemplated in the original budget. Although, as Sheriff Vescovo argues, § 57.104 does not prevent a court from granting attorney's fees to a sheriff, it does not expressly authorize it either. Therefore, the statute fails to provide the necessary authority in this case.[13]

"On 'rare occasions in an equity action,' the circuit court may award attorneys' fees when it 'finds it's necessary to award the fees in order to balance the benefits.'" *Barkho v. Ready*, 523

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[12] Often when attorney's fees are at issue in a case involving a government entity, courts must also address whether sovereign immunity has been waived. However, the County has not argued that Sheriff Vescovo failed to plead facts waiving sovereign immunity, and has not otherwise defended the claim for attorney's fees on the basis of sovereign immunity.

[13] The Sheriff's reliance on *State ex. Rel. Mennemeyer v. Lincoln County*, 553 S.W.3d 368 (Mo. App. 2018), is inapposite because in *Mennemeyer* we awarded fees under a statute completely unrelated to the case at bar.

S.W.3d 37, 46 (Mo. App. 2017) (citation omitted); *See also Goines v. Mo. Dep't of Soc. Servs.,* 364 S.W.3d 684, 688 (Mo. App. 2012) (stating: "Exceptions [to the American Rule are made] where very unusual circumstances exist so it may be said equity demands a balance of benefits.").[14] "In addition, an exception has been recognized in 'special circumstances' where a party's conduct is 'frivolous, without substantial legal grounds, reckless or punitive.'" *Goines*, 364 S.W.3d at 688 (citation omitted). A party's "intentional misconduct" has also been deemed a "special circumstance" supporting an award of fees. *Klinkerfuss v. Cronin*, 289 S.W.3d 607, 619 (Mo. App. 2009). "Special circumstances and very unusual circumstances are rare, and courts have confined these exceptions to limited fact situations." *KC Air Cargo Servs.*, 581 S.W.3d at 691 (quoting *Klinkerfuss*, 289 S.W.3d at 618).

In regards to unusual circumstances where equity demands a "balance of the benefits," this exception to the American Rule is grounded in two doctrines: the common fund doctrine and the common benefit doctrine. *Lett v. City of St. Louis*, 24 S.W.3d 157, 162-63 (Mo. App. 2000). Both doctrines address instances where a litigant secures a common benefit inured to other parties, or prevails on behalf of a class which is to be paid out of a fund. *Id.* In such instances, the party who incurred attorney's fees for prosecuting the action, may be entitled to reimbursement for such fees. *Id.* Those doctrines are clearly not applicable here, leaving us with the "special circumstances" exception.

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[14] We note that up through the middle of the last century, writs of mandamus were not considered actions in equity. *See, e.g., State ex rel. Walton v. Miller*, 297 S.W.2d 611, 615 (Mo. App. 1956) (stating that "[m]andamus is a legal, not an equitable remedy."). The view of mandamus has since evolved, with courts and treatises now viewing it as an equitable remedy. *See, e.g., Mertens v. Hewitt Assocs.,* 508 U.S. 248, 256 (1993) (stating: "'equitable relief' can also refer to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."); *Lexington v. Seaton,* 819 S.W.2d 753, 757 (Mo. App. 1991) (referring to a list of "equitable remedies" which includes mandamus); 52 Am Jur 2d Mandamus § 6 (stating: "A writ of mandamus is an equitable remedy…").

We cannot emphasize enough just how limited the fact situations are which support a finding of special circumstances. The seminal case on the matter, *David Ranken*, *Jr. Technical Inst. v. Boykins,* lists a variety of situations where fees were denied including instances where a defendant acted with an intent to defraud, cases of fraudulent concealment, and "when defendants tortiously conspired and threatened to wrongfully foreclose on notes and deeds of trust." 816 S.W.2d 189, 193 (Mo. banc 1991), overruled on other grounds by *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. banc 1997). Courts have found special circumstances where a seller of real estate received payment then refused to transfer the property and refused to return the sale proceeds, *Barkho v. Ready*, 523 S.W.3d 37 (Mo. App. 2017); where a party was found to have acted on "no other reason than spite," *Ellis v. Hehner*, 448 S.W.3d 320, 326 (Mo. App. 2014); where parties transferred funds out of a corporation with the intent to "hinder, delay and defraud creditors," *Volk Constr. Co. v. Wilmescherr Drusch Roofing Co.,* 58 S.W.3d 897, 901 (Mo. App. 2001); and where a city intentionally "scared off" tenants and potential purchasers of a property by telling them zoning laws only permitted a small set of uses for a property, *Law v. City of Maryville*, 933 S.W.2d 873, 878 (Mo. App. 1996).

Recently, our Supreme Court observed that the special circumstance of "intentional misconduct" has not led it to award fees outside of a declaratory judgment context. *Trs. Of Clayton Terrace Subdivision v. 6 Clayton Terrace, LLC*, No. SC97349, slip op. at *34-35 (Mo. banc Aug. 13, 2019). It noted that lower court cases have awarded fees citing the special circumstance of intentional misconduct in non-declaratory judgment actions, but it stopped short of determining if this was error. *Id.*, citing, *inter alia*, *Barr v. Mo. State Dep't of Soc. Servs.,* 565 S.W.3d 683 (Mo. App. 2018) (affirming an award of fees on the grounds that the respondent failed to challenge the factual findings underlying the award). The Supreme Court further held

that it need not determine if the "intentional misconduct" exception should be extended to non-declaratory judgment actions as the facts in the case before it nonetheless failed to establish "special circumstances." *Trs. Of Clayton Terrace Subdivision*, slip op. at 35.

Although declaratory judgment was sought below, the court ultimately denied it, entering only the writ of mandamus. It might appear, therefore, that the matter on which the Sheriff prevailed places us in a context where the legal authority is less clear, and our own Supreme Court has recently been intentionally silent. Regardless, we are dealing with a particularly unique set of facts where a government official seeks to have another government entity pay his legal bills. Though one could characterize this case – where funds would be transferred between county coffers – as robbing Peter to pay Paul, here we are considering if Peter should pay Paul's lawyer. Despite these difficulties, the particularly unique set of facts in this case do present special circumstances giving the circuit court authority to award fees.

The circuit court found that the County's actions were "arbitrary, capricious, or in bad faith." The County knowingly underfunded the Sheriff's office, and it did so in a manner calculated to make it impossible for the Sheriff to carry out his lawful duties and stubbornly refused to take any action to remedy the problem absent litigation. The Sheriff was budgeted an insufficient sum for operation of the county jail, and his insufficient budget was appropriated in a manner that made it impossible for him to move monies around to satisfy the vendor contracts approved and entered into by the Commission. The Sheriff was faced with a dilemma where he was forced to either not pay on the contracts risking the cessation of vital services, or violate county law by moving funds between budgetary lines. Furthermore, the County refused to place this matter before the Commission to allow the matter to be resolved there. The County's willful acts left the Sheriff with no option but to litigate. This is a key distinction between this and other

bad faith cases where fees were not warranted. Litigation was the only remedy left for the Sheriff to employ and he did so in his official capacity.

Crucially, the County's intentionally bad behavior continued after litigation commenced. The County argued at the first hearing that the petition should be dismissed because the Sheriff was required to go before the Commission and request additional funds. It was on this basis that a preliminary writ was first denied. Within days of making this argument to the court, the County then refused to place the matter before the Commission, citing counsel's advice that matters involving pending litigation not go before the Commission. This duplicitous tactic by the County forced the Sheriff to continue litigating the matter at great expense. Discovery violations delayed hearings, dragging out the proceedings even further and increasing the Sheriff's costs of litigation, including requiring Portwood to be deposed three different times. The County's actions were in retaliation for the Sheriff investigating criminal behavior of the County's employees. The case law cited above includes fee awards where parties acted simply out of spite. Such conduct is evident here.

We would add that the nature of the dispute and the relief that was granted also supports an award of fees. The County deliberately underfunded the Sheriff in retribution as found by the trial court. If he is now forced to pay his attorney's fees from his existing budget appropriations, the County would be gifted yet another opportunity to punish the Sheriff by refusing additional appropriations to offset his legal fees in this case, and we are under no illusions as to how the County would likely respond to a request for additional appropriations. We emphasize that this alone is not dispositive, as in many cases fees unavoidably diminish a prevailing party's recovery, but it is one of several factors unique to this case which militates in favor of an attorney's fees award.

At the same time, we decline to award fees as to this appeal. In *Barkho v. Ready*, we affirmed an award of fees at the trial level where a party's actions in litigation were found to be "reckless, willful, malicious, and in bad faith." 523 S.W.3d at 46. However, there was no such conduct before this Court, and we therefore denied fees on appeal. *Id.* Our criticisms of the County's conduct stopped when they appeared before this body, and we found their appeal, though unsuccessful, to be an illuminating and well-argued treatment of a novel and challenging legal problem. Therefore, we deny the Sheriff's motion for attorney's fees and expenses before this court. We otherwise grant the Sheriff's point on appeal, holding that the circuit court does have authority to award attorney's fees as to the costs incurred at the trial level. Because there are no findings regarding the attorney's fees sought, and the circuit court is in a superior position to determine the reasonableness of attorney's fees, we remand this matter to the circuit court for calculation of the attorney's fees incurred at trial.

CONCLUSION

The judgment of the circuit court granting a writ of mandamus is affirmed. We deny the Sheriff's motion for attorney's fees on appeal. We reverse, however, the judgment of the trial court as to the Sheriff's claim for attorneys' fees, and we remand for further proceedings not inconsistent with this opinion for the trial court's determination of attorney's fees incurred during the trial.

Anthony Rex Gabbert, Judge

All concur.

Clay County, Missouri
Office of the County Counselor
11 East Kansas Street
Liberty, Missouri 64068

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Kevin A. Graham
Asst. County Counselors
M. Andrew Roffmann
Jason Davey
Paemon Aramjoo

January 27, 2022

The Honorable Nicole Galloway
Missouri State Auditor
Truman State Office Building
301 West High Street, Room 880
Jefferson City, Missouri 65102

Re: Clay County, Missouri Audit

Dear Ms. Galloway,

Please accept this correspondence on behalf of the Clay County Commission and as Clay County's responses to the State Audit of Clay County, Missouri conducted by your office.

Appendix L: Clay County Commission Responses to State Audit of Clay County

1. Annex Project

Recommendation: The County Commission openly discuss and maintain adequate documentation to support decisions made, follow county procurement policy, and involve all commissioners in the approval of significant contracts.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding the annex project and the prior County Commission's actions regarding procurement and refusal to allow all Commissioners to participate in the approval of significant contracts. These concerns, coupled with other concerns regarding the project, resulted in the current County Commission terminating the annex project.

2. Additional Compensation

2.1 Employment contracts and severance
2.2 County housing

Recommendations: The County Commission:

2.1 Refrain from entering into automatically renewing employment contracts and unreasonable separation agreements with additional severance amounts, and consider the necessity of severance payments.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding employment contracts and severance and the prior County Commission's actions. The current County Commission is committed to entering into agreements, including employment agreements, which are fair, appropriate, and in the best interest of Clay County and Clay County's citizens.

2.2 If housing for county employees is considered necessary, establish a county housing policy and ensure the housing is properly reported as taxable wages if applicable. Additionally, the County Commission should consult with legal counsel and consider amending previous year employee W-2 forms, as appropriate.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding employee housing and the prior County Commission's actions. The current County Commission has initiated the development of a county housing policy that ensures County housing will only be utilized for essential workers and reflects the appropriate taxation of such housing. It should also be noted that two of the County buildings in question are set for demolition in 2022.

3. Closed Meetings

Recommendation: The County Commission maintain complete minutes for all closed meetings and ensure only topics allowed by state law are discussed in closed meetings.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding closed meetings and the prior County Commission's actions. The current County Commission is committed to compliance with Missouri's Sunshine Law, maintaining complete minutes for closed meetings, and only discussing topics in closed meetings which are specifically authorized by Missouri law.

4. Personnel and Payroll Controls and Procedures

4.1 Pay plan and approved pay rates
4.2 Employment change
4.3 Performance appraisals

Recommendations: The County Commission:

4.1 Ensure the compensation for all county employees is approved in the annual pay plan and documentation of COLA increases for all county employees are maintained.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding employee compensation and the prior County Commission's actions. The current County Commission is committed to reviewing the County's compensation program to ensure fair and consistent compensation practices for all employees. The 2022 budget team also recently updated the County's current play plan.

4.2 Ensure employment changes are timely approved.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding employment changes and the prior County Commission's actions. The current County Commission is committed to the timely approval of employment changes and believes this has been accomplished. In 2021, the County Commission and County Auditor implemented a new process in which the County Auditor now signs off on all employee status change forms.

4.3 Ensure documented performance appraisals are performed in accordance with the established policy or modify the policy.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding employee performance appraisals and the prior County Commission's actions. The current County Commission is committed to reviewing the County's performance appraisal process to ensure fair and consistent performance review for all employees.

5. County Contracting and Payment Procedures

5.1 Contract Pricing
5.2 Executed timely
5.3 Monitoring

Recommendations: The County Commission:

5.1 Ensure amounts paid on cooperative and term and supply contracts are verified per contract terms and adequate supporting documentation is maintained to support those payments. In addition, use change orders and maintain documentation for all significant project changes.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding contract pricing and the prior County Commission's actions. The current County

Commission is committed to following State law regarding contract pricing and believes this has been accomplished.

5.2 Enter into written contracts timely.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding written contracts and the prior County Commission's actions. The current County Commission is committed to following State law regarding written contracts and believes this has been accomplished.

5.3 Ensure sufficient documentation is provided to properly monitor contracts and ensure contract provisions are met.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding contract documentation and the prior County Commission's actions. The current County Commission is committed to verifying individual contract compliance and to following State law regarding contract documentation and believes this has been accomplished.

6. Procurement Policies

6.1 Requests for proposals for professional services
6.2 Bridge engineering services
6.3 Selection committees and surveys
6.4 Financial advisor/underwriter

Recommendations: The County Commission:

6.1 Solicit professional services in accordance with the county code.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding the solicitation of professional services and the prior County Commission's actions. The current County Commission is committed to following State and County law regarding the solicitation of outside professional services and believes this has been accomplished.

6.2 Ensure documentation is maintained in compliance with the county code to support the selection of vendors awards.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding the outside vendor documentation and the prior County Commission's actions.

The current County Commission is committed to following State and County law regarding outside vendor documentation and believes this has been accomplished.

6.3 Ensure selection committees include the required membership, have the recommended number of members, and members complete surveys as required.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding selection committees and the prior County Commission's actions. The current County Commission is committed to following State and County law regarding selection committees and believes this has been accomplished.

6.4 Discontinue using an underwriter who also acts in a dual capacity as financial advisor for debt issuances.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding using an underwriter acting in a dual capacity as a financial advisor. The current County Commission is committed to reviewing this procedure and following all applicable Federal and State laws regarding such conduct.

7. Expenditures and Purchasing Cards

7.1 Prepayment
7.2 Questionable purchases
7.3 Highway Department fuel
7.4 Purchasing cards

Recommendations: The County Commission:

7.1 Follow-up on the $20,000 prepayment and ensure prepayments are subsequently applied to services received by the county.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding this prepayment and the prior County Commission's actions. The current County Commission has followed up on this prepayment and believes the conduct has been addressed.

7.2 Ensure all disbursements are a necessary and prudent use of public funds. In addition, the commission should establish a policy regarding food purchases.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding purchasing and the prior County Commission's actions. The current County Commission is committed to following State law regarding purchasing and believes this

has been accomplished. The County Commission is also reviewing the County's current purchasing policy for any necessary changes.

7.3 Ensure beginning and ending fuel tank balances are documented and reconciled to fuel usage and fuel purchases. Any significant discrepancies should be promptly investigated.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding Highway Department fuel and the prior County Commission's actions. The current County Commission is committed to following State and County law regarding fuel usage and purchases and believes this has been accomplished. The County Commission is also reviewing the County's current policies for any necessary changes.

7.4 Periodically evaluate the need for each purchasing card issued and adjust employee purchasing card limits as deemed appropriate. In addition, reconsider the need to pay legal expenses and other high dollar expenses through purchasing cards and update purchasing card guidance to include best practices.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding purchasing cards and the prior County Commission's actions. The current County Commission is committed to following State and County law regarding purchasing and believes this has been accomplished. The County Commission has also terminated the practice of paying legal expenses and other high dollar expenses through purchasing cards.

8. Smithville Lake

8.1 Change funds
8.2 Discounts

Recommendations: The County Commission:

8.1 Ensure change funds are maintained at a constant amount.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding change funds and the prior County Commission's actions. The current County Commission has followed up on this concern and believes Parks Office personnel understand the need to appropriately oversee such funds.

8.2 Review park discount practices and ordinances and revise practices and/or ordinances as necessary.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding park discounts and the prior County Commission's actions. The County

Commission is also reviewing the County's current discount policy for any necessary changes.

9. Information Technology

9.1 Disaster recovery plan and backups
9.2 Electronic communication policies

Recommendations: The County Commission:

9.1 Develop a formal, written contingency plan that is periodically tested, evaluated, and updated as needed, including periodic testing of data backups.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding IT's disaster recovery plan and the prior County Commission's actions. The current County Commission has hired new leadership in the County IT's department and the department is reviewing the need for a disaster recovery plan.

9.2 Develop written records management and retention policies to address electronic communications management and retention to comply with Missouri Secretary of State Records Services Division Electronic Communications Guidelines. In addition, retain electronic communications in accordance with these policies.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding the County's electronic communication policy and the prior County Commission's actions. The current County Commission has hired new leadership in the County IT's department and the department is reviewing the need for an electronic communication plan.

10. Contract Approvals and Capital Assets

10.1 Contract approval
10.2 Capital assets

Recommendations: The County Commission:

10.1 Ensure all contracts are approved in accordance with county code and state law.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding contract approval and the prior County Commission's actions. The current County Commission is committed to following State law regarding contract approval, including contract review by the County Auditor, and believes this has been accomplished.

10.2 Continue to work with the other county officials to ensure complete annual physical inventories are conducted.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding County property inventories and the prior County Commission's actions. The current County Commission is committed to cooperating with the County Auditor to ensure that property inventories are conducted.

11. County Boards

11.1 Meeting minutes
11.2 Budgets
11.3 Conflicts of interest

Recommendations: The County Commission:

11.1 Ensure minutes are prepared for all meetings and signed.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding County Boards' meeting minutes and the prior County Commission's actions. The current County Commission is committed to working with its Boards and Commissions to ensure that each Board and Commission engages in good governance and operates in compliance with State and County law.

11.2 Prepare annual budgets that contain all information required by state law.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding County Boards' budgets and the prior County Commission's actions. The current County Commission is committed to working with its Boards and Commissions to ensure that each Board and Commission engages in good governance and operates in compliance with State and County law. Additionally, as part of the 2022 budget process, the County's budget team worked with several Boards to ensure greater budget compliance.

11.3 Ensure various boards refrain from activities that could result in the appearance of or actual conflict of interest including educating board members, as needed, on identifying actual or apparent conflicts of interest and how to mitigate them.

Auditee's Response. The County Commission appreciates and understands the recommendation. The current County Commission shares the State Auditor's concerns regarding County Boards' conflicts of interest and the prior County Commission's actions. The current County Commission is committed to working with its Boards and Commissions to ensure that each Board and Commission engages in good governance and operates in compliance with State and County law.

Clay County genuinely appreciates the work done by your office on behalf of the citizens of Clay County and the opportunity to respond to the recommendations contained in your audit. If you have any questions, please do not hesitate to contact me at your convenience.

Sincerely,

Kevin A. Graham

Kevin A. Graham
Clay County Counselor

CC: Clay County Commission
KAG/kmb

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Clay County Auditor

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AUDITOR
CLAY COUNTY, MISSOURI

Appendix M: Clay County Auditor Responses to State Audit of Clay County

- *Recommendation 10.1: Ensure all contracts are approved in accordance with county code and state law.*

  Auditee Response: We thank the State Auditor's Office for the recommendation. We agree that the former Commission majority and Administration disallowed the County Auditor to certify contracts before approval. Revised Statute of Missouri 50.660 requires the County Auditor/Accounting Officer to certify such contracts as to funds available in order for a financial obligation on the County to exist.

  Starting in 2021, the County Auditor is now certifying these contracts.

- *Recommendation 10.2: Continue to work with the other county officials to ensure complete annual physical inventories are conducted.*

  Auditee Response: We thank the State Auditor's Office for the recommendation. We agree that the County Auditor did not receive the full cooperation and responses from the former Administration necessary for a complete annual inventory for the years ended 2018 and 2019.

  Starting in 2021 the County Auditor is now receiving the necessary cooperation from Administration to conduct complete annual inventories and is doing so.