

IN THE SUPERIOR COURT OF MUSCOGEE COUNTY
STATE OF GEORGIA

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M. LINDA PIERCE
MUSCOGEE COUNTY
SUPERIOR COURT

JOHN T. DARR, in his official capacity as
Sheriff of Muscogee County,

Plaintiff,

v.

COLUMBUS, GEORGIA, a City, a public
corporation and body politic and a political
subdivision of the State of Georgia; TERESA
P. TOMLINSON, in her official capacity as
Mayor of Columbus and individually, ISAIAH
HUGLEY, in his official capacity as the City
Manager of Columbus and individually, PAM
HODGE, in her official capacity as Finance
Director of Columbus and individually, JERRY
"POPS" BARNES, in his official capacity as
District 1 Councilor and individually, GLENN
DAVIS, in his official capacity as District 2
Councilor and individually, BRUCE HUFF, in
his official capacity as District 3 Councilor and
individually, EVELYN TURNER PUGH, in her
official capacity as District 4 Councilor and
individually, MIKE BAKER in his official
capacity as District 5 Councilor and individually,
GARY ALLEN, in his official capacity as District
6 Councilor and individually, EVELYN "MIMI"
WOODSON, in her official capacity as District 7
Councilor and individually, JUDY THOMAS, in
her official capacity as District 9 at Large
Councilor and individually, and BERRY "SKIP"
HENDERSON, in his official capacity as District
10 at Large Councilor and individually,

Defendants.

CIVIL ACTION FILE
NO. SU-14-CV-3437-94

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

COME NOW, Defendants in the above-styled action, and files this Reply Brief in
Support of their Motion to Dismiss Plaintiff's Claims, noting that Plaintiff's claims are barred as

a matter of law, respectfully requesting the Court grant their Motion to Dismiss in its entirety and showing the Court as follows:

I. INTRODUCTION

Plaintiff Sheriff Darr has now filed his third Petition, claiming he is entitled to a long list of extraordinary measures to be ordered by this Court, most of which are aimed at providing him more funding than the twenty-seven million, six hundred fifty three thousand, nine hundred fifty-six dollars (\$27,653,956) which was appropriated to his Office by Council for FY15 in June of 2014.¹ (Second Amended Petition ¶232, ¶252). Defendants stand by their Motion to Dismiss, regardless of the amendments, because the Sheriff has continued to pursue legally deficient claims in his pleadings and has pled no facts to demonstrate relief is warranted. In response to this Motion, the Sheriff has failed to address the extraordinary nature of the relief requested, which is, under Georgia law, rarely granted and available only in limited circumstances. *See* O.C.G.A. §9-6-20, *et seq.* and O.C.G.A. §9-11-65.

Contrary to the statements in his Response Brief, the relief requested by the Sheriff is not typical, and the ramifications of his requests are enormous. (Darr Response Brief, pg. 1). The Sheriff's Petition asks this Court to "undo the entire FY15 Budget" and direct the Council in a specific manner to ensure he is provided with all of his proposed budgetary requests for both FY15 and FY16. (Second Amended Petition ¶232). Although the Sheriff claims he does not want to start at "square one" in the budget process, there is no other method available which could grant him additional funds without revising all other CCG Department and Office budgets for the remaining months of FY15, a virtual reset for all departments within the Columbus Consolidated Government. (Darr's Response Brief, pgs. 12,14; Second Amended Petition ¶232).

¹ Although the Sheriff has now filed his third Petition for Mandamus, and the District 8 Council seat vacated after the death of Councilor McDaniel has been filled by Mr. Thomas Buck, the Sheriff has not sought to include the District 8 Councilor in this lawsuit, so that all of Council is not present in this case.

However, the extraordinary measures sought are not warranted and indeed are contravened, under the very facts he alleges - The Sheriff himself has pled facts showing sufficient evidence was presented to and weighed by Council support the amounts appropriated to him in the FY15 budget process. (See Second Amended Petition ¶127, noting his proposals were all submitted to Council; ¶134, noting his appearance before Council to explain his budget requests, as well as the comparison and contrast made with those provided in the Mayor's Recommended Budget; ¶135, noting the discussion which resulted from the review and comparison of both proposals).

The Sheriff has continued to be overreaching in his claims, even in the Second Amended Petition which was filed after the Defendants' Motion to Dismiss. Instead of acknowledging that his remedy lies with the Council, which has the exclusive legislative power to grant him additional funds, he seeks this Court's direction and involvement, presumably to ensure each and every funding request he makes will be granted through either mandamus or other equitable relief (Second Amended Petition ¶65, ¶232 and ¶252). Plain and simple - Sheriff Darr has lodged this action as a budget negotiation tool, using the cost of litigation to extract what legislatively he has not been able to justify and what Council, after due deliberation, has determined is not warranted. Sheriff Darr requests this Court intervene and become involved in a legislative process in a manner which is simply beyond the jurisdiction of this Court. See Lowe v. State, 267 Ga. 754 (1997) and O.C.G.A. §36-5-22.1. All of this, the Sheriff asks of this Court, without any legal authority, or support for his theory, that the amounts appropriated to his Office fail to meet the minimum required for him to perform his constitutional duties.²

² There is no law, or even pleading in this case, that suggests the Sheriff is entitled to any specific amount of funding for his constitutional duties. Notably absent in any of the Sheriff's filings is any specific reference to the funding required by specific constitutional duties, nor is there any case law or statute which would demonstrate that \$27+million is below the constitutional minimum to fulfill his duties. His Petition states only that a "majority" of his budget requests were for "duties required by law". See ¶134 of Second Amended Petition. Sheriff Darr has no legal right to a specific amount of funding, only to a budgetary process that requires consideration of his requests.

II. MOTION TO DISMISS

Defendants' Motion to Dismiss has been filed for two reasons: (1) The facts of Sheriff Darr's filings show that he will not be entitled to move forward or receive relief on his claims; and/or (2) Sheriff Darr is barred as a matter of law the relief sought. *See Thomas v. Lee*, 286 Ga. 860 (2010)(motion to dismiss granted on petition for writ of mandamus to compel county official to act when "there is no manner in which" the alleged wrong states a valid claim). Although the facts and allegations stated in his Petitions may be reviewed in his favor for a motion to dismiss, much of what Sheriff Darr claims in his Second Amended Complaint are legal conclusions, which do not demonstrate a right to either extraordinary measure of mandamus or equitable relief.³ This Court does not need to accept inferences or legal conclusions drawn by the Plaintiff on the facts in his Petition.⁴ *See Chisolm v. Tippens*, 289 Ga.App. 757 (2008). Although this Court has not yet ordered any response to be made to the Plaintiff's Second Amended Petition, or the addition of the Defendants in their individual capacities, causing all of those allegations to be presumed denied by the Defendants -- the Defendants adopt their originally filed Motion to Dismiss and the pleadings made herein to seek dismissal on all of Plaintiffs' claims.⁵

Chaffin, *infra*. His Second Amended Petition shows that was performed. *See* ¶127¶134 and ¶135 of Second Amended Petition.

³ Throughout his Second Amended Complaint, Sheriff Darr alleges "it is illegal to not provide and cover all expenditures anticipated as necessary for the Sheriff" and "Ordinance 13-39 is being used to control the Sheriff".. and "Council disregarded the law".. in the manner and process of approving his FY15 budget" . (*Id* at ¶65,¶68,¶152, and¶154). Allegations of this kind should be disregarded. *Id*.

⁴ An amendment which does not require an answer is deemed denied, and its allegations will not support judgment on the pleadings. *Building Associates v. Crider*, 141 Ga. 825 (1977). A motion for judgment on the pleadings, without the introduction of affidavits, depositions or interrogatories in support of the motion, is the equivalent of a motion to dismiss a complaint for failure to state a claim.[*Cit. omitted*], *Mabra v. SF, Inc.*, 728 S.E.2d 737, 316 Ga.App. 62, (Ga. App., 2012). Defendants refer to the facts stated in Sheriff's Second Amended Petition in order to ensure all facts which Sheriff could possibly claim are discussed in their Motion to Dismiss, but they object to the Court's consideration of the same, as none should be considered by the Court in their unanswered state and in the parties current capacity before the Court.

⁵ Since Defendants are addressing newly asserted claims, this Reply Brief is slightly longer than the typical reply.

III. MANDAMUS RELIEF

Each of Sheriff Darr's Petitions is subject to dismissal, as his own allegations demonstrate no mandamus is warranted, and they request relief far in excess of that available under Georgia law. The Sheriff has requested this Court intervene in the Council's budgetary process by instructing the Councilors on the determination of the current and future budgetary amounts allotted to his Office, ordering Councilors to reconsider his specific requests for funding which were admittedly already considered, and advising Council against considering certain evidence in those decisions, namely any excessive spending he may incur over and above the funds appropriated to him for FY15. (Second Amended Complaint ¶232). All of this is sought to provide the Sheriff greater control over the budget process and to ensure he receives increases from specific sources for his Office - a level of control and involvement that the law does not contemplate as appropriate for a mandamus action.⁶ (Second Amended Petition ¶232(a)-(k), ¶249, ¶252; ¶First Amended Petition ¶232(a)-(k), ¶249, ¶252).

While a writ of mandamus will issue to compel a due performance of specific official duties, it will not lie to compel a general course of conduct or the performance of continuous duties nor will it lie where the court issuing the writ would have to undertake to oversee and control the general course of official conduct of the party to whom the writ is directed." [Cit.] The issuance of the writ of mandamus in this case would mandate a course of conduct by [State and] county officials.... Speedway Grading Corp. v. Barrow County Bd. of Comm'rs, 258 Ga. 693(1), 373 S.E.2d 205(1988).

Because appellants would have the courts compel appellees to perform discretionary acts, which are not within the proper scope of mandamus, that relief is not available. Without the ability to compel those discretionary acts, compelling the simply ministerial acts would be a useless act, which the law does not require. Jackson v. Southern Pan & Shoring Co., 260 Ga. 150(1), 390 S.E.2d 393 (1990). Since appellants cannot, as a matter of law, have the relief they seekthe trial court was correct in granting the motion to dismiss for failure to state a claim. Sixth St. Corp. v. City Stores Co., supra.

⁶ Similarly, the law does not contemplate allowing the constitutional officer this type of control or input into the distribution of the county funds. Lovett v. Bussell, 242 Ga. 405, 406 (1978), (Court denied request of Sheriff to demand pay raises for his personnel funding from the county authorities, and noted it did not want to "delegate to city officials the authority to set county pay scales, and vice versa, for law enforcement officers...").

Lowe v. State, 267 Ga. 754 (1997)(mandamus relief unavailable to compel officials to enforce Tuition Grant Act and award students grants under it, since this would require the Court to promulgate regulations and become overly involved in this process). Similarly, the Sheriff has requested this Court's involvement to a degree not contemplated within the legal confines of mandamus relief. Id.

In fact, there is no case cited by the Sheriff where a mandamus has been issued to force any public entity to remedy the allegedly insufficient funding of a constitutional officer in the manner in which he seeks in his Petitions.⁷ This is because, procedurally, Georgia law does not allow the extraordinary relief of a mandamus to provide continued oversight of minimum amounts of funding or to undo past budgetary decisions already made. Lowe, 267 Ga. 754 (1997); *See also* James v. Montgomery County Bd. of Educ., 283 Ga. 517 (2008)(Setting the school board agenda is a discretionary act which is not subject to mandamus, as mandamus not contemplated to compel a course of conduct or use of specific discretion).

Sheriff Darr's Petition is also flawed in that he asks this Court to use a mandamus action improperly to "undo a past act". Sheriff Darr prays for relief to completely unravel a FY15 budget that was assigned and distributed by each department and office of Defendant CCG, and which has been effective since July 1, 2014. The budget appropriations were decided by Council in June of 2014. (Second Amended Petition ¶232). His request is now moot. When the time has passed for the discharge of the official duty sought to be compelled, mandamus will be denied, as

⁷ Although Sheriff Darr relies heavily upon Bd of Comm'rs of Dougherty County v. Saba, 278 Ga. 176 (2004) for his assertion that mandamus is a proper claim in this case, the holding was confined to a very limited review of a grant of *both* injunctive and mandamus relief by the trial court which was presented with a spending issue - and the trial court's grant of relief was overturned due to the incorrect questions asked by the trial court. The Supreme Court did not discuss the procedural merits of a mandamus action - and certainly did not authorize the extensive manner in which the Sheriff seeks the court involvement in this case. Id.

it is not a proper remedy to compel the "undoing of acts already done or correction of wrongs".

Hilton Constr. Co. v. Rockdale County Bd. of Educ., 245 Ga. 533, 540 (1980).⁸

- (1) **Sheriff Darr's Petitions demonstrate no viable claim to show any gross abuse of discretion occurred in the actions taken by Council in making the appropriations for his FY15 budget, so that a mandamus action would be unnecessary.**

The three Petitions filed by the Sheriff reveal a series of facts and admissions to demonstrate no mandamus is necessary. Although the Sheriff claims that **only he** can determine what is reasonable and adequate for his Office to conduct all of its necessary duties, and therefore Council must have broken the law since it did not provide him with every amount of funding requested, these assertions are incorrect statements of law. A county governing authority is only required to provide funding for the constitutional mission of the constitutional officer, and the constitutional officer is only entitled to discretion in that process. Wolfe, 233 Ga. 162 (1974). The Sheriff's pleadings show no mandamus is warranted, because (1) he has not pled his case sufficiently to outline the alleged needs of his constitutional duties, and (2) the information he has provided, through his own pleadings, demonstrates his FY15 appropriations fulfill (and exceed) the constitutional minimum required for the performance of his duties. Bd. of Comm'rs of Randolph County v. Wilson, 260 Ga. 482, 483 (1990), *see also* Chaffin, 262 Ga. 202 (1992).

Instead of providing this Court with a list of his constitutional duties and the expenses incurred from those duties, which would be a minimum for a pleading requesting the extraordinary relief of this kind, Sheriff Darr has essentially admitted he made budget requests of Council which contemplated spending that was not required by his constitutional mission. In his

⁸ Sheriff Darr has not shown his request is timely when compared to Saba. The sheriff in Saba filed his petition *before* the effective date of the budget, and the trial court heard the issue immediately. He also pled that the budget would "interfere" with how he hires his personnel or spends his funds, issues that are appropriate for a mandamus. The Supreme Court returned it as the court answered the wrong question. Saba, 278 Ga. 176 (2004).

Second Amended Petition, he outlines the arguments he made to Council to support his budget requests as follows:

(a) That his proposed budget was the 'bare minimum he needed to operate the Muscogee County Sheriff's Office;

(d) That his proposed budget is the amount necessary to enable him to perform the constitutional state requirements expected of him as Sheriff; and that his proposed budget allows him **to continue to deliver the services expected of the Sheriff's office both from the citizens of Columbus and the other departments of the consolidated government;**

(e) That the majority of his budget is allocated to duties required by law.

Second Amended Petition ¶134(a),(d) and (e). (emphasis supplied). By his own pleadings, Sheriff Darr has admitted that he sought funding for duties and expenses over and above those which were required to be performed by law. Id.

A constitutional officer is not entitled to a specific amount of money under Georgia law, and Sheriff Darr has no legal rights to a specific budget. Instead, Sheriff Darr is entitled to a process, which then gives him an amount sufficient to reasonably perform his required constitutional duties. *See Saba*, 278 Ga. 176 (2004); *Wolfe*, 233 Ga. 162 (1974). No provision of Georgia law allows the constitutional officer to avoid the legislative budget process or to avoid the discretion afforded by the Council in determining his budgetary appropriations. The law simply does not require the Council to award him the entirety of his proposed budget.⁹ *Lovett v. Bussell* 242 Ga. 405, 4056 (1978) (Court upheld the refusal of the Laurens County Commissioners to provide a pay increase requested by Sheriff to match those provided to police,

⁹ This holding arose from *Wolfe v. Huff*, a case which was heard twice by the Supreme Court. The Court affirmed the County's responsibility and discretion in the use of its resources, and it required the County only to provide some funding for the fulfillment of required law enforcement duties. *Wolfe*, 232 Ga. 44 (1974) and 233 Ga. 162 (1974). Notably, the *Saba* Court did not review the actual budget appropriations made to the Sheriff, as it instead remanded the issue to the trial court, where the case remained. *Saba*, 278 Ga. 176 (2004). *See Chaffin*, which recognized the commission's broad authority to cut the Sheriff's budget 47%. *Chaffin*, 262 Ga. 202 (1992).

noting to "rule otherwise would be to delegate to city officials the authority to set county pay scales, and vice versa, for law enforcement officers, fireman... and so on whenever similar county and city jobs exist"), and O.C.G.A. §36-5-22.1(noting the original and exclusive jurisdiction of county governing authorities over all county funds).

Even as a county/constitutional officer, the sheriff's budget and accounts are subject to the authority of the county commission, which can amend or change estimates of required expenditures presented by the county officer. *See Saba* at 177; *See also Wilson*, 260 Ga. at 483(Court recognizes "sheriff's budget and accounts are subject to the authority of the commission" and affirms 20% reduction in funding for sheriff personnel,) *citing* O.C.G.A. §36-5-22.1 (governing authority oversees and settles county funds assigned to officers for its use and benefit); *and Chaffin*, 262 Ga. 202 (1992)(affirming injunction against sheriff to require cooperation with 47% reduction to his overall budget and holding commissioners do not have to approve the budget that a sheriff proposes). None of the cases cited by the Sheriff justifies the issuance of a mandamus against a county governing authority to require a new budget be issued for a constitutional officer when faced with claims of insufficient funding.¹⁰

Instead, the facts alleged by the Sheriff in each of his Petitions, as well as his Response Briefs, provide all the detail needed to show the sufficiency of evidence presented to the Council and to justify its appropriation to Sheriff Darr's Office the amount of \$27,653,956, instead of the \$29,360,932 requested in his Proposed Budget. Council has "original and exclusive jurisdiction over the .. directing and controlling of all the property of the county, according to law, as the governing authority deems expedient, ... as well as the examining and auditing of the accounts of

¹⁰ The cases in which a mandamus has been appropriately pled usually involve a specific spending decision which has been denied (*Griffies v. Coweta County*, 272 Ga. 506 (2000)) or an attempt at interference with the officer's position, i.e. the county could not direct the setting of salaries within the funds allotted by the county. *See Boswell v. Bramlett*, 274 Ga. 50 (2001). In *Saba*, the court expressly held that the commission's setting of a budget amount does not constitute interference with the sheriff's office. *Saba*, 278 Ga. 176 (2004).

all officers having the ..money belonging to the county or appropriated for its use." O.C.G.A. 36-5-22.1(a)(1) and (7). None of the Sheriff's allegations show a viable claim for the gross abuse of discretion by Council in this decision, and his complaints about the budget process had no effect on the deliberations and are irrelevant, particularly given his own conduct in that process.¹¹ (Second Amended Petition ¶¶112-¶117).

The Sheriff's complaints about the budget process must fail as irrelevant. The Sheriff has admitted that his FY15 requests were provided, in their entirety, to Council. (Second Amended Petition ¶127). He also admits that he requested a budget hearing before Council to discuss all of his budgetary needs and issues with the process used for the FY15 budget and to specify the detail of his budgetary requests. (Second Amended Petition ¶134, including subsections (a)-(g), outlining all of his needs which were discussed with Council). In that hearing, Sheriff Darr admits that the Finance Director and Councilors discussed the comparison to numbers presented in the Mayor's Recommended Budget, reviewed the overages spent by the Sheriff in past years, the total amounts to be provided for his Office and discussed the fact that the Sheriff had the authority to move around his budgeted funds as he determined necessary. (Second Amended Petition ¶135(c) and (f). Sheriff Darr even went so far as to recite Councilor Thomas' questions about the differences in the two budgets and the overruns she had seen the Sheriff make in previous years. (Id.).

¹¹ Sheriff Darr's complaints that the Mayor did not incorporate his proposed budget in her Recommended Budget to Council, per the requirements of Columbus Charter §8-105 are irrelevant, because Sheriff Darr has admitted that he did not submit his overall budget to incorporate to any member of the Executive Branch until mid-May of 2014, which was two weeks past the date on which the Mayor's Recommended Budget was legally required to be submitted to Council. *See FN23 on pg. 21 of Darr's Response Brief; See also Columbus Charter §7-401(2)"A proposed annual operating and capital budget for the ensuing fiscal year shall be prepared by the city manager to be submitted by the mayor to the Council on or before a date fixed by ordinance, but not less than 60 days prior to the beginning of the fiscal year", which is July 1, 2014. Any complaints on the incorporation of Darr's budget requests into the FY15 budgetary process lie with his actions alone.*

None of these facts, as recited by the Sheriff, demonstrates that the Council's budgetary appropriation to his Office was so "arbitrary and capricious" that it amounted to a "gross abuse of discretion" which requires that another budget be formulated. See Roswell v. Fellowship Christian School, 281 Ga. 767 (2007)(review of legislative action in grant of permit did not warrant mandamus where "sufficient evidence "was presented to body denying permit, so that no "gross abuse of discretion" could be found). Under Sheriff's own admissions, sufficient evidence was presented to each and every member of Council on his budget requests, as he appeared before Council to argue the needs and necessities within that budget, as well as to reiterate his complaints about the Mayor's Recommended Budget. (Second Amended Petition ¶127, ¶135). As a matter of law, there are no facts to warrant a mandamus to undo an entire FY15 budget or to place constraints on his FY16 future budget considerations, particularly since his funding was decided by Council upon the evidence presented by the Sheriff himself. See Wolfe, supra, and Roswell, supra.

- (2) **Defendants CCG, Tomlinson, Hugley and Hodge are improper parties, as they cannot provide Sheriff Darr with the relief he requests, and may not be subject to a mandamus in his requests for additional budgetary funds.**

A motion to dismiss is also appropriate where the objects of the petition, here the non-legislative Defendants, are not in a position to effectuate the relief requested. Garnett v. Murray, 281 Ga. 506, 507 (2007)(citing Sauls v. Winters, 215 Ga. 515, 517 (1959)(petition for mandamus is inappropriate unless the defendant is in a position to perform the act the petitioner seeks to have performed). Sheriff Darr's Response ignores the inability of the Executive Defendants to afford him any of the relief requested. None of these Defendants can, even under the admissions within the Sheriff's own filings, effectuate any changes to his budget or provide him with additional funding:

Except in the case of a tie vote among Councilors on a budget ordinance or resolution where the Mayor is authorized to cast a tie-breaking vote, the Mayor, and those under her control, including the City Manager and the Finance Director, **have no authority to do anything in an attempt to impose on or dictate an annual budget to the Sheriff.**

Second Amended Petition ¶67 (emphasis supplied); *See* O.C.G.A. §36-5-22.1 and Columbus Charter §7-401. Mandamus is not available when it is apparent that the writ would, for any cause, be nugatory or fruitless. *See* O.C.G.A. §9-6-26.

To the extent that the Sheriff insists this Court subject these individual Defendants to a mandamus to force the incorporation of the Sheriff's budget into the Mayor's Recommended Budget for consideration by Council, this Court should realize the practical impossibility of this claim during the FY15 budget process. (Second Amended Petition ¶123-127). The incorporation of the Sheriff's budget into the Mayor's Recommended Budget is entirely dependent upon the Sheriff's cooperation. The Columbus Charter requires the Mayor to submit a recommended budget to Council no later than sixty (60) days before the end of the fiscal year, or May 1, 2014 for FY15. *See* Columbus Charter §7-401(2). Sheriff's counsel admits that the Sheriff did not submit his proposed budget until mid-May of 2014 to Council. (Darr Response Brief, FN23 at pg. 21). Although the Sheriff claims that the Mayor was required to incorporate his proposed budget into her Recommended Budget for Council, his own failure to provide it to her in the timeline required makes that impossible. Most importantly, there is no evidence that the Sheriff was penalized or in any way harmed for his failure to submit to the regular budget process. He admits his entire proposed budget was submitted to Council, and he appeared before Council on several occasions to argue its content and admitted his requests were deliberated at length.¹² (Second Amended Petition ¶127-135). Mandamus is, under these allegations, unwarranted. O.C.G.A. §9-6-26.

¹² It should not be forgotten that Sheriff Darr, in advocating for his own budget requests, confirmed not all of his requests were made to carry out his constitutional duties as Sheriff. Second Amended Petition, ¶134(d) and (e).

- (3) **Sheriff Darr's requests of this Court far exceed the available jurisdiction on these claims, as neither Sheriff Darr, nor this Court may direct funds of the Defendant CCG in a particular manner.**

Georgia law not only speaks to the powers of a Sheriff, it speaks quite clearly to the “original and exclusive” jurisdiction of the legislative body of a county government, and the judicial reverence the court must give it. *See* O.C.G.A. § 36-5-22.1(a). No court can interfere with the budgetary or financial decisions of a legislative local government:

By article 1, section 1, paragraph 23, of the Constitution of 1945 (Code, Ann. Supp., § 2-123), providing for a division of governmental powers, the judiciary cannot modify, amend, or repeal legislative action, nor concern itself with the wisdom of it; that is a field in which only the Legislative Department may work. *Barnes v. Carter*, 120 Ga. 895, 897 (1904).

Sirota v. Kay Holmes, 208 Ga. 113, 115 (1951); *See also* *Lovett v. Bussell*, 242 Ga. 405

(1978)(“In the administration of county affairs, county commissioners are vested by law with a broad discretion, and the reviewing power of a judge of the superior court should be exercised with caution, and no interference had unless it is clear and manifest that the county authorities are abusing the discretion vested in them by law). *See also* *Moore v. Baldwin County*, 209 Ga. 541 (2) (74 SE2d 449) (1953).

Sheriff Darr's prayers for relief exceed the jurisdiction of this Court, as he specifically requests that he receive additional budgetary funds from the General Fund for his FY15 Budget. (Second Amended Complaint. ¶232(f), requesting more monies from the General Fund and ¶250, requesting the reinstatement of the \$29,360,932 spent in FY14). By law, however, every portion of Defendant CCG’s “operating budget” is assigned to a particular department, division or office budget, fund or account, to include the budget fund of Sheriff Darr. *See* Columbus Charter §7-401 and §8-105; O.C.G.A. §36-5-22.1(a)(7)(accounts of officers contain “money belonging to the county or appropriated for its use and benefit”). *See also* O.C.G.A. §36-81-3(e)(“[a]ll units of

local government" are required to use the state chart of accounts for the recording of every expenditure and receipt by each department, division, fund or account). In no event does the Sheriff's constitutional authority allow him to dictate what expenditures should be made by the legislative branch or by other county departments or agents.

What the Sheriff requests is that this Court order a legislative budget amendment to *add* monies to the Sheriff's FY2015 budget, which presumably must come from some other source or department within Defendant CCG, so that their budgets would be altered as well. Even if a mandamus would lie to find that Council grossly abused its discretion in failing to grant him adequate funding, which Defendants deny and the Sheriff's own allegations defy, the relief available is limited to the creation of a new budget, and thereby, Councilors would have to determine (and undo) the appropriations of other entities and departments within Defendant CCG. Contrary to the Sheriff's requests, this Court is without authority to order that funds be transferred from one budgetary designation, division or department to the Office of the Sheriff. *See Sirota, supra*, and *Lovett, supra*. *See also* O.C.G.A. §36-5-22.1(monies in the "accounts of all officers" "belong to the county or [are] appropriated for its use and benefit", the "settling" of those accounts is in the "original and exclusive jurisdiction" of the county); and *Lawson v. Lincoln County*, 292 Ga.App. 527, 904-905 (2008)(to allow sheriff to operate "independent from the county's budgeting process would, in the extreme, undermine the county's broad discretion to exercise control over public property.") As Sheriff Darr recognized in his Response Brief, "[e]ven where official action of some sort is required, however, where the action involves the exercise of discretion, mandamus will not lie to dictate the manner in which the action is taken or the outcome of such action." *See* Darr Response Brief, pg .27, *citing Bibb County v. Monroe County*, 294 Ga. 730 at 735 (2014).

- (4) **Mandamus cannot lie for Sheriff's claims that his office is under unnecessary control by requiring he appear before Council before any extra funding requests are made, and likewise, mandamus cannot lie for his not-yet determined FY16 Budget.**

The Sheriff's contentions that the Defendants are somehow controlling his office by requesting that he appear before Council if he exhausts his entire FY15 budget (or in some undisclosed manner are not affording him the due considerations for his FY16 budget) are simply not yet ripe for this Court's review. "The issue of whether the Board is improperly dictating to the Sheriff how to operate his office does not arise until a budget has been adopted, the Sheriff exercises his discretion regarding the spending of the allocated funds, and the Board refuses to honor the spending decision. Saba, 278 Ga. at 179, *citing* Griffies v. Coweta County, and Boswell v. Bramlett. Similarly, a mandamus will not be granted on a mere suspicion or fear, before a refusal to act or the doing of a wrongful act. *See* O.C.G.A. §9-6-26.¹³

IV. CLAIMS FOR EQUITABLE RELIEF ARE PROHIBITED BY IMMUNITY AND UNNECESSARY AS STATED

Sheriff Darr has admitted that any of the claims against the Defendant CCG and the individual Defendants in their official capacities for injunctive relief are now barred by the application of sovereign immunity. *See* Darr Response Brief, pg. 30, FN28, *citing* Georgia Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc., 294 Ga. 593, 597 (2014). Instead, the Sheriff has now amended his Petition to include claims against the Defendants in their individual capacities, but even if ordered by this Court, the amendments do not change the basis of Defendants' Motion to Dismiss. Those claims must fail due to the application of official or legislative immunity.

¹³ Although Sheriff Darr spends a great deal of his response stating he cannot be both too late and too early for relief by a mandamus action, the Court in Saba did instruct on this very point. It noted that the issue of whether the Board is improperly dictating on how to run the Sheriff's office "does not arise until a budget has been adopted, the Sheriff exercises discretion on the spending of the allocated funds, and the Board refuses to honor the Sheriff's spending decision." Saba, 278 Ga. at 178 (2004).

1. Sheriff Darr's claims for injunctive relief must fail due to the application of official or legislative immunity.

The Sheriff now claims, for the first time, that the duties inherent in the budgetary process are all ministerial in nature, which is simply a weak attempt to avoid the application and protection of the qualified immunity afforded to all of the individual Defendants. (*See Darr Response Brief*, pg. 34, where he stated "[b]udgetary laws are mandatory and mandatory duties that are simple, absolute and definite, arising under conditions proved to exist, and requiring merely the execution of a specific duty"...). In making this statement, Sheriff Darr not only completely contradicts the nature of the relief sought in his mandamus request in Count One of his Petition, but also the law, wherein it is clear that the enactment of a budget and the legislative process is a wholly "discretionary" act. Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998).

In each of his Petitions for Mandamus, including his most recent Second Amended Petition, Sheriff Darr specifically alleges as follows: **"[t]he Mayor, City Manager, Finance Director and Councilors abused their discretion in the preparation, submission and approval of the Sheriff Office's FY2015 Budget."** (Second Amended Petition ¶158). Aside from his own factual admissions that the actions complained of are discretionary, the law cited by the Sheriff in response to this Motion to Dismiss also supports the finding that discretion is inherent in every part of the budgetary process. "[T]he county commission's changes to the budget submitted by the elected constitutional county officer may be judicially reviewed for "abuse of discretion". Saba, 278 Ga. at 177, citing Griffies v. Coweta County, 272 Ga. 506(1) (2000), as cited in *Darr Response Brief*, pg. 10. See also Lovett v. Bussell, 242 Ga. 405 (1978)(Supreme Court recognized discretion inherent in the administration of county affairs to deny raises in Sheriff's budget for extra pay, and stated no interference shall be had unless it is clear and manifest that an abuse of discretion is present); A discretionary act calls for the

exercise of personal deliberation and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed. *See Common Cause/ Georgia v. City of Atlanta*, 279 Ga. 480, 482 (2005). Sheriff Darr's Petitions rely on a series of official and discretionary actions he claims interfere with his ability to perform his constitutional duties.

The law supports the finding that each and every individual Defendant's participation in the Defendant CCG's budgeting process is inherently legislative in nature. *See Woods v. Gamel*, 132 F.3d. 1417, 1419 (11th Cir. 1998)("[l]egislators have absolute immunity under section 1983 when they are "acting within their legislative roles", performing "legislative acts"). Actions involving the entire budgetary process, even those within the executive branch, have been recognized as "legislative" and therefore entitled the official performing them to legislative immunity. *Bogan*, 523 U.S. 44, 55 (1998)(noting a city mayor who merely introduced and signed a budget into law was integral to the legislative budget process, entitling him to immunity). *See also* O.C.G.A. §36-81-1 *et seq.* and Columbus Charter, §7-401 *et seq.*(each of these provisions require the assistance of the Executive Branch members, the Mayor, the City Manager and the Finance Director in the formulation of the Mayor's Recommended Budget for Council, a process which reviews the historical spending levels, expenses, etc. of all areas which are funded by Council). Despite the distinction in duties, all of the individuals Defendants are entitled to official or qualified immunity, particularly in the absence of malice or a specific intent to harm. *Saleem v. Snow*, 217 Ga.App. 883, 886 (1995)(Individuals acting in a legislative capacity are immune from suit; and *see also Village of North Atlanta v. Cook*, 219 Ga. 316, 319 (1963)(Supreme Court recognizing immunity provided to members of the General Assembly from suit for actions taken in an official capacity). Sheriff Darr has failed to make these

allegations and cannot, therefore, survive a motion to dismiss. Common Cause, 279 Ga. at 482 (2004).

In all of Sheriff Darr's amended pleadings, his allegations describe a series of official, discretionary decisions taken, i.e. budget appropriation and incorporation decisions, allegations of improper control over funding, and there is not one allegation which implies malice or an intent to cause harm was present in the processes described. Instead, he claims his *ultra vires* allegations override the application of immunity. (Darr Response Brief, pg. 29). This argument not only ignores the presumption that a public officer is afforded, that he/she have performed their duties as the law requires, but it also ignores the requirement of malice and specific intent to cause harm which are necessary to avoid qualified immunity. Adams v. Hazelwood, 271 Ga. 414 (1999) The analysis of whether an action was *ultra vires* does not relate to the standard to impose personal liability upon the individual Defendants for the performance of their official, discretionary duties. Cameron v. Lang, 274 Ga. 122, 123-126 (2001).

2. Injunctive Relief is not warranted under the mere apprehensions of injury.

None of the injunctive relief sought should be granted, as the Georgia Supreme Court has recognized this extraordinary relief should be reserved for situations of *grave* danger of impending injury. Thomas v. Mayor of Savannah, 209 Ga. 866 (1953) and Price v. Empire Land Co., 218 Ga. 80 (1962). Any request for injunctive relief to require incorporation of budget requests in the future (FY16) is woefully premature and unwarranted. The Petition cannot, and does not, allege the Mayor failed to incorporate his budgetary requests in the past. His Petition claims she failed to incorporate them on FY15, knowing he had failed to submit the requests to her office before the budget was legally due to be sent to Council under Charter §7-401(2). His failure does not support an injunction against another public official, particularly where there is

no showing (or allegation) that the Mayor would fail to submit his budget in the future. Absent a showing of "vital necessity", the Sheriff's claims should be denied. A "mere apprehension" of injury is likewise not a ground upon which an enjoinder should issue, as there must be some overt act, which Sheriff Darr admits has not taken place, to result in irreparable harm or injury. Maddox v. Threatt, 225 Ga. 730 (1969)(equity will not provide relief against an apprehension where facts sufficient to justify are not present).

3. Sheriff Darr's constitutional challenges to the ordinances must fail, as he has admitted they are not in conflict with the Constitution but are duplicative in nature.

Sheriff Darr challenges both local budget ordinances (13-39 and 14-25) and claims that the allegations of his Petition declare them in conflict with the Georgia Constitution, so therefore his constitutional challenge must survive a motion to dismiss. (Darr Response Brief, pg. 37-39). Not only does the Sheriff ignore that this Court is not required to consider legal conclusions made in the Petition, but he fails to demonstrate his burden that an actual conflict between the ordinances and any facet of law.

Any plausible or arguable reason that supports an ordinance will satisfy substantive due process. So long as an ordinance realistically serves a legitimate public purpose, and it employs means that are reasonably necessary to achieve that purpose... the ordinance must survive a due process challenge. The rational basis standard is the least rigorous test of constitutional scrutiny. It does not require that an ordinance adopt the best, or even the least intrusive, means available to achieve its objective. To the contrary, the means adopted by an ordinance need only be reasonable in relation to the goal they seek to achieve. Only if the means adopted, or the resultant classifications are irrelevant to the City's reasonable objective, or altogether arbitrary, does the ordinance offend due process.

Advanced Disposal Servs. Middle Ga., L.L.C. v. Deep S. Sanitation, L.L.C. 296 Ga. 103, 105-106 (2014)(injunctive relief inappropriate because of legitimate public purpose served in waste management ordinance and fact that the means provided within were reasonably related to such purpose).

Sheriff Darr's Petition does not state that both ordinances are "in conflict with" the Georgia Constitution. His Petition alleges that Ordinance 13-39, which requires that the Sheriff seek approval from Council for any expenditures desired to be made which would exceed his appropriated budgetary funds, is "unnecessary", because those expenditures are already forbidden by both the Charter and the law. (Second Amended Petition ¶80). This allegation shows the Ordinance is actually consistent with the law, and in no way demonstrates any claim to contest it on the basis of constitutional grounds. Advanced Disposal, 296 Ga. 106 (2014).

Similarly, Sheriff Darr contests Ordinance 14-25, which sets the budget for FY15 for Defendant CCG, as he claims it does not provide a budget for the entire year, since it contemplates a mid-year review of his budget if Council deems appropriate. (Second Amended Petition ¶91). Later, in his Petition, Sheriff Darr recognizes the legal authorization of Council to amend any budget by his citation to O.C.G.A. §36-81-3(d), when he notes "budget amendments are to be used when circumstances occur that cause changing governmental needs or necessitate extraordinary expenditures". (Second Amended Petition ¶96); *see also* Charter §7-404 (expressly allowing for amendments to be considered by Council). Even under Sheriff Darr's own pleadings, nothing in either of these ordinances shows an inherent conflict with any right established by the Sheriff under the Constitution. In fact, O.C.G.A. §36-81-3(d)(1) contemplates, and in fact anticipates, that local governments will set up a process in order to address any budget amendments needed as follows:

Any increase in appropriation at the legal level of control of the local government, whether accomplished through a change in anticipated revenues in any fund or through a transfer of appropriations among departments, shall require the approval of the governing authority. Such amendment shall be adopted by ordinance or resolution.

O.C.G.A. §36-81-3(d)(1) There is no evidence of "undue control" by a provision which is entirely consistent with the statutory guidelines. Advanced Disposal, 296 Ga. 103 (2014). Therefore, the motion to dismiss is due to be granted, as no valid constitutional challenge exists.

V. CONCLUSION

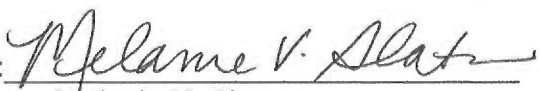
Each of Sheriff Darr's Petitions is subject to dismissal, because they are legally deficient and request extraordinary relief far beyond what is contemplated for either a mandamus or equitable relief under Georgia law. A mandamus does not lie to undo past acts or to legislate to his particular budget requests. Sheriff Darr has no legal right to a specific amount of funding for his constitutional duties, and his own pleadings show that he has received sufficient funding - and most importantly, the exercise of discretion by Council, which is all the law requires. His claims against named Defendants in their official capacities are barred by immunity, as Sheriff Darr admits. Although he has attempted to amend to add the Defendants in their individual capacities to avoid the application of sovereign immunity, those claims must also fail. None of Sheriff Darr's pleadings show the evidence required to circumvent the application of official immunity, and the alleged constitutional questions he raises do not show any conflict in the laws. As such, Defendants request dismissal of all his pleadings.

WHEREFORE, Defendants respectfully request that this Court grant their dismissal and provide any and all other relief it deems just and appropriate under the circumstances.

Respectfully submitted, this 9th day of January, 2015.

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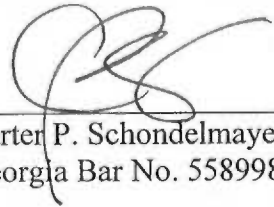
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TABLE OF AUTHORITIES

Defendants' Reply Brief in Support of Motion to Dismiss

Statutes

O.C.G.A. § 9-5-3
O.C.G.A. § 9-11-12(b)(6)
O.C.G.A. § 23-1-4
O.C.G.A. § 36-5-22.1(a)
O.C.G.A. § 36-81-3(d)

Charter

Charter § 7-400
Charter § 7-401
Charter § 7-402
Charter § 7-404
Charter § 8-105

Local Ordinances

Ga. Laws 1915, p. 63
Ordinance 13-39

Cases

Advanced Disposal Servs. Middle Ga., L.L.C. v. Deep S. Sanitation, L.L.C., 296 Ga. 103 (2014)
Bd. of Comm'rs of Dougherty County v. Saba, 278 Ga. 176 (2004)
Bogan v. Scott-Harris, 523 U.S. 44 (1998)
Butler v. Carlisle, 299 Ga. App. 815 (2009)
Chaffin v. Calhoun, 262 Ga. 202 (1992)
Chisolm v. Tippens, 289 Ga. App. 757 (2008)
Common Cause of Georgia v. City of Atlanta, 279 Ga. 480 (2005)
Georgia Dep't of Natural Resources v. Center for a Sustainable Coast, Inc., 294 Ga. 593 (2014)
Gilbert v. Richardson, 264 Ga. 744 (1994)
Grammens v. Dollar, 287 Ga. 618 (2010)
Griffies v. Coweta County, 272 Ga. 506 (2000)
Gwinnett County v. Yates, 265 Ga. 504 (1995)
J.M. Huber Corp. v. Georgia Marble Co., 239 Ga. App. 271 (1999)
Lovett v. Bussell, 242 Ga. 405 (1978)
Lowe v. State, 267 Ga. 754 (1997)
Saleem v. Snow, 217 Ga. App. 883 (1995)
Sarrio v. Gwinnett County, 273 Ga. 404 (2001)
Stockbridge v. Stuart, 2014 WL 5334067 (Ga. Ct. App. Oct. 21, 2014)
Thomas v. Mayor of Savannah, 209 Ga. 866 (1953)
Village of North Atlanta v. Cook, 219 Ga. 316 (1963)

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Saleem v. Snow, 217 Ga.App. 883 (1995)

Sirota v. Kay Holmes, 208 Ga. 113 (1951)

Thomas v. Lee, 286 Ga. 860 (2010)

Thomas v. Mayor of Savannah, 209 Ga. 866 (1953)

Village of North Atlanta v. Cook, 219 Ga. 316 (1963)

Wolfe v. Huff #1, 232 Ga. 44 (1974)

Wolfe v. Huff #2, 233 Ga. 162 (1974)

Woods v. Gamel, 132 F.3d. 1417 (11th Cir. 1998)

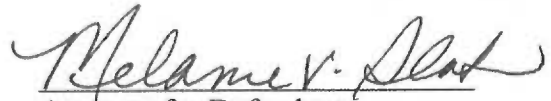
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** via electronic mail, per agreement of counsel and the Court, addressed as follows:

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This 9th day of January, 2015.


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