

IN THE MISSOURI SUPREME COURT

Case No. SC90693

STATE OF MISSOURI ex rel.
KANSAS CITY POWER & LIGHT CO.,

Relator,

vs.

THE HONORABLE GERALD D. MCBETH,
Judge, Circuit Court of Platte County

Respondent.

BRIEF OF RESPONDENT

April 28, 2010

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STATEMENT OF FACTS

Introduction

This Court issued its preliminary writ in prohibition following the Respondent's decision to overrule Relator Kansas City Power & Light Company's ("KCPL") motion to dismiss. This case seeks review by extraordinary writ of a motion to dismiss. Where a motion to dismiss is at issue, the pleadings are presumed to be true in all regards. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 101 (Mo. banc 2010). This rule applies in mandamus actions. "We therefore look to the well-pleaded material facts in the petition and the return [to a mandamus] for our facts...." *State ex rel. State Tax Commission v. Briscoe*, 451 S.W.2d 1, 3 (Mo. 1970)

Respondent's Statement of Facts thus reflects the pleadings in this case.

Relator KCPL (an intervenor in this case) asserts that this case is a challenge to the amount of the discretionary assessment of KCPL's local property by the Platte County Assessor, Lisa Pope. IT IS NOT. Rather, this case claims that Pope failed to perform ministerial duties imposed on her by statute in valuing KCPL's property. More specifically, underlying Plaintiffs aver that: (1) Pope failed to accept KCPL's sworn valuation of its local real property as its true value in money of that property and (2)

failed to include local property of KCPL in her assessment of KCPL's property. The pleadings speak for themselves. They provide the operative facts. They are summarized following.

Facts that the Court Must Take as True.

One of the Underlying Plaintiffs/Relators is the West Platte R-2 School District (“the School District”); it is a body corporate and politic, and is a duly constituted and authorized school district of the State of Missouri operating pursuant to authority granted it under the Revised Statutes of Missouri and the Missouri Constitution. The School District brought this action “under its authority to sue in order to protect its financial obligations to students of the School District and because the actions of the Defendant have and will continue to unlawfully deprive the School District of tax revenue due it under state law.” App. A2, Pet. at ¶ 1.

The other Underlying Plaintiffs/Relators are Donald Wilson and John Collier. These gentlemen are residents and taxpayers of Platte County, Missouri and of the School District. *Id.* at ¶ 2, 3. These Plaintiffs/Relators brought this action as individuals and as taxpayers averring that the actions and failures to act of the Assessor have and threaten to continue to result in an unlawful deprivation to the School District of tax revenue due the School District.

The Defendant/Respondent in the underlying case is Lisa Pope. Pope is the duly elected Assessor of Platte County, Missouri. *Id.* at ¶ 4. Kansas City Power & Light Company, Inc., intervened in this case with the consent of the Underlying Plaintiffs/Relators.

In 2006, Kansas City Power & Light Company, Inc., a public utility, together with several partners and/or co-investors (together sometimes referred to as “KCPL”), commenced an environmental retrofit of a coal-fired, electricity generating power plant commonly known as Iatan I in Platte County, Missouri, and more specifically on real property situated within the geographic area of the School District in Platte County, Missouri. Pet. ¶ 7. Iatan I has been fully permitted since 1980. It remained operational from 1980 until the Fall of 2008, when it went off line for construction (not maintenance) purposes for a period exceeding six months. Iatan I returned to distributing and/or generating electricity in the late Spring of 2009. *Id.* at ¶ 8, 9, 10.

The total cost of the Iatan I environmental retrofit according to a report of a staff member of the Missouri State Tax Commission is \$485,000,000. This amount represents a substantial increase over the anticipated cost of the environmental retrofit when KCP&L and its partners initially announced the construction costs for the Iatan I project.

Id. at ¶ 11. The final cost is not known to Respondent, but is believed to be higher even than the publicly reported figure.

KCPL believed that Iatan I was completely operational in the Fall of 2008. Construction had been completed. A malfunction occurred when KCPL attempted to place the plant on line. This malfunction required KCPL to cease generating or distributing electricity at Iatan I and complete additional construction. This additional construction took more than one-half year to complete. During this period of time, Iatan I did not generate or distribute electricity. *Id.* at ¶ 10.

As with any construction project, the fixtures attached to the land became part of the real property owned by KCPL. KCPL filed the report required of it by § 151.110.1, RSMo 2000. That statute required KCPL to report “the true value in money” of its land under oath. *Id.* at ¶ 24. Nevertheless, Pope refused to accept KCPL's report of the “true value in money” of the now-completed, but not yet operational Iatan I project; instead she applied a 50% discount to the true value in money of the Iatan I real property reported by KCPL. *Id.* at ¶ 31, 32. Moreover, Pope concluded that the amount reported by KCPL should be divided as 50% real property and 50% personal property. App. at A79.

In 2006, KCP&L began the construction of a second coal-fired electricity generating and production facility called Iatan II. Iatan II is also physically located on real property situated in Platte County and within the geographic area of the School District. *Id.* at ¶ 12. Iatan II currently remains under construction, with an anticipated completion date in 2010. *Id.* at ¶ 13. KCP&L and its partners originally estimated that construction costs for Iatan II would be \$1.3 billion according to one published source. *Id.* at ¶ 14. A report of a staff member of the Missouri State Tax Commission states that final construction costs for Iatan II would be approximately \$1.9 billion. *Id.* at ¶ 15.

As to Iatan II, KCPL filed the report required of it by § 151.110.1, RSM0. That statute required KCPL to report the true value in money of its land under oath. *Id.* at ¶ 24. Nevertheless, Pope again discounted the true value in money reported by KCPL for Iatan II by 50% of the reported true value in money before applying the tax rate. *Id.* at ¶ 31, 32. She concluded again that 50% of the amount reported was personal property and 50% was real property. App. at A79.

Section 151.110.1 required KCPL to provide under oath the true value in money of its land, which necessarily includes fixtures. KCPL is a sophisticated taxpayer; it cannot claim ignorance of the law. The report it

filed as Form 30 is the report required by the State Tax Commission to respond to the duties imposed by § 151.110.1. App. at A77.

The Causes of Action Pleaded Are for Declaratory Judgment and Mandamus

The Plaintiffs/Relators in the underlying action pleaded counts for declaratory judgment, seeking to have the Respondent trial court declare the law. If the law is declared as the Underlying Plaintiffs suggest it should be, then the Underlying Plaintiffs seek a writ of mandamus to require the Assessor to perform the ministerial duties required of her by statute. There is no claim for damages; there is no prayer for an increase in the *proper* valuation; there is no challenge to any discretionary assessment made by the Assessor.

ARGUMENT

Introduction

Respectfully, the proper focus of the Court's consideration is the Underlying Petition. KCPL continues to insist that Plaintiffs "challenge the valuation and assessment of another's property." KCPL Br. at 8. Those words simply do not appear in the Petition. Indeed, the Underlying Petition pleads and prays for no more than a decision by a court as to what the law of Missouri requires and, if the law is as the Underlying Plaintiffs aver, then an order in mandamus requiring the Underlying Defendant, the Platte County Assessor, to perform the ministerial duties the General Assembly has placed on her. The questions raised below are legal questions; KCPL's insistence that this case is about valuation and assessment is but a strawman.

For all the verbiage that follows, this Court's task is really reduced to a simple question: Do the statutes mean what they say? If the statutes are read for their clear meaning, in harmony with statutes in *pari materia*, and treating all words in the statute as though they carry meaning, Plaintiffs have stated causes of action and should prevail on the merits.

Plaintiffs rely on the statutes to challenge Pope's acts because the statutes provide the only path by which any third party can challenge an assessor's ministerial acts. KCPL is quite right that under current Missouri law, third parties cannot challenge the *discretionarily determined* valuation of another's property by an Assessor. And this may be so even where, as Plaintiffs informed the trial court, the local assessor placed herself in a position to retaliate against the School District if it refused to endorse her work prior to her last election.

But what happens, for example, if an assessor refuses to assess property that should be assessed by law? Is there no recourse to a political subdivision that relies on ad valorem taxes to fund, for example, teacher salaries? In that circumstance, KCPL's argument is that the assessor's failure to value the property at all is unassailable unless KCPL itself challenges the assessor's decision not to tax its property. How likely is that? KCPL's argument, if accepted by this Court, will allow it to reap a windfall that resulted from the Assessor's failure to follow the law, since only KCPL can challenge the Assessor's mistake in the world KCPL believes exists -- and, not surprisingly, KCPL has not challenged that valuation.

That is why this Court carved out a narrow exception to the general rule barring any challenge to an assessor's acts in *State ex rel. Cabool v. Texas County Board of Equalization*, 850 S.W.2d 102 (Mo. banc 1993). Under *Cabool*, the only way the School District and these taxpayers can obtain any relief from the Assessor's failure to perform her duties is to assert a good faith, legally cognizable claim based on the statutes that the Assessor did not perform ministerial duties required of her by those statutes. That is precisely why these Underlying Plaintiffs brought this action in mandamus.

By way of introduction, two more points bear highlighting. **First**, "assessment" is the act of determining the amount of ad valorem tax due on specific property. The act of assessment is a 3-step process, not a one-step process. It is *not* limited to determining the value of property.

The State Tax Commission has admitted in other litigation that there are three steps that are part of the assessment process: (1) valuation; (2) categorization of the property by classification; and (3) application of the proper tax rate.¹ See, App. at A73. KCPL's counsel

¹ Steps 1 and 2 together determine the "assessed valuation" of the property, that is, the value of the property based on its proper categorization. For example, if the true value in money of the property is \$100 and the

agreed that assessment is a three-step process at oral argument in the trial court.

[Mr. Graves for KCPL]: [A]n assessment is many things. It's an appraisal, and then it's a classification within the Missouri constitutional scheme. Agriculture is one classification, residential, commercial. So there's an appraisal, there's an – a classification, and then there's a – an application of a tax break [sic] [rate] to a classification or – I'm sorry, then there's a – there's an assessed valuation based on the classification (inaudible) of the true – true value of money.... At the heart of that assessment is the appraisal. And nothing could be -- which is the setting of the true value in money.

App. at A64. Further, the State Tax Commission makes a distinction between appraisal and assessment in its own description of the assessment process. "It is our obligation at the State Tax Commission to

property is personal property, which is assessed at 33 1/3 of its true value in money, the assessed valuation is \$33.33. Section 151.100 RSMo. (2008) permits a challenge to the assessed valuation, that is, a challenge to either the true value in money or the assessor's categorization of the property or both.

appraise and *assess* railroad and public utility property....” State Tax Commission Assessor Manual III, 2 (2008).²

In addition, 12 C.S.R. 30-2.011(2) shows that "assessment" is a three-step process. The regulation draws the distinction between market value and assessment, valuation being a distinct step in the assessment process. "[E]ach assessor in the state shall provide a breakdown of the market value and assessment of the real estate held by each company within his/her jurisdiction on Form 30, Schedule 15."³

² That assessment is necessarily this three step process is shown in the taxation of distributable property owned by utilities. The value of the utility property is determined by the State Tax Commission; the assessment of the property is completed in accordance with the levy of each taxing jurisdiction. “The assessed values by county are certified along with the other centrally assessed property (railroad and public utility) to the counties in the state.” State Tax Commission Assessor Manual III, 7 (2008).

³ The breakdown that the regulation requires would not prohibit the use of KCPL’s sworn true value in money of its real estate in the assessor’s report. Nor do the forms prohibit the assessor from doing what the forms require – providing the “market value” supplied by KCPL as the

Despite its agreement with the notion that ""assessment" means a three-step process, most of KCPL's argument reads the word "assessment" too narrowly, confining its meaning to the valuation/appraisal step alone. But "assessment" is not a synonym for "appraisal" or "valuation." KCPL's argument partakes of this mistake and it infects KCPL's reasoning throughout its brief.

Second, KCPL argues that even if the Plaintiffs are right in this case; even if the Assessor violated the law; even if the Assessor failed to perform a ministerial duty; even if KCPL received an illegal windfall; even if the evidence reveals that the Assessor acted in retaliation for the School District's unwillingness to assist her politically, the Courts cannot do anything about it. The Missouri Constitution proclaims otherwise. "That courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character...." Mo. Const. art. I, § 14.

"true value in money" as to real estate. What the forms do not permit is the assessor arriving at a valuation less than the true value in money – and that is what KCPL is required to supply under oath pursuant to § 151.110.1 RSMo. (2008)

Standard of Review Applicable to All Points

This Court issued its preliminary writ in prohibition based on Respondent's decision to overrule KCPL's motion to dismiss. For prohibition to issue based on the pleadings, review is the same as for a motion to dismiss.

"We therefore look to the well-pleaded material facts in the petition and the return [to a mandamus] for our facts...." *State ex rel. State Tax Commission v. Briscoe*, 451 S.W.2d 1, 3 (Mo. 1970). "A plaintiff is entitled to the benefit of every favorable inference which may reasonably be derived from the facts pleaded, ... for we must determine whether the plaintiff has invoked any substantive principle of law which would entitle it to relief. *Farmers Ins. Co., Inc. v. McCarthy*, 871 S.W.2d 82, 84 (Mo.App. E.D.1994)." *Honigmann v. C & L Restaurant Corp.*, 962 S.W.2d 458, 459 (Mo.App. E.D.1998). "A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009)(prohibition)(quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001)). The plaintiff's allegations are taken as true, and no attempt is made to weigh any facts alleged as to whether they are credible or persuasive. *Id.* The petition is reviewed in an almost

academic manner, to determine if the facts alleged meet the elements of a recognized cause of action or of a cause that might be adopted in that case. *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 101 (Mo. banc 2010). *Accord, Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

Prohibition is not the Proper Remedy Where the Underlying Plaintiffs Properly Plead Recognized Causes of Action

KCPL's reliance on *State ex rel. Henley v. Bickel*, 285 S.W.3d 327 (Mo. banc 2009) in its standard of review reads that case too broadly. *Henley* followed *J.C.W. v. Wyciskalla*, 275 S.W.3d 249, 252 (Mo. banc 2009), this Court's now famous decision limiting application of the word "jurisdiction" to issues of subject matter or personal jurisdiction.

Generally speaking, this Court has considered jurisdictional flaws as the usual basis for prohibition, erecting a wall between the writ and issues that were non-jurisdictional. *Henley*, mindful of the new precision in vocabulary required by *Wyciskalla*, allows a narrow crack in the jurisdiction wall for prohibition purposes at the motion to dismiss stage. "[U]se of a writ in a motion to dismiss context does not depend upon jurisdictional analysis." *Henley*, 285 S.W.3d at 330. But that crack exists only for a pleading failure, that is, when there is an "absence of well

pleaded facts altogether." *Id.* The *Henley* "crack" is not open to pretermitted consideration of legal issues that are properly pleaded but for which a legal decision is required. That is the function of summary judgment and appeal.

Henley involved a claim that a *passenger* in a vehicle could somehow be liable to the occupants of a different car involved in a two-vehicle collision. This Court first noted that a motion to dismiss must ***not*** be sustained where the pleadings set forth " 'substantive principles of law entitling plaintiff to relief and ... ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial.' " *Id.* at 329, quoting *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 82 (Mo. banc 2008). This Court nevertheless issued a writ of prohibition and ordered the case dismissed against the passenger because the "facts pleaded do not meet the elements of a recognized cause of action." *Henley*, 285 S.W. at 333. The Court held that no cause of action lies against a passenger for the negligence of the driver with whom the passenger was riding without pleadings setting out facts of either agency or control.

It is the pleading failure that justified the decision in *Henley*.

For causes of action requiring a pleading of a ministerial duty, *Boever v. Special School Dist. of St. Louis County*, 296 S.W.3d 487,

492 (Mo.App. E.D.2009) makes a similar point. There, the plaintiffs' motion to dismiss was sustained because plaintiffs did not allege the existence of the necessary ministerial duty. Plaintiffs "did not allege the existence or breach of any statutory or regulatory duty." *Id.* Had the plaintiffs alleged such a duty, the motion to dismiss would not have been sustained. Further, the "issue they do raise, whether the duty to give constant, individualized supervision is ministerial or discretionary, is not one we would reach if there is no allegation that the duty had been imposed by statute or regulation." *Id.*

Here KCPL does not challenge the sufficiency of the pleadings. Rather KCPL argues that Plaintiffs cannot prevail on the merits of cognizable causes of action that are properly pleaded. What KCPL seeks is summary judgment by prohibition.

Further, the cases upon which KCPL relies use the word jurisdiction in a manner now banned by this Court's decision in *Wyciskalla*. Under *Wyciskalla*, the trial court (Respondent) has jurisdiction – that is subject matter jurisdiction over the causes of action pleaded. Moreover, because the trial court has subject matter jurisdiction, the trial court has authority to decide the issues pleaded in this case. This is because the causes of action pleaded here are well recognized under Missouri law. Declaratory

judgments are rooted in the statutes; mandamus has a history dating back in the common law to well-before the founding of this nation. Courts have authority to declare the meaning of statutes and to direct public officials to do their jobs. Further, there is an adequate remedy by appeal of the legal issues raised by the parties. And, KCPL does not claim that the trial court did not obtain personal jurisdiction over the parties.

If the purpose of *Wyciskalla* was to bring about "some curtailment of the issuance of remedial writs and that this Court would only exercise its constitutionally granted superintending control over the trial courts when 'necessary to prevent usurpation of judicial power, to remedy excess of jurisdiction, or to prevent irreparable harm to a party,'" *Id.* at 334 (Fischer, J. dissenting), then making the writ absolute in this case does not achieve that purpose. Nor would such a writ be consistent with the teachings of *Wyciskalla* or *Henley*.

I. THE UNDERLYING PLAINTIFFS HAVE STANDING TO ASSERT BOTH A DECLARATORY JUDGMENT AND A MANDAMUS ACTION IN WHICH THEY AVER THE FAILURE OF A PUBLIC OFFICIAL TO PERFORM A MINISTERIAL DUTY.

The process by which the amount of an electric utility property owner's taxes are determined -- the assessment of taxes -- is controlled by a series of statutes. See, *State ex rel. Halferty v. Kansas City Power & Light Co.*, 145 S.W.2d 116, 121 (Mo. 1940)("assessors have no jurisdiction to assess property otherwise than as the statute prescribes.... Under our system of taxation ... there can be no lawful assessment except in the manner prescribed by law").

Respondent begins where KCPL fears to tread, with the statutes themselves. KCPL's omission of the language of the statutes in its Point I is curious, since the statutes lie at the heart of Plaintiffs' claim.

The Legal Framework for Ad Valorem Taxation of Electric Utilities

First, for purposes of ad valorem taxes, electric utilities are taxed in the same way as railroad companies. Section 153.030.2 RSMo (2000) requires that real property and tangible personal property of "electric

power and light companies” will be taxed in the same manner as “railroad property” in this state.

Further, the reports that an electric utility must file are the same reports that a railroad company must file. Section 153.030.2 requires an authorized officer of any such ... electric power and light compan[y] ... is hereby required to render reports of the property of such ... compan[y] ... in like manner as the authorized officer of the railroad company ... for the taxation of railroad property.

Id.

Chapter 151 relates to the taxation of railroads (and, by virtue of § 153.030.2, to electric power and light companies). Section 151.110.1, RSMo requires that:

“an **authorized officer** of every such railroad company [electric company] **shall**, in addition to the report required to be furnished to the county clerk, as described in section 151.030, no later than April first in each year, **furnish to each county assessor** in this state, **wherever any local property owned or controlled by such company may be located, a separate report, under oath** for the benefit of county and other local

assessors, **specifically describing all lands by county tax map parcel number, situated in such county**, and not included in their returns to the state tax commission and county clerks, under sections 151.020 and 151.030, owned or controlled by such company, on the first day of January in each year, ***and the true value in money thereof.***

Id. (Emphasis added). Under this section, the electric utility must declare the "true value in money" of its real property under oath.

It is important at this juncture to turn to the Constitution, as the phrase "true value in money" is an awkward phrase not expected in the normal discourse of valuation of property.

The 1875 Constitution of Missouri expressly authorized the taxation of "railroad corporations." Mo. Const. art. X, § 5 (1875). Article X, Section 11 of the 1875 Constitution established tax rates for "school purposes" based on the "valuation" of property. (e.g. "For County purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars *valuation*;").

In 1982, the voters approved a constitutional amendment that added § 4(b) to Article X of the Missouri Constitution. For the first time, the constitution used the phrase "true value in money."

No classes [of property] or subclasses shall have a percentage of its *true value in money* in excess of thirty-three and one-third percent.

Mo. Const. art. X, § 4(b)(as amended August 3, 1982); Laws of Missouri, 1982 at 741-42 (emphasis added).

From 1899 until 1986, the language of the statute now codified as § 151.110 remained the same. It required a railroad officer to report under oath the "cash value" of the property. *See, e.g.* § 9361 RSMo (1899); § 11580, RSMo (1909); § 151.110, RSMo (1978).

In 1986, the legislature linked § 151.110 to § 4(b), amending the former to require that the railroad company report the "true value in money," that is the valuation of the property for purposes of assessment. H.B. 1022, Laws of Missouri, 1986 at 627.

This "true value in money" is not the complete assessment. It is merely Step One of the assessment, the valuation of the property. To this valuation, Steps Two and Three -- classification and application of the proper tax rate -- must be added before the assessment is complete.

This is the distinction this Court made in *Snider v. Casino Aztar*, 156 S.W.3d 341, 348 (Mo. banc 2005). “The purpose of valuing property for tax assessment purposes is to determine the true value in money of the property on the relevant day.” (Emphasis added). As *Casino Aztar* later notes: “A determination of the true value in money cannot reject the property's highest and best use and value the property at a lesser economic use of the property.” *Id.* at 349. Thus, the true value in money only provides the valuation step of the assessment process; assessment requires the other two steps (classification and application of the proper tax rate) before an assessment is complete.

This understanding that "assessment" does not mean merely "appraisal/valuation," allows the Court to read the remaining statutes related to the assessor's role in a manner consistent with the canons of construction. Generally, “[a] provision in a statute must be read in harmony with the entire section.” *PDQ Tower Servs., Inc. v. Adams*, 213 S.W.3d 697, 698 (Mo.App. W.D.2007). Statutes relating to the same subject matter are *in pari materia* and should be construed harmoniously. *Id.* Where two statutory provisions covering the same subject matter are unambiguous when read separately but conflict when read together, the reviewing court must attempt to harmonize them and give effect to both.

City of Clinton v. Terra Found., Inc., 139 S.W.3d 186, 189 (Mo.App. W.D.2004); *Anderson ex rel. Anderson v. Ken Kauffman & Sons Excavating, L.L.C.* 248 S.W.3d 101, 107 (Mo.App. W.D.2008). Every word in a statute must be presumed to have meaning; courts "will enforce a statute unless it plainly and palpably affronts fundamental law embodied in the constitution." *Missouri Prosecuting Attorneys v. Barton County*, ___ S.W.3d ___, 2010 WL 1049420, 2, 4 (Mo. banc 2010).

For example, § 151.100 states: "All local property owned or controlled by any railroad company ..., shall be *assessed* by the proper assessors in the several counties..." (Emphasis added). KCPL says this statute is at loggerheads with § 151.100 because the former requires KCPL to swear to the true value in money and the latter would require the assessor to determine the value. If "assess" means only "to value," then § 151.110 is at loggerheads with § 151.100. But if "assess" means the three-step process previously described, § 151.110.1 and § 151.100 can be read together in harmony, with the latter merely authorizing the local assessor to complete the final two steps of the assessment process after KCPL has provided the valuation step.

If, however, Relator's argument is correct, § 151.110 and § 151.100 operate at cross purposes and the statutes cannot be read in harmony.

Moreover, Relator's reading requires the Court either to ignore the existence of the phrase "true value in money" in § 151.110.1, an act this Court's own precedents condemn, or produces the untenable possibility of property having more than one "true value in money." Neither under the constitution nor common sense can one phrase have two different meanings.

The Underlying Petition

Counts I and II aver that the local assessor bears a statutorily established, ministerial duty to assess property at its true value in money. That figure was provided by the owners of Iatan I and Iatan II for the local property under a statutory mandate. § 151.110. Nevertheless, the underlying Plaintiffs plead, the local assessor reduced the reported true value in money by 50% in violation of Article X, § 4(b) of the Missouri Constitution.⁴

Counts I and II plead for a declaration of the local assessor's duties, that she failed to perform those duties, that the School District and the Taxpayers face a pecuniary loss as a result of the failure to perform a

⁴ § 137.115, RSMo. (2008) mandates that a local assessor use "true value in money" as the value of property for assessment purposes.

ministerial duty and that the local assessor should be ordered to follow the statutes. These pleadings are sufficient to state a cause of action for declaratory judgment and mandamus in Count I and II.

The Underlying Petition (which must be accepted as true) avers that KCP&L was not generating or distributing electricity at Iatan I because it was not capable of producing electricity due to construction from the Fall of 2008 through March of 2009, a period exceeding six months. Counts III and IV plead that Iatan I was subject to assessment by Pope when it ceased generating and/or distributing electricity in the Fall of 2008 as part of the construction of the Iatan I environmental retrofit and had not begun generating and/or distributing electricity on “the relevant day,” that is, January 1, 2009. See, *Casino Aztar*, 156 S.W.3d at 348 (“The purpose of valuing property for tax assessment purposes is to determine the true value in money of the property ***on the relevant day***”)(emphasis added).

Again, there is no challenge to the assessor's exercise of discretion in the Underlying Petition. The causes of action pleaded there are claims that the assessor was required to take the reported true value in money as the valuation of the property: (Counts I and II) and that the assessor was required to include Iatan I in her assessment because it had not, for a period exceeding one-half year, produced or generated electricity and had

thus reverted to local property status under § 153.034 RSMo. (2008). (Counts III and IV).

The Underlying Plaintiffs Have Standing

KCPL argues that neither mandamus nor the Declaratory Judgment Act waive the usual standing requirements. As far as it goes, KCP&L's argument is correct; it is also irrelevant. This is because KCP&L's argument against the standing of the School District and the Taxpayers is founded upon, and therefore depends upon, a mischaracterization of the causes of action pleaded in the Underlying Petition. KCPL's oft-repeated assertion that this case challenges the discretionary assessment and valuation of its property by the Assessor is simply not true to the case Plaintiffs pleaded. On the actual averment of the petition, the precedents of this Court give the Underlying Plaintiffs standing in this case.

First, the standing of a school district to seek determinations of the law that affect the school district's pecuniary interest is well-established. A school district has a direct pecuniary interest in tax revenues produced by *ad valorem* property taxes. *Ad valorem* taxation revenue is an important source of funding for the School District's operations. A decision by the assessor **to fail to assess property** that is otherwise taxable will result in the loss of tax revenue to the School District.

Similarly, a failure of the assessor to accept the true value in money as the valuation of property likewise may result in a School District suffering a loss of tax revenue.

Under *Ste. Genevieve School District R-II v. Board of Aldermen of the City of St. Genevieve*, 66 S.W.3d 6 (Mo. banc 2002):

a school district that is threatened with the imminent unlawful deprivation of part of its funds has standing to seek a declaratory judgment challenging the statutory interpretation that would lead to the deprivation. *State ex rel. Sch. Dist. Independence v. Jones*, 653 S.W.2d 178, 189 (Mo. banc 1983).

Id. at 10 (emphasis added). This Court affirmed this fundamental understanding of school district and taxpayer standing in *Committee for Educational Equality v. State*, 294 S.W.3d 477, 485 (Mo. banc 2009).

Despite these precedents, KCPL asserts that on the specific question of a school district or a taxpayer's ability to challenge the failure of the assessor to perform ministerial duties, no such standing exists, even when those failures may result in a loss of tax revenue if the assessor had followed the law.

This is not a case where the claim is that the assessor assessed property at \$100 when the plaintiffs believe the property should have been assessed at \$200. A variant of that issue is at the heart of each case KCPL cites.

State ex rel. Brentwood School Dist. v. State Tax Commission, 589 S.W.2d 613 (Mo. banc 1979) decides that where real property ad valorem taxpayers appealed to state tax commission to have their assessments lowered, school district cannot intervene to support the higher assessment before the state tax commission.

State ex rel. St. Francois County School Dist. v. Lalumondier, 518 S.W.2d 638, 640 (Mo.1975) holds that a school district may not obtain a review of a decision of the county board of equalization which failed to increase an alleged discretionary underassessment of the real estate of a taxpayer.

City of Richmond Heights v. Board of Equalization, 586 S.W.2d 338 (Mo. banc 1979) holds that a school district does not have standing under § 536.150 to seek review in circuit court of a board of equalization's discretionary assessment of property within its boundaries.

KCPL misreads *State ex rel. Cabool v. Texas County Board of Equalization*, 850 S.W.2d 102 (Mo. banc 1993). That case held that a

school district (and taxpayers) have standing to “compel the Assessor and Board of Equalization of Texas County to not apportion the assessment on certain trucks” because apportionment required the exercise of discretion concerning evidence about the situs to trucks in other states. More of *Cabool* later.

Bartlett v. Ross, 891 S.W.2d 114 (Mo. banc 1995) considers whether a school district may, as an intervenor, appeal a decision of a court that unclaimed ad valorem tax refunds would escheat to the state. This Court concluded that the district had no standing to appeal even though the circuit court had allowed the school district to intervene in the case. The Court reasoned that the case that generated the right to a refund had been initiated when taxpayers paid their taxes under protest, challenging the rate of the ad valorem tax used by the collector to set their taxes. Section 139.031 RSMo. (1993) established the right of a taxpayer to obtain a judicial determination of the rectitude of the tax protest in the circuit court. That same statute permitted only the taxpayer or the collector to appeal from the circuit court’s decision. Because the statute limited the right to appeal to the taxpayer and the collector, the school district had no standing to appeal to the Supreme Court. No issue discussed in *Bartlett* is

germane to the causes of action pleaded by the School District and the Taxpayers here.

(Respectfully, the Court should note, however, that these cases have a common theme. The Supreme Court reads statutes relating to taxation literally and applies them strictly. State ex rel. Halferty v. Kansas City Power & Light Co., 145 S.W.2d 116, 120 (Mo. 1940) ("The assessors have no jurisdiction to assess property otherwise than as the statute prescribes.") That is what the School District and the Taxpayers plead with regard to the assessor's duties and to the documents filed by KCP&L pursuant to statute. This is, of course, a merits discussion.)

Importantly, no case cited by KCP&L denies standing to a school district to seek a declaration of the law regarding the assessor's duties; nor does any case deny a school district the right to seek (or the authority of a court to order) mandamus to require a public official to do her job as directed by the statutes.

Also importantly, *Cabool* **expressly recognizes the standing of a school district to seek mandamus where the claim is that the assessor failed to perform a ministerial duty.** Against a direct attack that the school district had no standing to bring a mandamus action based on arguments identical to those launched by KCP&L, *Cabool* expressly

authorized school districts to bring mandamus actions to enforce ministerial duties of assessors.

Initially, respondents argue that relators lack standing to pursue this mandamus action. The bases for respondents' assertion are this Court's holdings in *State ex rel. St. Francois County School Dist. v. Lalumondier*, 518 S.W.2d 638 (Mo.1975), and *City of Richmond Heights v. Board of Equalization*, 586 S.W.2d 338 (Mo. banc 1979). These cases held that neither a city nor a school district has standing to appeal, or seek review by certiorari of, an assessment by a board of equalization. The rationale for these decisions was that the legislature has provided a procedure for reviewing assessments and it made no provision for political subdivisions to challenge assessments. "No doubt such was originally omitted on the theory that public officials would adequately protect the interest of the state and its subdivisions." *Lalumondier* at 643. To permit political subdivisions to intercede would violate the legislative purpose.

Nevertheless, a narrow window exists by which even

a member of the general public may seek mandamus against a public official. “The principle at the heart of [the writ of mandamus] is that public officers are required to perform ministerial duties without any request or demand, and the entire public has the right to that performance.” *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. banc 1992). Thus, where the duty sought to be enforced is a simple, definite ministerial duty imposed by law, the threshold for standing is extremely low. *Id.*

Cabool, 850 S.W.2d at 105 (emphasis added). *Cabool* then noted that mandamus was the proper cause of action and decided the appeal on the merits of the mandamus decided in the trial court. Because the school district had standing to bring the mandamus action in the circuit court, the Court could proceed to determine “whether apportionment of ad valorem property taxes on trucks used in interstate commerce is a simple, definite ministerial act imposed by law.” *Id.* at 105. A bare majority of the Court found that the duty under review was not a ministerial duty.

However, Judge Elwood Thomas dissented, defining the issue thus: “[R]elators sought to use the writ to direct the assessor to require the taxpayer to establish a tax situs for the trucks outside Missouri before the

assessor undertakes to apportion the property." *Id.* at 106 (Thomas, J. dissenting). Seen in that light, a statement of the issue with which the majority did not disagree, Judges Limbaugh and now Chief Justice Price joined Judge Thomas in concluding that "[t]he duty of an assessor to require such a showing before undertaking the process of apportionment is a simple, definite duty clearly imposed by law." *Id.*

Despite the disagreement on the discretionary/ministerial issue, all seven judges in *Cabool* recognized the propriety of a mandamus action to challenge a local assessor's adherence to statutorily imposed duties. KCPL refuses to recognize that *Cabool* is not an original writ case filed in this Court challenging standing, but an appeal of a decision on a pleaded-in-the-circuit-court writ of mandamus decided by the trial court. Again, standing was directly at issue in *Cabool* and was decided in favor of allowing the school district and taxpayers to enforce ministerial duties in a mandamus action.

The Underlying Petition pleaded causes of action that make their way through *Cabool's* narrow window recognized by a unanimous Court in *Cabool* through which the Underlying Petition pleaded its causes of action. Respondent here decided the procedural and standing issues in favor of the Underlying Plaintiffs and left the legal merits of the properly pleaded

causes of action for decision in the summary judgment stage or, if necessary, at trial. All of that is subject to appeal.

KCPL's mischaracterization of the Underlying Petition is the only basis from which it can make any argument in the face of *Cabool*. Again, whether a duty is ministerial requires a court to declare the law. That is exactly what the School District and the Taxpayers have pleaded in this case, in a manner consistent with *Cabool*.

State ex rel. School Dist. of Kansas City v. Waddill, 330 Mo. 1118, 1122-1123, 52 S.W.2d 476, 477 (Mo.1932) agrees, deciding **in a mandamus action** the questions:

Is it the duty of the state tax commission to separately assess the portion of the service company's property which lies within the territorial limits of relator school district? If no such duty devolves upon the commission, is it then the duty of the state board of equalization to allocate to the district, as a basis for levying school taxes, a portion of the assessed aggregate value of the service company's property?

Id. Indeed, *State ex rel. Halferty v. Kansas City Power & Light Co.*, 145 S.W.2d 116 (Mo. 1940) highlights the ministerial aspects of an assessor's

duties by holding that an assessor has no discretion to operate her assessment process outside the statutory framework.

The court said 'the assessment and levy of taxes in this state is purely statutory. [Case cited]. The assessors have no jurisdiction to assess property otherwise than as the statute prescribes. [Case cited]. Under our system of taxation * * * there can be no lawful assessment except in the manner prescribed by law.' (Case cited.)

Id. at 121.

The Underlying Plaintiffs claim that the assessor has strayed from the ministerial and mandatory demands of the statute. Respondent had the authority to decide the merits of those well-pleaded issues.

On the standing issue, a further point bears consideration. KCPL relies on both *Lalumondier* and *City of Richmond Heights*. Those cases rely on a presumption that may not be true in this case to justify denial of standing to a political subdivision. *Lalumondier* notes that there "a presumption of validity and of good faith in the actions of taxing officials." 518 S.W.2d at 641. Further, *City of Richmond Heights* cites *Lalumondier* for the proposition that:

No doubt such was originally omitted [appeals by a political subdivision to the board of equalization] on the theory that public officials would adequately protect the interests of the state and its subdivisions and hence it was only necessary to provide an appeal for property owners who considered the valuation of their property to be excessive.

City of Richmond Heights, 586 S.W.2d at 343, quoting *Lalumondier*, 518 S.W.2d at 643 (emphasis added).

The trial court record includes allegations of an overture by an emissary of the Platte County assessor to the School District seeking a thank you, that is, an endorsement of her work prior to her last election and prior to the assessments at issue in this case. The quid pro quo was that such an endorsement would be considered in the assessment of the Iatan projects. When that endorsement was not forthcoming, these completed assessments occurred, with the 50% discount in the reported "true value in money" as the valuation of the property -- and these discounts were applied even after the environmental retrofit of Iatan I was essentially completed.

Although the evidence has not been developed, the allegations beg this question: Who protects a school district when the official the law assumes will do so does not?

The answer exists in mandamus, at least in this case. Even if the School District may not attack the assessor's exercise of her discretion, it may challenge the Assessor's fidelity to the ministerial acts required by the law.

The Difference between Ministerial and Discretionary Acts

Just as it attempts to read "assessment" too narrowly (to mean only "appraisal/valuation"), KCPL also is confused about the distinction between discretionary and ministerial duties. Courts are not so confused.

Discretionary acts involve the exercise of reason in developing a means to an end, and discretion in determining how or whether an act should be done or a course pursued. *Kanagawa, [v. State by and through Freeman, 685 S.W.2d 831,] 836 [(Mo. banc 1985)]*. In contrast, ministerial functions concern clerical duties to be performed upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to the public

officer's own judgment or opinion on the propriety of the act.

Id.

Brummitt v. Springer, 918 S.W.2d 909, 912 (Mo.App. S.D. 1996).

To illustrate the difference, assume hypothetically that the statutes mandate that all barns be valued at \$1,000 for assessment purposes. The statute removes all discretion from the assessor as to barns, establishing by law the valuation of the barns for assessment purposes. Now suppose a local assessor valued a barn owned by a person who had helped her in her campaign at \$500 for assessment purposes. The establishment of the value of a barn is not a discretionary act under the statute; it is a ministerial act under the statute. The fact that an assessor may exercise her discretion to value office buildings does not also mean that all valuations are discretionary. Where the legislature has said how barns must be valued, that is the value of the barn. There is no discretion as to barns.

Nor is there discretion to reduce the "true value in money" when determining value.

Under *Cabool*, a local school district has standing to bring a mandamus action to require that the assessed valuation comply with the statutory directive. The attack in the hypothetical is not on the assessor's

discretion to determine value, but on the failure of the assessor to follow the ministerial, mandatory duty to accept the legislature's valuation.

It is true, as KCPL argues at 18-19 of its brief, that mandamus may result in the barn's valuation increasing. But it is not true, as KCPL would be forced to argue, that a mandamus requiring the assessor to follow the law is an attack on a discretionary valuation made by the assessor. The difference is the existence of a mandatory, ministerial duty. And that is what the Underlying Plaintiffs have pleaded.

Conclusion

The Underlying Plaintiffs/Relators have standing to obtain a trial court judgment on the merits. Point I should be denied.

II. PROHIBITION WILL NOT LIE TO OUST A TRIAL COURT FROM MAKING A LEGAL DECISION ON THE MERITS OF A PROPERLY PLEADED MANDAMUS ACTION; ON THE MERITS, THE PLATTE COUNTY ASSESSOR HAD A CLEAR LEGAL DUTY TO VALUE KCPL'S PROPERTY AT ITS TRUE VALUE IN MONEY AND TO INCLUDE ALL LOCAL PROPERTY OWNED BY KCPL IN THE ASSESSMENT PROCESS.

KCPL's Point II begins with its second misstatement of the holding in *Cabool*. Respondent will not repeat the discussion of KCPL's error here beyond referring the Court to pages 26-29 of this brief and noting, again, that *Cabool* is not an original writ filed in this Court, but an appeal of a decision on the merits of a pleaded-in-the-circuit-court writ of mandamus decided by the trial court. This Court expressly recognized mandamus as the proper cause of action by which a school district or a taxpayer can challenge the failure of an assessor to perform a ministerial duty. If mandamus had not been the proper remedy, this Court would not have addressed the merits, but would have decided the case on the standing issue that was also before the Court. See, also, *State ex rel. Thompson v. Jones*, 41 S.W.2d 393 (Mo.1931)(where local assessor fails to include

property that should have been assessed, mandamus lies to remedy that failure).

A. An Assessor May Not Reduce the Valuation of Property Below its True Value in Money.

The crux of KCPL's Point II. A is its claim that no ministerial duty exists in the assessor, despite the Underlying Petition's well-pleaded claim that it does. If this Court wishes to decide the merits of a well pleaded cause of action in a prohibition action, Respondent offers the following refutation of KCPL's arguments.

Section 137.115.1, RSMo (2000) mandates that the "assessor shall annually assess all real property, including any new construction and improvements to real property, and possessory interests in real property at the percent of its true value in money." This duty is clearly established by statute. It brooks no discretion. It clearly defines the value that the assessor must use.

"True value" is an estimate of the fair market value on the valuation date." *Hermel, Inc. v. State Tax Commission* 564 S.W.2d 888, 897 (Mo. banc 1978). Though it is an estimate, the meaning of "true value in money" does not change; it is the polestar of valuation for assessment

purposes. “This definition [of true value in money] has not changed from case to case.” *Id.*

Section 151.110.1 required KCPL to provide the Assessor with the “true value in money” of its property under oath. How can the Assessor, who is mandated by § 137.115.1 to find the true value in money, reject the “true value in money” provided by KCPL? Absent ignoring the phrase “true value in money” in § 151.110.1, KCPL’s only argument is that “true value in money” has at least two meanings; one provided by KCPL as required by § 151.110.1 and one determined by the assessor. In this case, the assessor found that the “true value in money” is exactly 50% of the true value in money reported by KCPL!

KCPL’s argument thus depends on the very fluidity that *Hermel* rejected – that “true value in money” can have more than one meaning. *Hermel* is not alone among this Court’s cases in rejecting the notion that “true value in money” can have more than one meaning. In *Casino Aztar* this Court again rejected the possibility of two different meanings for “true value in money.” “A determination of the true value in money cannot reject the property’s highest and best use and value the property at a lesser economic use of the property.” *Casino Aztar*, 156 S.W.3d at 349.

**KCPL's Meaning of "Assessment" Creates Artificial Conflicts
within the Relevant Statutes**

As previously discussed by Respondent in Point I, neither the State Tax Commission nor this Court agrees with KCPL's narrow reading of the word "assessment."

KCPL asserts that 151.110.1 cannot mean what it says because that statute, if read literally for its clear and unambiguous meaning, creates a conflict with other statutes. KCPL's argument depends on the word "assessment" becoming a synonym for "appraisal/valuation." In truth, it is KCPL's crabbed meaning for "assessment" that creates the conflict; if the previously cited rules of statutory construction are applied, all of the words in the statutes can be read to have meaning and the statutes can be read together harmoniously.

First, KCPL asserts that § 151.110.2 requires that "[e]ach county assessor in this state shall certify a copy of the report required by subsection 1 of this section *and a copy of assessments thereon* to the county clerk, the company and the state tax commission no later than April twentieth in each year." (Emphasis added). If "assessment" means "appraisal/valuation" then the statutes might be at loggerheads. If,

however, "assessment" means the three-step process of determining the amount of tax due, then the Assessor may accept the true value in money reported by KCPL and complete the remaining two steps in making the report to the county clerk and the state tax commission. The Assessor still makes the assessment under this reading, using the KCPL valuation as step one.

KCPL next argues that § 151.110.3 requires that railroads and utilities file a report with the State Tax Commission by May 1 that contains the "**true value in money of all local property as derived by the county assessor....**" *Id.* (emphasis added). As to the statute itself, the primary meaning of the word "derive" is to "take or receive esp. from a source." WEBSTER THIRD NEW INTERNATIONAL DICTIONARY (2002) 608. By its own terms, § 151.110.3 assumes that an assessor will determine the "true value in money" from a source. "Derive" does not mean, as KCPL seems to argue, that the Assessor must make her own appraisal. Thus, read for its intended meaning, § 151.110.1 requires that KCPL report the true value in money of its "land" from which the Assessor derives the true value in money for her § 151.110.3 report.

Moreover, "all local property" as used in § 151.110.3 includes both land and personal property. See, § 153.034.2. And while land necessarily

includes fixtures placed on the land, § 151.110.3 can be read in harmony with § 151.110.1 only if the former requires a report that includes what the assessor is required to value (the personal, local property) and the true value in money of the land is derived by the Assessor from KCPL's sworn report required by § 151.110.1. The distinction drawn by § 151.110.1 between "land" and "all local property," including personal property, is entirely consistent with § 53.030, RSMo (2000) under which the assessor is charged with "assess[ing] *all* of the real and tangible personal property in the county... *at what [s]he believes to be* the actual cash value." (emphasis added). Again, assessing is the arrival at the tax due via a three-step process, not merely determining a valuation of the property being taxed.

KCPL's hope that § 151.100, RSMo. (2000) creates a disqualifying disagreement with § 151.110.1 fares no better. Section 151.100 requires that "[a]ll local property owned or controlled by any railroad company or corporation in this state, shall be *assessed by the proper assessors* in the several counties, cities, incorporated towns and villages wherein such property is located...." *Id.* (emphasis added). Again, KCPL reads "assessed" too narrowly. The Assessor may surely assess the property using KCPL's sworn "true value in money" submitted under oath pursuant to §

151.110.1 in the same way she assesses property if she determines the first step – valuation. Her performance of steps 2 and 3 completes the assessment after KCPL provides the "true value in money."

KCPL also argues that the statutes governing the review of railroad and utility assessments defeat Respondent's conclusion that the Underlying Plaintiffs stated causes of action in their Petition. But the review provided by statute speaks of "assessments" and "assessed valuations" by the board of equalization and, eventually, the State Tax Commission:

...Review of such local railroad *assessments* shall be the first order of business of the county board of equalization. In no event shall the board of equalization or any county officer alter or amend the local *assessed valuations* of railroad property later than August fifteenth in any year, except by order of the state tax commission.

Section 151.100, RSMo. Again, the "assessment" is the determination of the tax liability produced by the three-step process. The "assessed valuation" is the true value in money multiplied by the rate assigned each category by § 137.115. Thus, § 151.100 can be read harmoniously with 151.110.1, as the former permits appeals from the assessor's

categorization of or tax rate application to a taxpayer's property even when KCPL supplies the true value in money.

Next KCPL turns to the regulations of the State Tax Commission, citing 12 CSR 30-2.011. But that regulation is entitled: "**Completion of Forms by Assessors to be Used in Original Assessment by the State Tax Commission.**" Further 12 CSR 30-2.011 states its purpose as: "*PURPOSE: This rule sets forth procedures to be used by assessors in the completion of forms for original assessment by the commission.*" The property at issue here is not assessed by the Commission, but by the local assessor. 12 CSR 30-2.011 does not apply to locally assessed property by its own terms.

Even if the regulations did apply to locally assessed property, KCPL again refuses to draw the distinction § 151.110.1 draws – between "land" and personal property. 12 CSR 30-2.011(1) states that "each assessor in the state shall estimate on Form 30, Schedule 14 the market value of property owned by each ... public utility corporation ... doing business within his/her jurisdiction." To repeat: Only the land, with its fixtures, is covered by § 151.110.1. The assessor must still supply the market value of the personal property. And she may use KCPL's report for the purpose of deriving the true value in money the land that must be locally assessed.

Reading § 151.110.1 as written allows the regulation and the statute to be read in harmony.

KCPL argues that it only reported its "construction costs" to the assessor. KCPL is charged with knowing the law. KCPL is a sophisticated taxpayer employing numerous staff persons to handle its ad valorem tax issues. As Form 30 Schedule 14 shows, KCPL's officer attested that the Form stated a "true, full and complete valuation of the property of said electric company in the County of Platte" App. at A79, A80. That is what 151.110.1 required. By attesting that it supplied the "valuation," KCPL cannot be heard now to say that it supplied "construction costs" that was not based on value.

No Statute KCPL Cites Now Requires Sworn Statements of Taxpayers as to Value Except § 151.110.1

KLCPL argues that "Missouri taxpayers have long been required to file sworn reports with the county assessor listing all real and personal property of the taxpayer and stating the value of such property. See §§ 137.115, 137.120, 137.280, RSMo." KCPL Br. at 30. None of the statutes cited have a requirement that the taxpayer provide a value under oath. For example, § 137.115 provides that:

The assessor may call at the office, place of doing business, or residence of each person required by this chapter to list property, and require the person to make a correct statement of all taxable tangible personal property owned by the person or under his or her care, charge or management, taxable in the county.

Id.

Section 137.120 RSMo. (2008) provides:

The lists required by section 137.115 shall contain:

- (1) A list of all the real estate;
- (2) A list of all the livestock, poultry, and bee colonies, showing the total number of each;
- (3) An aggregate statement of all lawn and garden tractors, harvesting equipment, drilling machines, irrigation systems, farm machinery and implements;
- (4) All automobiles, trucks, motorcycles, minibikes, motorized and recreational vehicles, airplanes and all other motor vehicles;

(5) All home, boat and other trailers; mobile homes; boats; boat motors; and all other tangible personal property not exempt by law from taxation.

Id.

Section 137.280 RSMo. (2008) provides:

1. Taxpayers' personal property lists, except those of merchants and manufacturers, and except those of railroads, public utilities, pipeline companies or any other person or corporation subject to special statutory requirements, such as chapter 151, RSMo, who shall return and file their assessments on locally assessed property no later than April first, shall be delivered to the office of the assessor of the county between the first day of January and the first day of March each year and shall be signed and certified by the taxpayer as being a true and complete list or statement of all the taxable tangible personal property....

Id.

None of these statutes requires a statement of value under oath.

KCPL's reliance on *State ex rel. Dobbins*, 60 S.W. 70, 71 (Mo. 1900);

Wymore v. Markway, 89 S.W.2d 9, 13 (Mo. 1935) and *State ex. Rel. Pehle v.*

Stamm, 65 S.W. 242, 244 (Mo. 1901) is thus misplaced. While ancient statutes of the state may have imposed a valuation requirement on ordinary taxpayers, that provision of those statutes, which did not apply to sophisticated utilities, has been repealed, as shown above.

Moreover the rationale for those decisions does not exist in Chapter 151. *Dobbins* reasoned that the statute left valuation to the assessor even in the presence of the oath requirement because the statutes also permitted the assessor to provide a value if the taxpayer refused or was unable to cooperate.⁵ No such provision exists in Chapter 151, RSMo.

⁵ Section 7532, RSMo (1889) provided: “If any person required by this chapter to list property shall be sick or absent when the assessor calls for a list of his property the assessor shall leave at the office or usual place of residence or business of such person a written or printed notice, requiring such person to make out and leave at the place named by said assessor *** a sworn statement of the property which he is required to list, and shall leave with such notice a written or printed blank for the statement required of such person. *** And if any such person shall neglect or refuse to deliver the statement, properly made out, signed and sworn to, as required, the assessor shall make the assessment as required by this chapter.” *Dobbins*, 60 S.W. at 71.

As to railroads and electric companies, the requirement that the valuation be made under oath has not only been kept by the General Assembly, but expressly tied to the constitutional language with an amendment to § 151.110 in 1986. This policy decision no doubt reflects: (1) the differences between the average taxpayer and sophisticated utilities; (2) the potential lack of sophistication of a locally elected assessor on issues related to valuing the real estate of utilities; (3) the local assessor's lack of resources to complete a meaningful assessment of utility property; and (4) the fact that the local assessor's role in completing the assessment of electric utility property that will one day generate and distribute electric power (construction work in progress) is of limited duration in time, that is, permitted only during the construction of the power plant. Only during that time period (or subsequent periods when the plant cannot generate or distribute electricity due to construction) is the utility real estate local property for purposes of the three-step assessment process. Once the power plant goes on line, it loses its character as local property and becomes distributable property (unless it ceases generating and distributing electricity.) § 153.034.1 and .2 RSMo 2000. "Distributable property" is assessed by the state tax commission, not the local assessor. § 151.020, RSMo 2000.

By requiring that the "true value in money" be stated under oath, the General Assembly placed the utility under the sword of perjury if it was found to have lied about the valuation, thus ameliorating to some extent the potential for abuse by a utility whose local assessor could not compete with its sophistication or resources. By further limiting the scope of § 151.110.1 to "land" the statute left in the hands of the local assessor matters of personal property (office furniture, vehicles, material and supplies, etc) whose values could easily be derived by the Assessor by reference to readily available outside sources (e.g. automobile value publications).

The Assessor has No Discretion to Reject the True Value in Money as the Valuation of KCPL's Property.

Respondent has previously discussed the difference between ministerial and discretionary duties in Point I, *supra*. Perhaps the Court will recall the example regarding barn valuation. See pp. 32-33, *supra*. The point is that where the assessor is given authority to provide the value of property, her determination of that value is a function of discretion. KCPL's long discourse on that issue is, again, both correct and irrelevant.

The Underlying Plaintiffs' claim is not that the assessor exercised her discretion improperly. The claim in the Underlying Petition is that she

had no discretion to exercise. The value of KCPL's locally assessed real property is set by statute, that is, set by KCPL's statement of the "true value in money" of its land, under oath. If the "true value in money" is the polestar of valuation for assessment purposes, that is the value, not sum discount the Assessor concocts.

B. Section 153.034, RSMo Determines Whether Property is Local Property or Distributable Property.

Again, KCPL believes it serves its purposes to mischaracterize the averments of the Underlying Petition. KCPL states: "Count IV can be boiled down to one dispositive question: do county assessors have a clear, ministerial, legal duty to assess utility property as "local" property if it was not actively "being used to generate and distribute electrical power" sometime during the twenty-four hours of January 1 in the relevant year—even if the property's sole and ordinary use is to generate electrical power?" KCPL Br. at 33.

Here is what the Underlying Petition actually says:

10. In the Fall of 2008, KCP&L essentially completed construction of the Iatan I environmental retrofit and attempted to return Iatan I to service. Because of a malfunction in the operation of the Iatan I power plant when KCP&L attempted to begin generating electricity, KCP&L

could not return Iatan I to electricity generating/distributing service, but kept the Iatan I power plant off line through the Spring on 2009, including, but not limited to January 1, 2009.

App. A5.

KCPL's misstatement is breathtaking. From the Fall of 2008 until the Spring of 2009 is not twenty-four hours -- it is six months. The work done was not routine maintenance; it was major construction that shuttered the plant for more than half a year. The Petition goes on to state:

51. KCP&L and its partners terminated the operation of the Iatan I power plant during a portion of 2008, for additional construction on the Iatan I power plant to include an environmental retrofit.

52. Iatan I has failed to generate and/or distribute electricity since the fall of 2008. [The original Petition was filed April 20, 2009].

53. Specifically, Iatan I was off-line, not generating or distributing electricity and not capable of generating or distributing electricity on January 1, 2009.

54. Once Iatan I ceased generating and/or distributing electricity to permit, the Iatan I plant no longer held its status as distributable property under Section 153.034 and became local property for purposes of ad valorem taxation of the real and personal property comprising the Iatan I power plant.

55. Defendant Lisa Pope has failed to assess the true value in money of the entire Iatan I power plant for purposes of ad valorem taxation due the School District.

Section 153.034, RSMo (2000) distinguishes between local property and distributable property for purposes of local ad valorem taxation.

1. The term “**distributable property**” of an electric company shall include all the *real or tangible personal property which is used directly in the generation and distribution of electric power*, but not property used as a collateral facility nor property held for purposes other than generation and distribution of electricity. Such distributable property includes, but is not limited to: [list omitted]

* * *

2. The term “**local property**” of an electric company shall include all real and tangible personal property owned, used,

leased or otherwise controlled by the electric company not used directly in the generation and distribution of power and not defined in subsection 1 of this section as distributable property. Such local property includes, but is not limited to:

* * *

(2) Construction work in progress; ...

Id.

Under § 153.034, property that is not directly generating or distributing electricity is not distributable property. It is local property. If it is local property, it is locally assessed. If it is locally assessed property, the local assessor must assess it. Pope failed to do so, despite a duty to do so. "All local property ... shall be assessed by the proper assessors in the several counties...." § 151.100, RSMo. Where the local assessor fails to include property that should have been assessed, mandamus lies to remedy that failure. *State ex rel. Thompson v. Jones*, 41 S.W.2d 393 (Mo.1931).

As shown, the Underlying Petition (which must be accepted as true) avers that Iatan I was neither generating nor distributing electric power for a period exceeding six months due to construction work in progress at that plant. It became local property for that tax period. And because the

relevant date for valuation is January 1 of a given year, that date determines when the assessor must decide whether property is local or distributable. If, for example, Iatan II goes on line on December 31, 2010, it will become distributable property on that date. If, however, it goes on line on January 2, 2011, it will remain local property for tax purposes. The difference is the status of the property on January 1.

KCPL's rationale for insisting that Count IV is only about January 1 is now clear. Its argument collapses in light of the statute if the averments of the Petition are deemed true -- that Iatan I was unable to generate or distribute electricity for an extended period of time for construction work in progress and, during that period of time, reverted to local property. Under the law of this state previously discussed, mandamus lies when there is a showing that an assessor has failed to perform a ministerial duty imposed by statute. See, *Cabool; State ex rel. Thompson v. Jones*, 41 S.W.2d 393, 399 (1931).

KCPL's complaint that all Plaintiffs cite is two statutes, coupled with its deliberate misstatement of the Petition, are all that is necessary to show that the Underlying Plaintiffs had standing to assert this mandamus actions against Pope. A ministerial act exists when an official must act "in

obedience to the mandate of legal authority." *Brummitt*, 918 S.W.2d at 912. Besides, KCPL cites no law for its argument.

Pope had a duty to assess all local property. She did not assess. Iatan I. Mandamus will lie to correct that failure.

Conclusion

For the reasons expressed, KCPL's Point II should be denied.

III. MANDAMUS IS THE PROPER REMEDY FOR ASSESSOR POPE'S FAILURE TO PERFORM MINISTERIAL DUTIES.

KCPL's final point asserts that no remedy exists for the Assessor's failure to perform the duties required of her by law. KCPL's argument is that the Assessor has no authority to raise the valuation of property after August 15, 2010, unless ordered to do so by the State Tax Commission. Absent statutory authority for the Assessor to act, KCPL's argument goes, there is nothing this or any other Court can do to remedy the Assessor's unlawful acts and failures to act. According to KCPL, courts are impotent in the face of statutory directives.

While KCPL's first two points were founded on mischaracterizations of the issues, its Point III betrays a fundamental misunderstanding of the role of the judiciary in government. It is the judiciary to which the Constitution entrusts the fashioning of remedies for wrongs committed. "That courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property of character..." Mo. Const. art. I, § 14. It is the quintessential role of the judiciary to stand between wrongdoers and those they have wronged, to judge, and to repair the

damage caused by those for whom the law's requirements have meant nothing.

KCPL argues that "the statutes are explicit that not only does the Assessor have no *duty* to act as Plaintiffs demand, she has no *power* to do so." KCPL Br. at 38. "Under Section 151.100, RSMo.," KCPL reasons, "the Assessor may make no increase in an assessment after August 15th of any year, except by order of the State Tax Commission." KCPL Br. at 39.

The limits to the Assessor's authority to act under the statute do not extend to a court's authority to provide a remedy. That is the point made in *State ex rel. Thompson v. Jones*, 41 S.W.2d 393 (Mo.1931). There, the local assessor failed to assess property of a pipeline company in 1929, for taxes payable in 1930. The State Tax Commission discovered the omission and assessed the property. By the time the Supreme Court decided the case, the calendar had rolled to 1931. Noting that mandamus was the proper remedy to address the assessor's failure to perform the ministerial act of assessing property within the county, this Court concluded that the county clerk's failure to apply the new assessment could not prohibit the collection of the tax two years later. "[R]espondent's wrongful act in delivering the tax books to the collector without computing and extending the taxes on the assessment here in question will not deprive relators of

the relief sought in this proceeding.” *Id.* at 399. And the remedy sought? “[T]o compute and extend the taxes levied by lawful authority in Morgan County, Missouri, and by the State of Missouri, for the year 1930 against said property of said corporation....” *Id.* This Court ordered (in 1931) the levy of the tax from a previous year (1930), well after the close of time for the payment of the taxes, precisely for the reasons raised in this case – the failure of the assessor to perform the duties required of her.

The notion that the Courts can order the assessor to follow the law is the very nature of a legal remedy. Blindness to this legal truth is the core fallacy of KCPL’s argument; statutes limiting the authority of the assessor do not also limit the authority of the courts to provide a remedy.

Indeed, the entire appeal process established in Chapter 138 contemplates that appeals are permitted and that courts may order the amendment of an assessment well after August 15 of the tax year in question. This Court’s cases regularly consider valuations of assessors well after the August 15 date has passed and enters orders requiring an adjustment in the valuation of property. For example, *Casino Aztar*, 156 S.W.3d at 349, rejected the State Tax Commission’s valuation of casino property and ordered that valuation changed. All of this took place in 2005; the taxes at issue were 1999 taxes.

KCPL's unstated premise is that changes in the assessment can take place only within the appeal process permitted under §§ 138.060 RSMo. (2000) and 138.180, RSMo (2000). As previously shown, however, mandamus lies to require an assessor to perform ministerial duties. Mandamus is a procedure distinct from statutory appeal, with its own course and remedies. Indeed, the Underlying Plaintiffs did not object to KCPL's intervention precisely because that intervention would pretermitt any claim by KCPL that it was unaware of this action or that it did not know that the Assessor's failure to follow the law might result in a change in its tax liability.

Finally, KCPL asserts that a decision of this Court requiring the assessor to do what the law required of her would, in effect, require the assessor to perform an unlawful act -- that is, changing an assessment after the date permitted by the statute. This argument chases its tail, essentially concluding that the first wrong must be ignored -- no matter how egregious -- to avoid a second "wrong."

But there are not two wrongs here. When a court orders a public official to follow statute's mandate, it is the official's unlawful act that requires a Court to order that the law be followed. That is the nature of mandamus -- not to break the law, but to enforce it.

State ex rel. City of St. Louis v. Mummert, 875 S.W.2d 108 (Mo. banc 1994) offers no assistance to KCPL beyond its hope that the unanalyzed headnote will be persuasive to this Court. In *Mummert*, the Supreme Court found that the law imposing the duty was unconstitutional; said differently, had the officer performed the duty for which mandamus was sought, *that* performance would have violated the constitution. The Court reasoned that mandamus would not lie to enforce a duty, the performance of which would be an unlawful act. But it was *not* the remedy provided by mandamus that would be unlawful, but the underlying act itself.

That is a far cry from what is sought here. Here the Underlying Plaintiffs seek to require the performance of a *lawful* duty. Indeed, there is no claim that the duties shirked by Pope are unlawful duties. KCPL's argument that it would be *unlawful* for this Court to require Pope to perform a mandatory *lawful* act has no support in the law.

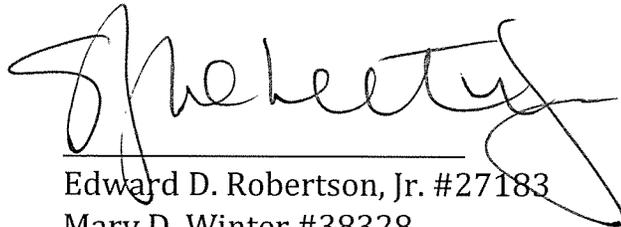
Conclusion

Relief by mandamus is available to the Underlying Plaintiffs if this Court finds that the duties imposed are mandatory, ministerial duties. Point III should be denied.

CONCLUSION

WHEREFORE, for the reasons stated, the preliminary writ should be quashed.

Respectfully submitted,



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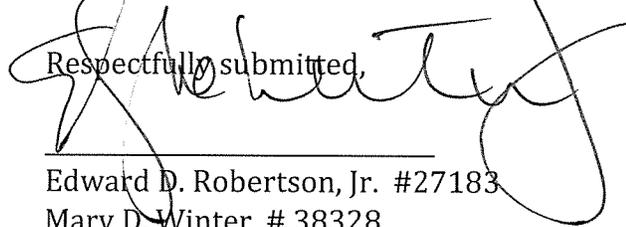
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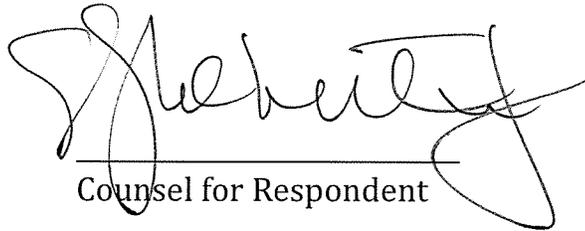
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