

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. LISA POPE,)
in her official capacity as)
Platte County Assessor)
)
 Relator,)
 vs.)
) **Case No. SC 90694**
)
THE HON. GERALD D. MCBETH,)
)
 Respondent.)

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY,
MISSOURI
THE HONORABLE GERALD D. MCBETH, CIRCUITJUDGE
CIRCUIT COURT CASE NO. 09AE-CV01533
WESTERN DISTRICT COURT OF APPEALS NO. WD72005

REPLY BRIEF OF RELATOR LISA POPE

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POINTS RELIED ON

I. THE RULES OF STATUTORY CONSTRUCTION REQUIRE THE ISSUANCE OF A WRIT.

R.S.Mo. 151.020.1(3) (2009).

R.S.Mo. 151.110.1 (2009).

R.S.Mo. 151.110.3 (2009).

State ex rel. Koster v. Olive, 282 S.W.3d 842 (Mo. 2009).

II. ONLY THE RETROFIT PORTION OF IATAN I IS “LOCAL PROPERTY”.

State ex rel. Henley v. Bickel, 285 S.W.3d 327 (Mo.2009).

III. *STE. GENEVIEVE SCHOOL DISTRICT R II V. BOARD OF ALDERMAN OF CITY OF STE. GENEVIEVE*, 66 S.W.3D 6 (MO. BANC 2002), IS CLEARLY DISTINGUISHABLE FROM THIS MATTER.

Ste. Genevieve School District R II v. Board of Alderman of City of

Ste. Genevieve, 66 S.W.3d 6 (Mo. banc 2002).

ARGUMENT

INTRODUCTION

Is construction cost the same as true value in money? The defense department can spend \$500.00 on a single hammer, but is \$500.00 the hammer's true value in money? Who decides? The statutory scheme for ad valorem tax challenges in Missouri has been referred to by this Court as, "a complex scheme of property taxation." *Bartlett v. Ross*, 891 S.W.2d 114, 116 (Mo. banc. 1995). However, on questions of local property, one fundamental rule is absolute: county assessors determine true value in money, not a utility company report. *See*, R.S.Mo. §§ 151.110.3 & 151.110.1.

"In order to withstand the motion [to dismiss], the petition must invoke substantive principles of law entitling plaintiff to relief..." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329-330 (Mo.2009) (internal citations omitted).

Respondent contends the underlying action correctly pleads that Relator failed to perform ministerial duties imposed on her by statute in valuing KCP&L's property. Pursuant to the plain language of the statutes at issue NO SUCH DUTY EXISTS. *See*, R.S.Mo. § 151.110. Respondent concedes this is a determinative issue, ("...Pope insists, she has the discretionary duty to appraise all local property. And this is where the battle lines in this case are clearly drawn."). Resp's. Br. at 22. Plaintiffs' standing, and Respondent's jurisdiction to proceed on Plaintiffs'

Petition, rest solely on Assessor Pope having a ministerial duty to assess the disputed property.

This supposition is unsupported by the plain language of the statutes.

R.S.Mo. § 151.110.3. states:

“An authorized officer of every such railroad company [electric utility] shall, in addition to the reports required to be furnished to the county clerk as described in section 151.030 and subsection 1 of this section, furnish to the state tax commission a list by county of the **true value in money of all local property as derived by the county assessor** in each county no later than May first in each year.”

(emphasis added).

The plain language of R.S.Mo. § 151.110.3 refutes Plaintiffs’ claims for mandamus and shuts the narrow window that was opened in *State ex rel. Cabool v. Texas County Board of Equalization*, 850 S.W.2d 102 (Mo banc 1993). “This Court has repeatedly held that ‘prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation.’ *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo.2009). To move forward with this litigation would be a waste of the parties’ time and taxpayer funds.

In rebuttal to Respondent, Relator offers the following concise matters to the Court.

POINTS RELIED ON

I. THE RULES OF STATUTORY CONSTRUCTION REQUIRE THE ISSUANCE OF A WRIT.

Plaintiffs challenge Relator Pope's assessment of construction work in progress at the Iatan II power plant. The duties sought to be enforced by the Plaintiffs, per the plain language of the statutory scheme, are not ministerial duties.

“A ministerial function, as opposed to a discretionary function, has been defined as ‘that of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed. [Citation omitted.] On the other hand, a discretionary function may be fairly defined as one necessarily requiring the exercise of reason in the adaption of means to an end, and discretion in determining how or whether an act should be done or a course pursued.”

Jackson v. Wilson, 581 S.W. 2d 39, 42 (Mo. App. 1979). Discretion is evident within the statutory scheme, and a mandamus action, Plaintiffs' premise for standing under *Cabool*, 850 S.W.2d 102, will not lie.

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to

consider the words used in their plain and ordinary meaning.” *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33, 37 (Mo. banc 2004). The plain meaning of R.S.Mo. § 151.110.3 is clear, the assessor “derives” (i.e. determines) the true value in money of ALL local property. Respondent’s failure to harmonize R.S.Mo. §§ 151.110.1 and 151.110.3 is decisive, regardless of Respondent’s tenuous parsing of the word “assessment” or hypothetical describing barn assessments under an invented statutory scheme that certainly does not exist in Missouri. Statutory construction requires that courts, “consider words in their plain and ordinary meaning.” *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 848 (Mo. 2009). The plain and ordinary meaning of R.S.Mo. § 151.110.3 defines that the “**true value in money**” of “**all local property**” is “**derived by the county assessor**”. The determination of the true value in money of the local property (including construction work in progress) is a discretionary function of the assessor’s office, not a ministerial duty, and therefore not subject to a mandamus action.

“The law favors statutory construction that harmonizes with reason and that tends to avoid absurd results.” *David Ranken, Jr. Technical Institute v. Boykins*, 816 S.W.2d 189, 192 (Mo. 1991). Respondent seeks to avoid the plain language of R.S.Mo. § 151.110.3 by citing the definition of the word “derive” as to, “take or receive especially from a source.” Resp’s. Br. at 28-29, citing WEBSTER THIRD NEW INTERNATIONAL DICTIONARY (2002), 608. Respondent then suggests

R.S.Mo. § 151.110.3 implies the assessor will “derive” the true value in money of the local property of an electric utility by pulling the amount directly from the R.S.Mo. § 151.110.1 report. Leaving for a moment the fragile nature of Respondent’s argument, the extraordinary implication of the above is that Plaintiffs’ entire claim rests on the Court reading R.S.Mo. § 151.110.3, “...true value in money of all local property as derived by the county assessor...”, for the proposition that, “derived by the county assessor”, means to pull the true value in money directly from the R.S.Mo. § 151.110.1 report. This is an absurd reading of R.S.Mo. § 151.110 and contrary to the plain meaning of the statute.

Even taken at face value Respondent’s use of “derive” in R.S.Mo. § 151.110.3 is wanting. The “source” pointed to in Respondent’s cited definition, for purposes of R.S.Mo. § 151.110.3 is THE ASSESSOR.

While one definition of “derive” is “to receive from a source or origin”, a separate definition is “**to gather or arrive at (as a conclusion) by reasoning and observation**”. WEBSTER THIRD NEW INTERNATIONAL DICTIONARY (2002). This is what the statutory scheme commands of the assessor, to “arrive at”, the true value in money of all local property, by “reasoning and observation”. This is not a mere clerical function (i.e. ministerial duty), the statute commands the use of discretion.

Finally, Respondent’s argument for disregarding the plain language of R.S.Mo. § 151.110.3 misleads in failing to harmonize the definition of “local property” in R.S.Mo. § 151.020.1(3), with R.S.Mo. §§ 151.110.1 and 151.110.3. R.S.Mo. § 151.020.1(3) states:

The term “**local property**” of a [utility company] *shall include all real and tangible personal property* owned, used, leased, or otherwise controlled by any [utility company]...Such property includes, but is not limited to:

(a) Construction work in progress...

(emphasis added). The true value in money of ALL “local property” is to be derived by the county assessor under R.S.Mo. § 151.110.3. “Local property” includes all the utility company’s (KCP&L’s) *real and tangible* personal property (including construction work in progress). Respondent has failed to harmonize the statutes. Respondent has glommed on to R.S.Mo. § 151.110.1 and myopically read into it a duty that is unsupported by the plain language of the statutes.

Respondent’s Brief suggests standing exists if the well-pleaded petition asserts that a party seeking relief has some legally protectable interest in the litigation so as to be affected directly and adversely by its outcome. *Committee for Educational Equality v. State*, 294 S.W.3d 477, 484 (Mo. banc 2009). Relator has no quarrel with this assertion. Plaintiffs simply do not have the required legally protectable interest.

The Petition is premised on the claim:

46. [Assessor Pope] **has a ministerial duty** to employ the true value in money provided by KCP&L pursuant to Section 151.110 as the value of the property for assessment purposes without a further reduction.

(emphasis added) Plaintiffs' First Amended Petition ¶ 46. This averment is Plaintiffs' sole ground for standing and rests on the Assessor having a ministerial duty to assess property as described by Respondent. Pursuant to the plain language of R.S.Mo. § 151.110.3, as harmonized with the broader statutory scheme of assessment for purposes of ad valorem taxation, no such ministerial duty exists. Thus, Plaintiffs fail to state a cause of action in mandamus as there is no ministerial duty to enforce.

In an effort not to be duplicative of Relator's Brief, the argument is simply this: for the underlying Plaintiffs to possess the required legally protectable interest, Assessor Pope's duty, sought to be compelled must be a "ministerial" rather than a "discretionary" duty. The statutes at issue in the underlying action, specifically R.S.Mo. § 151.110.3, reveal that the determination of the true value in money of a utility company's local property is to be "derived by the assessor", i.e. discretionary.

Plaintiffs have no standing to bring this action and the trial court thereby has no jurisdiction in the matter.

II. ONLY THE RETROFIT PORTION OF IATAN I IS “LOCAL PROPERTY”.

Plaintiffs contend that Relator was required to assess the entirety of Iatan I as local property based on its “off-line” status as of January 1, 2009. (Suggestion of Respondent Regarding Writ, p. 6, Appendix to Relator’s Brief, A71). Plaintiffs and Respondent simply fail to sufficiently plead that Relator had a ministerial duty to assess Iatan I as local property for the 2009 tax year. “In order to withstand the motion [to dismiss], the petition must invoke **substantive principles** (emphasis ours) of law entitling plaintiff to relief...” *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329-330 (Mo.2009) (internal citations omitted).

Nowhere in underlying Plaintiffs’ Petition does there appear a simple, definite ministerial act imposed by law, commanding Relator to assess Iatan I as suggested by Plaintiffs. No statute requires Relator to assess Iatan I, (a coal-fired power plant fully permitted and operational since 1980), as “local property” when it is “off-line”, for purposes of an environmental retrofit, on January 1st of any given year. No such duty exists.

As with the assessment of Iatan II, Plaintiffs standing and thus Respondent’s jurisdiction to proceed with the case, is premised on Relator having a ministerial duty to assess the entirety of Iatan I as local property because it was shut down on January 1, 2009. As underlying Plaintiffs have failed to, “invoke substantive

principles of law entitling plaintiff to relief [in mandamus]” *Henley*, 285 S.W.3d 327, 329-330, Plaintiffs lack standing. As such, Respondent is operating in excess of the trial court’s jurisdiction, and this Court’s writ should be made permanent.

III. *STE. GENEVIEVE SCHOOL DISTRICT R II V. BOARD OF ALDERMAN OF CITY OF STE. GENEVIEVE*, 66 S.W.3D 6 (MO. BANC 2002), IS CLEARLY DISTINGUISHABLE FROM THIS MATTER.

Respondent asserts that *Ste. Genevieve School District R II v. Board of Alderman of City of Ste. Genevieve*, 66 S.W.3d 6 (Mo. banc 2002), decides the standing issue. Resp. Br. At 32. Respondent misstates the precedential value of *Ste. Genevieve* as it applies to the writ proceeding currently before this Court. *Ste. Genevieve* is clearly distinguishable in at least the following respects:

1. In *Ste. Genevieve*, the school district alleged that the City Board of Alderman attempted to amend a redevelopment project without reconvening the tax increment financing commission of which Ste. Genevieve had appointed (3) three members.
2. The basis for the *Ste. Genevieve School District R-II* proceeding was a dispute with the TIF District of the City of Ste. Genevieve.
3. The *Ste. Genevieve School District* was suing the Board of Alderman of the City of Ste. Genevieve, whereas Plaintiffs bring suit against Lisa Pope, Assessor of Platte County, Missouri.

4. The “legally protectable interest,” which gave rise to the declaratory judgment action in *Ste. Genevieve* arose from the fact that the school district was, *by statute*, able to appoint (3) three members to the TIF Commission.

Id. The school district’s statutory authority in *Ste. Genevieve* has no corollary in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two written copies and CD-ROM of the above and foregoing was mailed first class, US Mail, postage prepaid, this 1st day of May, 2010, to:

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MISSOURI SUPREME COURT RULE 84.06(c)

COMPLIANCE CERTIFICATE

I hereby certified that the brief submitted under Missouri Supreme Court Rule 84.06:

1. Includes the information required by Rule 55.03; and
2. Complies with the limitations contained in Rule 84.06(b); and
3. Contains 2704 words; and
4. Contains 401 lines; and
5. The CD-ROM herein pursuant to Rule 84.06(g) has been scanned for viruses and is virus free.

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