IN THE SUPREME COURT OF THE STATE OF MISSOURI

No. SC89114

FRANKLIN COUNTY, MISSOURI, ex rel.
ROBERT E. PARKS, and JIM MING

Appellants,

vs.

FRANKLIN COUNTY COMMISSION, et al.

Respondents.

Appeal from the Circuit Court of Cole County
The Honorable Patricia S. Joyce

BRIEF OF INTERVENOR/APPELLANT JACK L. KOEHR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

Plaintiffs Robert E. Parks and Jim Ming brought this action in the Circuit Court of Cole County against defendants the Franklin County Commission and its commissioners, Claire McCaskill, and Jeremiah "Jay" Nixon seeking a declaratory judgment as to the validity of section 137.073.2 RSMo and 15 CSR 40-3.120, and further seeking a declaratory judgment as to the validity of property tax rates set by the Franklin County defendants. The circuit court granted motions for leave to intervene filed by plaintiffs/intervenors Jack L. Koehr and East Central College.

On January 29, 2008, the circuit court entered summary judgment in favor of the defendants, finding that section 137.073 authorizes political subdivisions to raise their tax levies, without a vote of the people, in response to inflationary adjustments in the assessed value of property. Plaintiffs Robert Parks and Jim Ming timely filed their notice of appeal on February 6, 2008. L.F. 173. Plaintiff/Intervenor Jack L. Koehr timely filed his notice of appeal on March 6, 2008. L.F. 183.

Jurisdiction of this appeal is proper in the Supreme Court of Missouri because this case involves the validity of a state statute. Mo. Const. Art. V, § 3.

STATEMENT OF FACTS

This appeal is the most recent in a series of actions seeking to require Franklin County officials to comply with the Hancock Amendment in levying taxes. *See*, *e.g.*, *Koehr v. Emmons*, 55 S.W.3d 859 (Mo. App. 2001) ("*Koehr I*"); *Koehr v. Emmons*, 98 S.W.3d 580 (Mo. App. 2002) ("*Koehr II*"); *Vogt v. Emmons*, 158 S.W.3d 243 (Mo. App. 2005) ("*Vogt I*"); *Vogt v. Emmons*, 181 S.W.3d 87 (Mo. App. 2005) ("*Vogt II*").

The facts are undisputed. Plaintiff/Intervenor/Appellant Jack L. Koehr owns real and personal and property within Franklin County and paid taxes with respect to said property in 2006. Legal File ("L.F.") at 39, 103. Judge Koehr paid his real property taxes for the year 2006 under protest in accordance with the protest provisions of section 139.031.1, RSMo. L.F. at 41, 103.

Defendant/Respondent Franklin County is a political subdivision of the State of Missouri and levied taxes upon the real and personal property within the County, including the real and personal property owned by Judge Koehr. L.F. at 39-40, 103. Defendant/Respondent Franklin County Commission is the governing body of Franklin County and is responsible for setting the rate of levy for the County property taxes. L.F. at 40, 103. Defendants/Respondents Edward Hillhouse, Terry O. Wilson, and Ann G. L. Schroeder, are the members of the Franklin County Commission. L.F. at 40, 103. (This brief will refer to these defendants collectively as the "County Defendants.")

The County Defendants raised the rate of levy for the property for which the County levies taxes for tax year 2006: "The 2006 revised rate of levy set by the Franklin County Defendants allowed for inflationary assessment growth occurring within the

political subdivision by an amount equal to the percentage increase in adjusted valuation of existing property. The amount of inflationary assessment growth included in the revised rate of levy was less than one percent, specifically 0.7117%." L.F. at 110, 40, 103. The County Defendants maintain that they increased 2006 taxes in reliance on forms promulgated by the State Auditor under 15 CSR 40-3.120, purportedly promulgated under the authority of section 137.073, RSMo. L.F. at 110, 122-27.

On November 6, 2006, Judge Koehr sent a formal complaint letter to Plaintiff/Appellant Robert E. Parks, the prosecuting attorney of Franklin County, noting that Franklin County's increased taxes for 2006, while allegedly authorized by section 137.073, were in violation of Article X, Section 22 of the Hancock Amendment, which prohibits counties increasing the current levy of an existing tax without the approval of the voters. L.F. at 20. Mr. Parks sought an opinion from the office of the Attorney General on the issues raised by Judge Koehr, but alleged that he did not receive a response. L.F. at 12, 21.

On December 21, 2006, Mr. Parks commenced this action in the Circuit Court of Cole County against the Franklin County Defendants, the Attorney General, and the State Auditor, seeking a declaratory judgment. L.F. at 1; S.L.F. at 8. On December 28, 2007, Mr. Parks filed an amended petition adding Jim Ming as a taxpayer plaintiff. L.F. at 8. The plaintiffs did not take a position on the complaint advanced by Judge Koehr, but instead prayed for a declaration that section 137.073.2 "is valid under the terms of Missouri Constitution Article X, Section 22, or alternatively that Section 137.073.2, RSMo, is invalid as violating Missouri Constitution Article X, Section 22." L.F. at 13.

Similarly, the petition asked for declarations that 15 CSR 40-3.120 and Franklin County's 2006 property tax rate were valid or, alternatively, invalid. L.F. at 13.

On March 30, 2007, Judge Koehr filed a motion for leave to intervene, which the County Defendants opposed. L.F. at 54, 2. On April 26, 2007, East Central College, a taxing authority in Franklin County, filed a motion for leave to intervene, which was not opposed. L.F. at 61. On July 27, 2007, the circuit court granted both motions for leave to intervene. L.F. at 72.

All parties moved for summary judgment, with East Central College joining the Franklin County Defendants, the Auditor, and the Attorney General in a single motion. L.F. at 87, 105, 114. Judge Koehr asserted that the Franklin County Defendants' 2006 tax rates for General Revenue and Road and Bridge were "unconstitutional because they allowed for inflationary assessment growth by an amount equal to the percentage increase in adjusted valuation of existing property in the current year over the prior year's assessed valuation even though such an adjustment is forbidden under the plain language of Article X, Section 22, of the Missouri Constitution." L.F. at 114. Judge Koehr also asserted that to any extent that the adjustment for inflationary assessment growth was deemed to be authorized under Section 137.073.2, RSMo, and/or the tax rate forms issued by the Missouri State Auditor pursuant to 15 CSR 40-3.120, both Section 137.073.2 and the instructions and forms promulgated under 15 CSR 40-3.120 were unconstitutional as violating Article X, Section 22. L.F. at 115.

On January 29, 2008, the circuit court entered judgment in favor of the defendants and against the plaintiffs, holding that Article X, Section 22 authorizes political subdivisions to increase their levies without a vote. L.F. at 168, 170.

The plaintiffs and Judge Koehr appealed. L.F. at 173, 183.

POINT RELIED ON

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE (A) FRANKLIN COUNTY'S 2006 PROPERTY TAX LEVIES, (B) SECTION 137.073.2, RSMO, (C) 15 CSR 40-3.120, AND (D) THE STATE AUDITOR'S FORMS PROMULGATED UNDER SECTION 137.073.2 AND 15 CSR 40-3.120 VIOLATE THE HANCOCK AMENDMENT (ARTICLE X, SECTION 22 OF THE MISSOURI CONSTITUTION) BY PURPORTING TO ALLOW INCREASES IN LOCAL TAXES WITHOUT A VOTE OF THE PEOPLE BASED ON INFLATIONARY ASSESSMENT GROWTH IN THAT THE HANCOCK AMENDMENT PROHIBITS COUNTIES FROM RAISING TAXES WITHOUT A VOTE OF THE PEOPLE, AND FRANKLIN COUNTY RAISED ITS 2006 TAX LEVIES WITHOUT A VOTE OF THE PEOPLE AS PURPORTEDLY AUTHORIZED BY SECTION 137.073.2, 15 CSR 40-3.120, AND THE STATE AUDITOR'S FORMS.

Mo. Const. Art. X, § 22.

Missouri Mun. League v. State, 932 S.W.2d 400 (Mo. banc 1996).

Loving v. City of St. Joseph, 753 S.W.2d 49 (Mo. App. 1988).

ARGUMENT

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE (A) FRANKLIN COUNTY'S 2006 PROPERTY TAX LEVIES, (B) SECTION 137.073.2, RSMO, (C) 15 CSR 40-3.120, AND (D) THE STATE AUDITOR'S FORMS PROMULGATED UNDER SECTION 137.073.2 AND 15 CSR 40-3.120 VIOLATE THE HANCOCK AMENDMENT (ARTICLE X, SECTION 22 OF THE MISSOURI CONSTITUTION) BY PURPORTING TO ALLOW INCREASES IN LOCAL TAXES WITHOUT A VOTE OF THE PEOPLE BASED ON INFLATIONARY ASSESSMENT GROWTH IN THAT THE HANCOCK AMENDMENT PROHIBITS COUNTIES FROM RAISING TAXES WITHOUT A VOTE OF THE PEOPLE, AND FRANKLIN COUNTY RAISED ITS 2006 TAX LEVIES WITHOUT A VOTE OF THE PEOPLE AS PURPORTEDLY AUTHORIZED BY SECTION 137.073.2, 15 CSR 40-3.120, AND THE STATE AUDITOR'S FORMS.

This is a simple case. Franklin County violated the Hancock Amendment in increasing its 2006 tax levy without a vote of the people. The County Defendants argued, and the circuit court held, that the levy was authorized by a statute and the regulations propounded under the statute, but laws and regulations cannot permit a tax to be increased in violation of the Missouri Constitution. The General Assembly may have acted in all good faith in passing section 137.073.2, RSMo, and the Missouri State Auditor may have acted in all good faith in propounding 15 CSR 40-3.120 and various forms, but these cannot authorize violations of the Hancock Amendment.

A. ..... Standard of review.

The trial court's entry of summary judgment is reviewed de novo. *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707 (Mo. banc 2006). Summary judgment will only be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id.*

B. ..... The Hancock Amendment prohibits tax increases without a vote.

At the general election in 1980, Missouri voters approved an amendment to the constitution popularly known as the Hancock Amendment. Mo. Const. Art. X, §§ 16-24. The purpose of the Hancock Amendment is to rein in increases in governmental revenue and expenditures. *Missourians for Tax Justice Educ. Project v. Holden,* 959 S.W.2d 100, 102 (Mo. banc 1997). "Reduced to its essence, the Hancock Amendment reveals the voters' basic distrust of the ability of representative government to keep its taxing and spending requirements in check. As an additional bulwark against local government abuse of its power to tax, the voters amended the constitution to guarantee themselves the right to approve increases in taxes proposed by political subdivisions of the state." *Beatty v. Metropolitan St. Louis Sewer Dist.,* 867 S.W.2d 217, 221 (Mo. banc 1993).

Section 22(a) of the Hancock Amendment forbids increases in local tax levies without a vote of the people:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the

> constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. If the definition of the base of an existing tax, license or fees, is broadened, the maximum authorized current levy of taxation on the new base in each county or other political subdivision shall be reduced to yield the same estimated gross revenue as on the prior base. If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

Mo. Const. Art. 10, § 22(a)

As the Court will note, in addition to barring tax increases without a vote of the people, section 22(a) provides for circumstances in which a municipality's taxes "shall be

reduced." By its plain terms, section 22(a) allows local taxes to be increased only with "the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon."

C. .....Franklin County's increase violates the Hancock Amendment.

In this case, the undisputed facts show that the County Defendants raised the rate of levy for the property for which the County levies taxes for tax year 2006, based not on a vote of the people but on "inflationary assessment growth." This action was blatantly in violation of the Hancock Amendment.

The Franklin County Defendants admit the facts showing violation of the Hancock Amendment. According to the defendants and the circuit court, a municipality can continue to extract more and more tax revenue every year. Quite to the contrary, the facts show a clear and willful violation of the Hancock Amendment. Section 22(a) of the Hancock Amendment allows local taxes to be increased only with "the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon." The Hancock Amendment does not contain any exception for inflation.

The Franklin County Defendants maintain that they relied on section 137.073.2, RSMo, and the tax rate forms issued by the Missouri State Auditor pursuant to 15 CSR 40-3.120 to allow them to increase the County's 2006 tax levy. Section 137.073.2 provides that, in the event of changes in assessed valuation, "political subdivisions shall immediately revise the applicable rates of levy for each purpose for each subclass of real property, individually, and personal property, in the aggregate, for which taxes are levied to the extent necessary to produce from all taxable property, exclusive of new

construction and improvements, substantially the same amount of tax revenue as was produced in the previous year for each subclass of real property, individually, and personal property, in the aggregate, except that the rate may not exceed the greater of the rate in effect in the 1984 tax year or the most recent voter-approved rate."

Purportedly acting under the authority of section 137.073.2, the Auditor promulgated a regulation that "applies to all political subdivisions and is designed to implement section 137.073, RSMo as it applies to calculating and revising property tax rates." 15 CSR 40-3.120. The regulation authorizes the use of forms with instructions available from the Auditor's office and "approved for use by school districts and all other political subdivisions to compute and substantiate the annual tax rate ceiling(s) pursuant to the requirements of the Missouri Constitution Article X, Section 22 and section 137.073, RSMo." *Id.*

As applied by the County Defendants to authorize increasing taxes, Section 137.073.2 plainly exceeds the constitutional authority permitted by the Hancock Amendment. Section 22(a) of the Hancock Amendment allows taxes to be ***reduced*** in some circumstances -- "[T]he maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value . . . ." Section 137.073.2 subverts the constitutional provision that taxes may be ***reduced*** and turns it into authority for taxes to be ***revised***, in this case revised upward. Promulgated under

authority of section 137.073, 15 CSR 40-3.120 and the Auditor's forms allow taxes imposed by entities like the Franklin County Defendants to be ***increased***.

The constitution contains explicit authority for the passage of laws to implement the Hancock Amendment, but they may not be inconsistent: "The provisions contained in sections 16 through 23, inclusive, of [the Hancock Amendment] are self-enforcing; provided, however, that the general assembly may enact laws implementing such provisions which are not inconsistent with the purposes of said sections." Mo. Const. Art. X, § 24(b).

In violation of this constitutional authority, section 137.073, the regulation, and the Auditor's forms are obviously inconsistent with the Hancock Amendment. Section 22(a) does not allow a political subdivision to ***increase*** a levy to allow for inflationary assessment growth occurring within the political subdivision. The Hancock Amendment mentions nothing about inflationary growth within a political subdivision.

The Court should reject the County Defendants' claim that the statute and the Auditor's forms allow a municipality to increase its tax levy without a vote of the people. The Missouri Constitution, as amended by a citizens initiative, "would be impotent indeed" if a legislative enactment could defeat the Hancock Amendment. *See Loving v. City of St. Joseph,* 753 S.W.2d 49, 51 (Mo. App. 1988). It is well settled that a statute cannot thwart the purpose of the Hancock Amendment. *Missouri Mun. League v. State,* 932 S.W.2d 400, 403 (Mo. banc 1996).

A statute that violates the Missouri Constitution is void. *State ex rel. Upchurch v. Blunt,* 810 S.W.2d 515, 516 (Mo. banc 1991) ("If a statute conflicts with a constitutional

provision or provisions, this Court must hold that the statute is invalid."); *State ex rel. Miller v. O'Malley*, 117 S.W.2d 319, 324 (Mo. banc 1938) ("An unconstitutional statute is no law and confers no rights. . . . This is true from the date of its enactment, and not merely from the date of the decision so branding it."). Provisions that are enacted under the authority of an unconstitutional statute are void. *Nixon v. City of Oregon*, 77 S.W.3d 107, 109 (Mo. App. 2002).

Franklin County's inflationary assessment growth adjustments in its year 2006 tax rate calculations constitute a violation of Section 22(a) of the Hancock Amendment; therefore, the Court should declare them to be void. Section 137.073.2 and/or the tax rate forms issued by the Auditor under 15 CSR 40-3.120 purport to authorize the County's tax rate adjustments for inflationary assessment growth; therefore, they are also unconstitutional and void.

D. .....The judgment of the trial court should be reversed.

In upholding Franklin County's 2006 tax levies, the trial court emphasized a single phrase of the Hancock Amendment: "If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value." L.F. at 170 (emphasis in original, quoting Mo. Const. Art X, § 22(a)).

The trial court's judgment concluded that the highlighted phrase allowed the Franklin County Defendants to increase taxes: "In the Court's opinion, the phrase 'adjusted for changes in the general price level' allows political subdivisions to make inflationary adjustments in revenue allowed by Section 137.073.2. When there is an upward change in the price level (i.e. inflation), the assessed value of property in a political subdivision goes up. Under such circumstances, the above-quoted language of Section 22(a) -- and Section 137.073.2 -- authorizes political subdivisions to adjust their levies in response." L.F. at 170.

This reasoning ignores the plain language of the Hancock Amendment. The very sentence in which the phrase appears does not allow ***increases*** in local taxes, but mandates that local taxes must be ***reduced*** in some circumstances: "If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, ***the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.***" Mo. Const. Art X, § 22(a) (emphasis added). This sentence as a whole belies the trial court's conclusion.

Further, as this Court has repeatedly held, the purpose of the Hancock Amendment is to prohibit tax increases without a vote. *See Missourians for Tax Justice,* 959 S.W.2d at 102; *Beatty,* 867 S.W.2d at 221. In light of that purpose and the plain language of

Section 22(a), the claim that a sentence allowing taxes to be ***reduced*** authorizes taxes to be ***increased*** is unsupported.

Most significantly, the judgment of the trial court ignores the undisputed meaning of "general price level" as explicitly defined in the Hancock Amendment. Section 17 of the Hancock Amendment is clear: "'General price level' means the Consumer Price Index for All Urban Consumers for the United States, or its successor publications, as defined and officially reported by the United States Department of Labor, or its successor agency." Mo. Const. Art. X, § 17(3).

Thus, Section 22(a) authorizes reductions in local taxes based on changes in the federal Consumer Price Index. The trial court's determination that this provision allows for increases based on changes in assessed valuation is demonstrably wrong. "General price level" is specifically defined in the Hancock Amendment, and no other meaning can be imposed on that clear and concise definition. There is no language in Section 22(a) allowing tax increases for inflationary assessment growth occurring within the political subdivision or any language that could be interpreted to mean that such adjustment could be made. Therefore, any increase not specifically authorized in the Hancock Amendment is an increase without a vote of the people and is unconstitutional.

Indeed, there could not have been any inflationary assessment growth between 2005 and 2006 to allow the increase imposed by the Franklin County Defendants. Any such increase would violate the law: "The assessor shall annually assess all real property in the following manner: new assessed values shall be determined as of January first of each odd-numbered year and shall be entered in the assessor's books; those same

assessed values shall apply in the following even-numbered year, except for new construction and property improvements which shall be valued as though they had been completed as of January first of the preceding odd-numbered year." § 137.115.1, RSMo.

By law, the assessor cannot change the assessed valuation of real property in even-numbered years; therefore, the assessed valuation of real property is not equalized in even numbered years. Section 22(a)'s provision that taxes may be reduced when "the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year" cannot be invoked in an even-numbered year like 2006.

CONCLUSION

In this case, the undisputed facts show that, because it was passed without a vote of the people, Franklin County's unconstitutional 2006 levy is invalid and void. Further, section 137.073.2, 15 CSR 40-3.120, and the tax rate forms issued by the Auditor are invalid for purporting to authorize this unconstitutional tax increase. Thus, the judgment of the circuit court should be reversed.

Judge Koehr brought this action in his capacity as a taxpayer and for the benefit of all of the taxpayers of Franklin County. L.F. at 32. He sought a declaratory judgment, an order directing the Franklin County Defendants to recalculate the tax, an injunction preventing them from collecting the excess tax or using to calculate future taxes, a refund of excess taxes collected, and an award of attorney fees and costs under Section 23 of the Hancock Amendment. The Court should remand this action to the circuit court for entry of a judgment granting this relief.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief of Intervenor/Appellant includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 4060, exclusive of the cover, signature block, and certificates of service and compliance.

The undersigned further certifies that the disks filed with the Brief of Intervenor/Appellant and served on all parties of record were scanned for viruses and found virus-free through the Symantec anti-virus program.

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