

BEFORE THE MISSOURI SUPREME COURT

No. SC90866

CITY OF SULLIVAN

Plaintiff / Respondent

vs.

JUDITH ANN SITES, as Trustee of
the Judith Ann Sites Trust,
Defendant/Appellant

On Transfer from the Missouri Court of Appeals, Southern District
Appeal No. SD29596

On Appeal from the Circuit Court of Crawford County
Honorable William Camm Seay, Circuit Judge
Circuit Court No. 05CF-CC00133

RESPONDENT'S SUBSTITUTE BRIEF AND APPENDIX

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Jurisdictional Statement.....	1
Statement of Facts.....	2
Points Relied Upon.....	6
Argument.....	8
Point I.....	8
Point II.....	28
Conclusion.....	39
Signatures.....	40
Rule 84.06 Certificate.....	41
Certificate of Service.....	42

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Arizona v. California</u> , 530 U.S. 392; 120 S.Ct. 2304; 147 L.Ed.2d 374 (2000).....	35
<u>Blaske v. Smith & Entzeroth, Inc., et al.</u> , 821 S.W.2d 822, 831 (Mo.banc 1991).....	15, 16, 22
<u>Board of Education of the City of St. Louis et al. v. The Missouri State Board of Education et al.</u> , 271 S.W.3d 1 (Mo.banc 2008)	8, 15
<u>Chesterfield Village v. City of Chesterfield</u> , 64 S.W.3d 315, 318 (Mo.banc 2002).....	29
<u>City of Lebanon v. Schneider</u> , 163 S.W.2d 588, 590-591 (Mo.banc 1942)	6, 19, 22
<u>City of Springfield v. Sprint Spectrum, L.P.</u> , 203 S.W.3d 177 (Mo.banc 2006).....	15
<u>Drainage District No. 1 v. Matthews</u> , 234 S.W.2d 567 (Mo. 1950).....	7, 30, 31, 33
<u>Forest City v. City of Oregon</u> , 569 S.W.2d 330 (Mo.App. 1978)	26
<u>Harris v. Missouri Gaming Commission</u> , 869 S.W.2d 58 (Mo.banc 1994)	27
<u>Healthcare Services of the Ozarks, Inc. v. Copeland</u> , 198 S.W.3d 604 (Mo. 2006)	8, 28
<u>Heintz Electric Company v. Tri Lakes Interiors, Inc.</u> , 185 S.W.3d 787, 792 (Mo.App.S.D. 2006)	28
<u>Hixson v. Kansas City</u> , 239 S.W.2d 341, 343-344 (Mo.banc 1951)	31

<u>Home Builders Ass’n of Greater St. Louis v. City of St. Peters</u> , 868 S.W.2d 187, 190 (Mo.App.E.D. 1994).....	12
<u>Hudson v. Carr</u> , 668 S.W.2d 68, 70 (Mo.banc 1984).....	37
<u>Hunter Avenue Property, L.P. v. Union Electric Company</u> , 895 S.W.2d (Mo.App.E.D. 1995).....	27
<u>In the Estate of Laura Downs</u> , 242 S.W.3d 729, 734 (Mo.App.W.D. 2008).....	35
<u>Joel Bianco Kawasaki Plus v. Meramec Valley Bank</u> , 81 S.W.3d 528, 530 (Mo. 2002)	29
<u>Johnston v. Allis-Chalmers</u> , 736 S.W.2d 544, 549 (Mo.App.E.D. 1987)	33
<u>Knowlton v. Ripley County Memorial Hospital</u> , 743 S.W.2d 132, 134-135 (Mo.App.S.D. 1988)	30
<u>Lakewood Park Cemetery Association v. Metropolitan St. Louis Sewer District et al.</u> , 530 S.W.2d 240, 246 (Mo. 1975).....	21
<u>Larson, et al. v. City of Sullivan, Missouri</u> , 92 S.W.3d 128 (Mo.App.E.D. 2002).....	3, 4, 6, 7, 13, 14, 15, 26, 27, 32, 33, 37, 38, 39
<u>Lodge of the Ozarks, Inc. v. City of Branson</u> , 796 S.W.2d 646 (Mo.App.S.D. 1990)	9
<u>McCollum v. Director of Revenue</u> , 906 S.W.2d 368, 369 (Mo.banc 1995).....	12
<u>Murphy v. Carron</u> , 536 S.W.2d 30, 32 (Mo. 1976)	8, 28
<u>Oates v. Safeco Ins. Co. of America</u> , 583 S.W.2d 713 (Mo. banc 1979).....	37
<u>Oswald v. City of Blue Springs</u> , 635 S.W.2d 332 (Mo.banc 1982)	11

<u>Patrick v. Koepke Construction, Inc. v. Woodsage Construction Company</u> , 119 S.W.3d 551 (Mo.App.E.D. 2003).....	7, 34, 35
<u>Powell v. City of Joplin</u> , 73 S.W.2d 408, 410 (Mo. 1934).....	30, 31, 36
<u>Ross v. Kansas City General Hospital and Medical Center</u> , 608 S.W.2d 397, 400 (Mo.banc 1980).....	15, 16
<u>Seibert v. City of Columbia</u> , 461 S.W.2d 808, 811 (Mo.banc 1971).....	31
<u>Shepherd v. City of Wentzville</u> , 645 S.W.2d 130 (Mo.App.E.D. 1982).....	6, 22, 25, 26
<u>Sierk v. Reynolds</u> , 484 S.W.2d 675 (Mo.App.S.D. 1972).....	32
<u>St. Louis Brewing Ass'n v. City of St. Louis</u> , 37 S.W. 525 (Mo. 1896).....	23
<u>St. Louis University v. The Masonic Temple Association of St. Louis</u> , 220 S.W.3d 721, 725 (Mo. 2007).....	9, 25
<u>State v. County Court of Greene County</u> , 667 S.W.2d 409 (Mo.banc 1984).....	16
<u>United States v. Sioux Nation</u> , 448 U.S. 371, 432, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980).....	35
<u>Zahner v. City of Perryville</u> , 813 S.W.2d 855 (Mo.banc 1991).....	21

Constitutional and Statutory Provisions

Mo.Const. art. III, Section 40(30).....	5, 6, 8, 15, 26, 27, 28, 39
Mo.Const. art. V, Section 10.....	1
Mo.Const. art. VI, Section 27.....	26
Chapter 250 R.S.Mo.	9, 22

Section 67.453 R.S.Mo.	20
Section 67.455 R.S.Mo.	21
Section 67.459 R.S.Mo.	20
Section 88.812 R.S.Mo.	20
Section 250.010 R.S.Mo.	9, 26
Section 250.120 R.S.Mo.	11, 21
Section 250.233 R.S.Mo.	10, 14, 22

JURISDICTIONAL STATEMENT

Following opinion by the Missouri Court of Appeals for the Southern District, this Court ordered transfer of the matter; this Court has jurisdiction to hear appeals on transfer from the Court of Appeals. Mo.Const. art. V, Section 10.

STATEMENT OF FACTS

Prior to 1996, several areas in the City of Sullivan did not have access to sanitary sewers as sanitary sewer mains had not been constructed in those areas. [Tr. 16; Plaintiff's Exhibit C].

Pursuant to its police powers and statutory authority, the City of Sullivan determined that extending sanitary sewers to areas which did not have access to such a sewer system was necessary for the public health and safety and in the best interests of those areas of the City and, upon a favorable vote of the citizens, issued revenue bonds for such purpose. [Ordinance 2574, Defendant's Exhibit B (all referenced ordinances are contained within Respondent's Appendix)].

The Ordinance authorizing the issuance of the revenue bonds specifically provided that the bonds are special, limited obligations of the city payable solely from, and secured by a pledge of, the Net Revenues¹. [Defendant's Exhibit B, Ordinance 2574, Section 202].

¹ "Revenues" are defined as "all income and revenues derived by the City from the System, including investment and rental income, net proceeds from business interruption insurance, sales tax revenues which have been annually appropriated by the City or which are limited solely to the payment of improvements to or expenses of the System and any amounts deposited in escrow in connection with the acquisition, construction, remodeling, renovation and equipping of facility to be applied during the period of determination to pay interest on System Revenue Bonds, but excluding any profits or

The revenues from the sewer system include a connection fee which was established for all properties connecting to and receiving direct benefit from the new extension of the sewerage system funded by the revenue bonds. [Defendant's Exhibit A, Ordinance 2581].

Prior to the election at which the voters approved the issuance of the revenue bonds, the City provided notice to the citizens of the City of Sullivan that a special class of connection fee would be charged to residents within the newly-sewered areas. [Plaintiff's Exhibit E]

The City published and mailed an informational brochure containing information about the revenue bond issue and stating that monthly sewer charges would be increased and that the users of the new system would be paying connection fees in the amounts of \$3,750.00 and \$4,250.00. [Plaintiff's Exhibit E; Tr. 59-60].

On July 6, 1999, the governing body of the City of Sullivan enacted Ordinance 2581, which imposed such connection fees pursuant to the voters' authorization. [Defendant's Exhibit A]. Shortly thereafter, property owners within the newly-sewered areas unsuccessfully challenged these connection fees on several grounds. Larson et al. v.

losses on early extinguishment of debt or on the sale or other disposition of investments or fixed or capital assets not in the ordinary course of business." [Ordinance 2574, Section 101, Defendant's Exhibit B].

City of Sullivan, Missouri, 92 S.W.3d 128 (Mo.App.E.D. 2002)².

The City of Sullivan imposes a requirement on certain property owners to connect to the sanitary sewer system. Section 705.080 (D), Sullivan Municipal Code states:

Buildings Must Have Toilet Facilities. The owner of all houses, buildings or properties used for human employment, recreation or other purposes, situated within the City and abutting any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary or combined sewer of the City, is hereby required at his/her expense to install suitable toilet facilities therein and to connect such facilities directly with the proper public sewer in accordance with the provisions of this Article within two hundred ten (210) days after date of official notice to do so, provided that said public sewer is within one hundred (100) feet (30.5 meters) of the property line.

[L.F. 14]

As of the time of the trial of this matter, 288 out of 336 existing residences in the newly-sewered area that satisfied the criteria for sewer connection as set forth in Section 705.080 had made connection to the new sewer system and paid the requisite fee. [Tr. 17] Appellant's residence is among those which meet the service conditions, but have not been connected to the new sewer system for proper collection of the sewage generated at

²The property owners in the Larson case were also represented by Mr. Waller and Mr. Owens, Counsel for Appellant in the present case.

such residence. [Tr. 24]. Plaintiff, City of Sullivan, filed an action against the Appellant seeking a court order requiring Appellant to make the connection to the public sanitary sewer system and cease discharging any further sewage effluent onto or from the property without properly connecting to the City's public sewer infrastructure. [L.F. 7-10]

Following trial, the Court rendered a final judgment on July 9, 2008, enjoining Appellant from discharging further sewer effluent onto or from the property without properly connecting to the City's public sewer infrastructure; allowing the City to enter upon the property and make the connection and granting judgment in favor of the City for the required connection fee. [L.F. 44-47]

Appellant appeals only one aspect of the judgment – the validity of the sewer connection fee of \$3,750.00 imposed upon Appellant under Mo.Const. art. III, Section 40(30).

Appellant did not appeal any other aspect of the trial court's judgment and has not appealed or otherwise disputed the facts which were the basis for the lawsuit including the fact that Appellant's residence meets the criteria for sewer connection under Section 705.080 of the Municipal Code.

The Southern District reversed that portion of the trial court's judgment after finding that the City's ordinance imposing the connection fee of \$3,750.00 constituted a special law under Mo.Const. art. III, Section 40(30). This case was then ordered transferred to this Court.

POINTS RELIED ON

I. THE TRIAL COURT WAS CORRECT IN GRANTING JUDGMENT FOR THE CITY OF SULLIVAN AND FINDING THAT DEFENDANT OWES THE SEWER CONNECTION FEE OF \$3,750.00 FOR THE REASON THAT THE ORDINANCE IMPOSING THE FEE IS NOT IN VIOLATION OF MO.CONST. ARTICLE III, SECTION 40 (30) BECAUSE (i) THE ORDINANCE IS NOT A SPECIAL LAW OR (ii) THE CITY HAS A SUBSTANTIAL JUSTIFICATION FOR SUCH FEE CLASSIFICATION

Larson et al. v. City of Sullivan, Missouri, 92 S.W.3d 128 (Mo.App.E.D. 2002)

City of Lebanon v. Schneider, 163 S.W.2d 588 (Mo.banc 1942)

Shepherd v. City of Wentzville, 645 S.W.2d 130 (Mo.App.E.D. 1982)

II. THE TRIAL COURT WAS CORRECT IN GRANTING JUDGMENT FOR THE CITY OF SULLIVAN AND FINDING THAT DEFENDANT OWES THE SEWER CONNECTION FEE OF \$3,750.00 FOR THE REASON THAT THE DEFENDANT'S CHALLENGE TO THE ORDINANCE IS BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL

Larson, et al. v. City of Sullivan, Missouri, 92 S.W.3d 128 (Mo.App.E.D. 2002)

Drainage Dist. No. 1 v. Matthews, 234 S.W.2d 567 (Mo. 1950)

Patrick V. Koepke Construction, Inc. v. Woodsage Construction Company, 119 S.W.3d 551 (Mo.App.E.D. 2003)

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN GRANTING JUDGMENT FOR THE CITY OF SULLIVAN AND FINDING THAT DEFENDANT OWES THE SEWER CONNECTION FEE OF \$3,750.00 FOR THE REASON THAT THE ORDINANCE IMPOSING THE FEE IS NOT IN VIOLATION OF MO.CONST. ARTICLE III, SECTION 40 (30) BECAUSE (i) THE ORDINANCE IS NOT A SPECIAL LAW OR (ii) THE CITY HAS A SUBSTANTIAL JUSTIFICATION FOR SUCH FEE CLASSIFICATION

STANDARD OF REVIEW

This was a bench-trying case; the standard of review in such matters is that the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Healthcare Services of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 612 (Mo. 2006) (citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976).

Given that there are no factual disputes between the parties, the sole issue as to whether a statute or ordinance is unconstitutional is a question of law which is reviewed *de novo*. Board of Education of the City of St. Louis et al. v. The Missouri State Board of Education et al., 271 S.W.3d 1 (Mo.banc 2008)

Ordinances are “presumed constitutional and will not be found otherwise unless

they clearly contravene a constitutional provision”, and the Appellant bears the burden to demonstrate that a particular ordinance is unconstitutional. St. Louis University v. The Masonic Temple Association of St. Louis, 220 S.W.3d 721, 725 (Mo. 2007)

SULLIVAN’S ORDINANCE

In 1996, the City of Sullivan, pursuant to its statutory authority under Section 250.010 R.S.Mo. et seq. and its lawful police powers³, determined that extending sanitary sewers to previously-unserved areas and the construction of a new sewer system was necessary for the public health and safety. Appellant’s property is located in the area where the new sewer system was constructed.

The City chose to finance the new sewer system through revenue bonds pursuant to Section 250.010 R.S.Mo. et seq. and the issuance of bonds was approved by the voters.

The issuance of the revenue bonds pursuant to Chapter 250 R.S.Mo. was authorized by the governing body of the City by the enactment of Ordinance 2574 on May 20, 1999. That Ordinance specifically provides that the bonds are special, limited obligations of the city payable solely from, and secured by a pledge of, the Net Revenues of the sewer system which include “all income and revenues derived by the City from the

³ See, Lodge of the Ozarks, Inc. v. City of Branson, 796 S.W.2d 646, 650 (Mo.App.S.D. 1990) (“Providing for sewerage is a governmental function and an exercise of the police power of the state...the authority to establish and locate sewers and to provide plans for their construction is legislative”).

System”.

The revenues from the sewer system consist of a monthly user fee paid by all users based on water usage and a connection fee to be paid by the properties connecting to the system for the first time. A separate connection fee was established for all properties connecting to and receiving direct benefit from the *new sewer system funded by the revenue bonds*. See, Ordinance No. 2581 enacted July 6, 1999 [Defendant’s Exhibit A]. The provision imposing this connection fee for access to the new sewer system funded by the revenue bonds is the only provision of any city ordinance or of the municipal code challenged by Appellants.

As a threshold matter, Section 250.233 R.S.Mo. expressly provides for the imposition of a connection fee in order to access a city’s sewer system. The statute does not limit the purposes for which a tap-on fee may be imposed. That section states:

Any city, town or village operating a sewerage system or waterworks may establish, make and collect charges for sewerage services, *including tap-on fees...*

Section 250.233 R.S.Mo. (Italics added.)

And, when the voters approved the issuance of the revenue bonds, they also authorized the board to increase the monthly rates, tap-on fees⁴, or other charges to retire

⁴ In fact, the City explicitly and directly informed the voters of its obligation to impose and collect the necessary fees and charges; prior to the 1996 election, the City mailed an

the bond obligations and maintain and operate the system. Sec. 250.120, R.S.Mo.; Oswald v. City of Blue Springs, 635 S.W.2d 332 (Mo.banc 1982).

In this case, the connection fees at issue are one form of revenue used for the repayment of the principal and interest of the revenue bonds issued for construction of the new sewer system. Section 250.120 imposes a “mandatory duty” on cities issuing revenue bonds to impose fees and charges in order to pay the cost of maintenance and operation thereof and pay the principal of and the interest on all revenue bonds (emphasis added):

It shall be the mandatory duty of any city . . . which shall issue revenue bonds pursuant to this chapter to fix and maintain rates and make and collect charges for the use and services of the system for the benefit of which such revenue bonds were issued, sufficient to pay the cost of maintenance and operation thereof, to pay the principal of and the interest on all revenue bonds . . . issued or incurred by such city . . . and to provide funds ample to meet all valid and reasonable requirements of the ordinance or resolution by which such revenue bonds have been issued.

Such rates shall be from time to time revised so as fully to meet the requirements of this chapter. As long as any bond so issued or the interest thereon shall remain outstanding and unpaid, rates and charges sufficient to meet the requirements of

informational brochure detailing the fees and charges that the users of the new sewer lines would pay following voter approval and issuance of the revenue bond. [Plaintiff's Exhibit E; Tr. 59-60]. Furthermore, the City held public hearings regarding the proposed fees.

this section shall be maintained and collected by the city . . . which shall have issued such bonds.

In fulfillment of that “mandatory duty” imposed by state law, the City of Sullivan has pledged all revenue from the sewer system, including the connection fee at issue in this case, to pay the principal and interest on the revenue bonds and maintenance and operation of the sewer system constructed with such bonds. *See*, Ordinance 2574, Art. VIII, Section 802 (“Rate Covenant”); Section 803 (“Reasonable Charges for Services”); and Art. VI (“Application of Revenues”). [Defendant’s Exhibit B, Ordinance 2574, p 8 - 10].

The decision to impose particular charges to repay the revenue bonds and the percentage of revenue sought to be collected from each form of “charge” (monthly rate and other charges, including connection fees) is a product of legislative discretion, which decision is presumed to be valid. McCollum v. Director of Revenue, 906 S.W.2d 368, 369 (Mo.banc 1995) (“Ordinances are presumed to be valid and lawful...The ordinance should be construed to uphold its validity unless the ordinance is expressly inconsistent or in irreconcilable conflict with the general law of the state”); Home Builders Ass’n of Greater St. Louis v. City of St. Peters, 868 S.W.2d 187, 190 (Mo.App.E.D. 1994) (“An ordinance enacted pursuant to the police power of a city is presumed to be valid, and the party challenging said ordinance bears the burden of proving its invalidity”).

SULLIVAN’S ORDINANCE AND SEPARATE CONNECTION FEES

UPHELD IN PREVIOUS CHALLENGE

The connection fee and ordinance provisions at issue in the case at bar previously withstood legal challenge by several residents within the newly-sewered area who were subject to the same connection fee. Larson et al. v. City of Sullivan, Missouri, 92 S.W.3d 128 (Mo.App.E.D. 2002).

The Larson appellants challenged the connection fee on various constitutional grounds⁵ and additionally argued “Sullivan is not permitted to ‘arbitrarily charge all new users \$3,650.00 and \$4,250.00...’ and that ‘the charge of this fee is ‘unreasonable, arbitrary and has no basis in the law...’” Larson, 92 S.W.3d at 134.

In finding the connection fee to be reasonable and valid, the Eastern District Court of Appeals stated, in pertinent part:

- “Only those people who had not previously been connected to the old system were required to pay the fee in order to hook onto the new system. The fee was not charged against any vacant lots which did not use the system. *Therefore, only those benefiting from the new system were charged the increased amount.*” Larson at 132 (Italics added).

⁵ In their original Petition before the trial court, the Larson plaintiffs argued that the separate connection fees violated Equal Protection principles which is similar to the special law argument being made in the present case. [Legal File filed in the Larson appeal, Pages 24-26]. The Larson appellants appeared to have abandoned the Equal Protection argument on appeal.

- “The system itself is a good or service, which is provided in return for the fee. Residents did not have the benefit of a sewer system prior to this. In return for the payment of the fee, residents now have the benefit of the system.” Larson at 133.
- “The increased fees are placed in the water and sewer fund *from which payments on the revenue bonds are made*, as well as payments for maintenance expenses and for new projects to improve the sewer system in Sullivan. Section 250.233 plainly states that charges for sewer services, including tap-on or connection fees, may be imposed in addition to charges collected maintenance and repair of the system.” Larson at 134 (Italics added).
- “We conclude there was substantial evidence to support the trial court’s determination that the increased fee was not an unreasonable, arbitrary or capricious exercise of police power under section 250.233.” Larson at 134-135.

Given the consideration and holding by the Eastern District Court of Appeals, it has already been judicially determined that there was a reasonable basis to establish a separate fee classification for those users accessing the new system constructed for their benefit with the revenue bond proceeds and that the separate connection fee was not unreasonable, arbitrary or capricious. Larson.

Eight years later, the Southern District's Opinion in this case is directly contrary to

the Eastern District's decision in Larson.

ORDINANCE 2581 AND SEPARATE CONNECTION FEE

IS NOT A SPECIAL LAW

Appellants contend that the connection fee for users benefiting from the new sewer system is a special law which violates Mo.Const. art. III, Section 40.

...a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.'

Blaske v. Smith & Entzeroth, Inc., et al., 821 S.W.2d 822, 831 (Mo.banc 1991)

(Emphasis added) (quoting Ross v. Kansas City General Hospital and Medical Center, 608 S.W.2d 397, 400 (Mo.banc 1980)).

Applies to All of a Given Class Alike

A general law is 'a statute which relates to persons or things as a class,' while a special law is 'a statute which relates to *particular persons or things of a class*'.

Board of Education of the City of St. Louis, et al. v. The Missouri State Board of Education, et al., 271 S.W.3d 1 (Mo. banc 2008) (quoting City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177, 184 (Mo. banc 2006)) (Italics in original).

We have defined a 'special law' as '[a] law which includes *less than all who are similarly situated*...It is not enough to demonstrate constitutional invalidity to conclude that the statute excepts from its scope persons or things which would, but for the exception, otherwise be affected. In order to find such a statute invalid as a special law, it must be found that members of the stated class are omitted '*whose*

relationship to the subject-matter cannot by reason be distinguished from that of those included.’

Blaske, 821 S.W.2d at 831 (quoting Ross, 608 S.W.2d 397, and State v. County Court of Greene County, 667 S.W.2d 409 (Mo.banc 1984)).

The classification at issue in this case includes all who are similarly situated. The connection fee applies to all customers or users of the new sewer system – to all who benefit from the new sewer mains, pipes and infrastructure constructed for the previously unserved area.

Appellant is not a member of the class solely because of where her property is located. Appellant is a member of the class because she has chosen to use her property in such a manner as to require a sanitary sewer system; her status in the class is as rate payer, customer and user of a utility service - not simply as a property owner.

Not all properties within the newly-sewered area fall within the fee classification. For instance, vacant property is not subject to the connection fee even though it is located within the area where the new sewer system was constructed. *See*: Section 705.080 (D), Sullivan Municipal Code: [All ordinances received into the record before the trial court, Transcript Page 8]

D. *Buildings Must Have Toilet Facilities.* The owner of all houses, buildings or properties used for human employment, recreation or other purposes, situated within the City and abutting any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary

or combined sewer of the City, is hereby required at his/her expense to install suitable toilet facilities therein and to connect such facilities directly with the proper public sewer in accordance with the provisions of this Article within two hundred ten (210) days after date of official notice to do so, provided that said public sewer is within one hundred (100) feet (30.5 meters) of the property line.

[L.F. 14]

And, *see*, Ordinance 2581 which provides that the connection fee is only due upon a person making application to the City for a sanitary sewer connection:

...

2. ...A permit and inspection fee of \$3,750.00 for a Type A Sewer Connection or \$4,250.00 for a Type B Sewer Connection shall be paid to the City Collector at the time the application is filed...Sewer connections made after the completion of the unsewered areas identified in the 1996 Revenue Bond are subject to a permit and inspection fee inflation adjustment (consumer price index) calculated from the date of completion of the unsewered areas identified in the 1996 Revenue Bond to the date of permit for the connection.

[Plaintiff's Exhibit A].

While certain factors of the classification reference geography and historical facts, other qualifying features of the classification are variable including (i) whether the property is improved with a house, building or otherwise used for human employment,

recreation or other purposes; (ii) whether the property abuts any street, alley or right-of-way in which there is now located or may in the future be located a public sanitary or combined sewer of the City; and (iii) the public sewer is within one hundred (100) feet (30.5 meters) of the property line.

Moreover, future users, who are currently not known or members of the class, are not foreclosed from inclusion within the class. Therefore, the class is not fixed and closed.

The number of system users within the classification is subject to change as property is subdivided and developed; current land uses are converted to other land uses and redeveloped; existing buildings are demolished and redeveloped; vacant lots are improved; and streets and rights-of-way are developed which abut more properties.

While a finite number of residential structures within the newly-sewered area existed at the time of trial, as more lots satisfy the criteria of Section 705.080(D), *supra*, and more structures having a toilet are constructed and connect to the sewer system, those customers will also fall within the classification and will be subject to the same connection fee. Therefore, the class cannot be presumed to be fixed or unchanging.

Reasonable Basis for Classification

“If there is a reasonable basis for the classification, the law must stand...If there is no reasonable basis, the law must fall...The presumption is always in favor of constitutionality.” City of Lebanon v. Schneider, 163 S.W.2d 588, 590-591 (Mo.banc 1942).

In the present case, (i) revenue bonds were issued in order to construct a new sanitary sewer system; (ii) previously-unserved area now have the benefit of the new sewer system; (iii) the revenue bonds must be repaid; and (iv) the law places a mandatory duty upon the City to impose sufficient charges (which permissible charges include a tap-on fee) in order to ensure the repayment of the revenue bonds and operation of the System.

The class is defined as those customers within the newly-sewered areas deriving a direct benefit from the new sanitary sewer system and who are responsible for the payment of such public improvements.

Many fees for public improvements or services are based upon the level or benefit of such improvements or services to the user. Such method of establishing fee classifications for public improvements and services has been utilized across the state, has several statutory bases, and has long been upheld as an appropriate method to pay the costs of services or improvements.

For instance, *see*, Section 88.812 R.S.Mo. which provides for special assessments, in the form of special tax bills, for the cost of sidewalk, curbing, street, or highway improvements; such assessments to be made "against each property to be benefited by the project".

And, *see*, Section 67.453 R.S.Mo. et seq. pertaining to Neighborhood Improvement Districts. Pursuant to such statutory authorization and a proper Petition or election, any city or county may establish a "Neighborhood Improvement District" for the

higher fee to connect to the City sewer system in the area identified as the area where new sewers were built (1996 Bond Issue) than areas of the community where there were already public sewers. While it is true that the areas that already had sewers were excluded, anyone in the area where the new sewers were constructed had the right to connect to the new sewer. In other words, there was no limitation on the right of those in the area where new sewers were constructed to connect to the new public sewers. In City of Springfield v. Sprint Spectrum, L.P at 203 S.W.3d 177, 184 -185, the court stated that if the state law had stopped with the proviso that it applied to all cities that had adopted a similar business license tax by a vote of the qualified electorate after November 4, 1980, the statute “would appear to be open ended”; but the statute went on to require that the ordinance had to have been adopted and enforced prior to January 15, 2005, a date prior to the date when the statute was a law making it closed to everyone but those who had adopted and enforced the law prior to its effective date, making it to a special law. City of Springfield v. Sprint Spectrum, L.P at 203 S.W.3d 177, 184 -185.

Ordinance No. 2581 adopted by Sullivan meets the test in City of Springfield v. Smith, 322 Mo. 1129, 1137-1138, 19 S.W.2d 1, 3-4 (Mo.1929) cited by Appellant because the classification in the Sullivan ordinance (all persons connecting to the new public sewers built with the proceeds of the “1996 Bond Issue”, pay a higher tap fee than persons who are in an area where public sewers were already available) is a reasonable classification that covers all who are similarly situated.

This court should affirm the trial court’s decision because the classification of customers in Ordinance No. 2581 where new sewers were built at a cost of \$3,305,000.00

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Cemetery Association v. Metropolitan St. Louis Sewer District, 530 S.W.2d 240, 246 (Mo.banc 1975). *See, also*, Zahner v. City of Perryville, 813 S.W.2d 855 (Mo.banc 1991).

The Southern District's Opinion failed to consider the challenged classification in terms of the benefits which the users of such system derive from the new sewer mains and related infrastructure. Furthermore, the Opinion undermines the entire traditional system of funding new public infrastructure which allocates the cost of public improvements among the properties benefited.

Lastly, Appellants are barred, under the doctrine of collateral estoppel, from denouncing that a reasonable basis exists for the classification in this case.

In the previous challenge to the same fee classification, the Eastern District specifically determined:

...residents alleged that under Chapter 250 Sullivan is not permitted to “arbitrarily charge all new users \$3,650.00 and \$4,250.00 permit and inspection fees ...”.

Additionally, residents pleaded that the charge of this fee is “unreasonable, arbitrary and has no basis in the law ...”. The trial court determined that while the tap-on or connection fees are high, they are based “at least in part on the higher construction costs attributable to this particular project.”... We conclude there was substantial evidence to support the trial court's determination that the increased fee was not an unreasonable, arbitrary or capricious exercise of police power under Section 250.233.

Larson at 134-135.

Also, *see*, Respondent's Point II, *infra*.

Fallacies of Appellant's View

1) Appellant erroneously assumes, without any supporting authority, that a city ordinance must apply uniformly to the entire jurisdiction that has enacted it. This is not true of the State of Missouri and it is not true of cities.

Instead, there must be a reasonable basis for the classification and the classification must include all who are similarly-situated. Blaske; Lebanon.

In Shepherd v. City of Wentzville, 645 S.W.2d 130 (Mo.App.E.D. 1982), the Eastern District appellate court upheld a different fee classification for "multi-unit complexes", which included apartment buildings and office buildings, while other land uses, including motels and nursing homes, were classified otherwise, stating:

A municipality may classify its users for the purpose of fixing rates if the classification is reasonable and if there is no discrimination within the class...Cost of service is but one consideration in the determination of the reasonableness of the rate.

645 S.W.2d at 133.

And, in St. Louis Brewing Ass'n v. City of St. Louis, 37 S.W. 525 (Mo. 1896), where a different fee classification based on quantity of water consumed was upheld by the Court:

It seems entirely reasonable, therefore, and just to consumers, that the charges for water should be graded in proportion to the quantity used at one place or

factory... The city was required to raise a revenue sufficient to pay the interest on the water bonds and the expense of operating the waterworks... The duty of making the apportionment devolved upon the city, and was left to its judgment and discretion, with which the courts should not interfere, except in the case of manifest exceptional discrimination.

37 S.W. at 528.

Appellant's analysis fails to adequately consider that the properties within the newly-sewered area receive a direct benefit from the new sewer lines while properties outside of the area do not receive such a benefit.

And, utility rates, by their very nature, are based upon various classes of customers within the jurisdiction. While elements of geography and historical facts affect rate making and are, therefore, inherent within the classifications established for utility rates, there are other qualifying factors which vary thereby establishing that the class of customers is open-ended.

Appellant ignores those other factors and the process to establish utility rates in general.

2) Appellant focuses on only **one** component of the sewer system and service to Appellant, that being the point where the connection is made between the sewer lateral and the sewer main (the actual "tap"). Appellant improperly dismisses the fact that the sewer lateral is being connected to new sewer mains which are part of a new sewer system – facilities and infrastructure which were not available to Appellant previously.

Even worse, Appellant appears to view the new sewer system as a gift from the revenue bond diety. Appellant completely ignores the responsibility for repayment of the revenue bonds, and that the payment for such improvements must be borne by those benefited. Appellant's argument is as specious as the economic theory that: "I can't be out of money because I still have checks left."

Appellant's rationale is not consistent with the various statutory provisions and the related cases upholding the method of allocating the cost of constructing public improvements among properties *benefited* by such improvements.

NO AUTHORITY IN SUPPORT OF APPELLANT'S POSITION

Appellant bears the burden to demonstrate that the ordinance at issue is unconstitutional. An ordinance is presumed constitutional and will not be found otherwise unless it clearly contravenes a constitutional provision. Saint Louis University v. Masonic Temple Ass'n of St. Louis, 220 S.W.3d 721 (Mo.banc 2007).

In addition, with regard to municipal charges related to its sewer system:

The basic precepts enunciated by all jurisdictions are that the function of fixing rates and the determination of whether differences in rates between classes of customers are to be made, and the amount of differences, is a legislative function not a judicial function. There is a strong presumption that the rates fixed by the municipality are reasonable and the burden of proving that the rates fixed by the municipality are unreasonable is upon the party challenging the rates.

Shepherd v. City of Wentzville, 645 S.W.2d 130, 133 (Mo.App.E.D. 1982)

Appellant has failed to cite to any case in which the "special law" analysis proposed by Appellant in this case has been applied to determine the propriety of utility rates or the allocation of the cost of public improvements among those benefited by the improvements.

As a matter of fact, Appellant has failed to cite to any case in which such analysis was applied to such proprietary functions of local government.

Appellant's challenge under Mo.Const. art. III, Section 40(30) is inappropriate given (i) the fee classification challenged in this case is based on the benefit derived by specific utility customers and (ii) the fee is necessary to pay the revenue bonds issued to construct the new sanitary sewer system (for which there is statutory and constitutional authority, Mo.Const. art. VI, Section 27; Section 250.010 R.S.Mo. et seq.).

Typically, fees charged to customers for municipal sewer service are reviewed by the courts under the following standard:

Municipal corporations that operate public utilities are not subject to the rate making process of the Public Service Commission. The courts, however, have equitable jurisdiction to prevent a municipality from enforcing public utility charges that are 'clearly, palpably and grossly unreasonable.'

Shepherd, 645 S.W.2d at 133 (quoting Forest City v. City of Oregon, 569 S.W.2d 330 (Mo.App. 1978).

Appellant's counsel challenged the same connection fee at issue in this case as "unreasonable" in the previous Larson case. Again, in Larson, the connection fee of

\$3,750.00 was determined to be reasonable.

The attempt to now apply the special law analysis under article III, Section 40(30), without any supporting authority, is merely Appellant's hope for a second bite at the apple.

SUBSTANTIAL JUSTIFICATION FOR THE FEE

Even a special law may be valid if the party defending the statute or ordinance can "demonstrate a 'substantial justification' for the special treatment." Hunter Avenue Property, L.P. v. Union Electric Company, 895 S.W.2d (Mo.App.E.D. 1995)(quoting Harris v. Missouri Gaming Commission, 869 S.W.2d 58 (Mo.banc 1994)).

Respondent has argued, *supra*, that a reasonable basis exists for the classification of sewer system users challenged in this case.

The same facts mentioned above and the same rationale apply in determining that a substantial justification exists in the event that the fee classification is deemed to be special under Mo.Const. art. III, Section 40(30).

Simply put, the City has a duty to pay the revenue bonds issued to construct the new sewer lines which are now available to Appellant. And, the City is justified in structuring connection fees to ensure those that derive a special benefit or service from the new sewer system bear a fair share of the cost of the public improvement.

Therefore, even if the special connection fee set forth in Ordinance 2581 constitutes a "special law", there is substantial justification for such special connection

fee based upon the special benefit and service enjoyed by the payers of the fee. Larson.

II. THE TRIAL COURT WAS CORRECT IN GRANTING JUDGMENT FOR THE CITY OF SULLIVAN AND FINDING THAT DEFENDANT OWES THE SEWER CONNECTION FEE OF \$3,750.00 FOR THE REASON THAT THE DEFENDANT’S CHALLENGE TO THE ORDINANCE IS BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL

STANDARD OF REVIEW

As this was a bench-tried case, the standard of review is that the judgment of the trial court will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. Healthcare Services of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 612 (Mo. 2006) (citing Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976)).

RES JUDICATA

Appellant’s challenge under Mo.Const. art. III, Section 40(30) is barred under the doctrine of *res judicata* or claim preclusion. Given the broad public policy concerns in this matter, Respondent asserts that the Southern District drew too fine of a line with respect to its rejection of the *res judicata* issue.

As a threshold matter, the general principles of *res judicata*, or claim preclusion, would apply in this case. In Heintz Electric Company v. Tri Lakes Interiors, Inc, 185 S.W.3d 787, 792 (Mo. App S.D. 2006), the Southern District Court stated:

‘[R]es judicata operates as an affirmative defense, which, if properly invoked, will

prevent litigation of a claim arising out of the same transaction or occurrence that is the subject of the earlier judgment.’ ...The doctrine ‘applies not only to losers, but also to parties that prevailed in an earlier judgment.’ ... ‘The doctrine precludes not only those issues on which the court in the former case was required to pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.’ ...In order for res judicata to be applicable ‘four identities’ must occur: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made’.

(internal citations omitted; emphasis added) (quoting Joel Bianco Kawasaki Plus v. Meramec Valley Bank, 81 S.W.3d 528, 535 (Mo. 2002) and Chesterfield Village v. City of Chesterfield, 64 S.W.3d 315, 318 (Mo.banc 2002)).

An exception to the “identity of persons and parties” element for claim preclusion has long been recognized in the public law arena:

The generally applicable principle dealing with the scope of res judicata arising from judgments for or against a public body in respect to its constituency has received the following expression: ‘In the absence of fraud or collusion a judgment for or against a municipal corporation, county, town, school or irrigation district, or other local governmental agency or district, or a board or officers properly representing it, is binding and conclusive on all residents, citizens and taxpayers in

respect to matters adjudicated which are of general or public interest such as questions relating to public property, contracts or other obligations. The rule is frequently applied to judgments rendered in an action between certain residents or taxpayers and a municipality, county or district or board or officer representing it, it being held that all other citizens and taxpayers similarly situated are represented in the litigation and bound by the judgment in the absence of fraud or collusion.’ In this state, the rule has been extended to include not only issues raised, but those which could have been raised.

(Emphasis added). Knowlton v. Ripley County Memorial Hospital, 743 S.W.2d 132, 134-135 (Mo.App.S.D. 1988) (quoting Powell v. City of Joplin, 73 S.W.2d 408, 410 (Mo. 1934)).

While Appellant was not directly a party to the prior unsuccessful challenge which resulted in the previous judicial ratification of the City’s sewer tap fees, the bar of *res judicata* is nonetheless applicable under the “binding and conclusive” principle of judgments involving public bodies endorsed in Knowlton v. Ripley County Memorial Hospital, *supra*. This Court has called the principle “the doctrine of virtual representation”; in Drainage Dist. No. 1 v. Matthews, 234 S.W.2d 567 (Mo. 1950) this Court said:

The rule just above stated is founded upon basic concepts of privity and virtual representation. The doctrine of virtual representation, well recognized in equity, is based upon considerations of necessity and paramount convenience and may be

invoked to prevent a failure of justice. [Citation omitted.] The doctrine is applicable if (as here) the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them.

Drainage Dist. No. 1 at 574 (referring to the rule in Powell v. City of Joplin, 73 S.W.2d 408, 410 (Mo. 1934), *supra*); *See also*, Hixson v. Kansas City, 239 S.W. 2d 341, 343-344 (Mo. banc 1951)⁶ and Seibert v. City of Columbia, 461 S.W.2d 808, 811 (Mo. banc 1971).⁷

Res judicata and the virtual representation doctrine have been applied under

⁶“Under similar circumstances we held that the rule of ‘privies’ of parties applied and that the parties in the second suit whose interests were the same as the parties to the first suit were bound by the judgment of the first suit. . .” (citing Drainage District No. 1, *supra*)

⁷“We are in full accord with the doctrine of virtual representation. It would be unthinkable in our system of jurisprudence to hold that each taxpayer of a municipality could bring a suit to attack an annexation and that *res judicata* would not apply because there was not an identity of parties. Of necessity, absent fraud or bad faith, all residents and taxpayers must be bound by the result of litigation of a public nature carried on by one in similar circumstances and having a common interest.” (Emphasis added.)

circumstances similar to the instant one to bar a second suit challenging a municipal sewer fee system in Sierk v. Reynolds, 484 S.W.2d 675 (Mo.App.S.D. 1972).

. . . we agree with plaintiff that the issues raised in this action concerning the city's compliance with its charter are res judicata under the doctrine sometimes referred to as that of 'virtual representation' . . . All these facts were, or easily could have become known to the defendant when the amended petition was filed . . . the legal issues thereby raised were ripe for adjudication and could have been pleaded. It is therefore of no significance . . . that the issues tendered here were not specifically pleaded and tendered in the amended petition for injunction; they were questions which might have been raised, and the rule in this state is that a judgment is conclusive not only as to questions which were raised, but as to every question which could have been raised.

Sierk at 679 and 681.

In the previous case, as here, the plaintiffs were residents who paid the same sewer connection fees challenged in this case. Larson. Any and all facts bearing on the "special legislation" challenge Appellant now posits were fixed and known at the time that the Larson suit was filed, tried, decided and appealed. The same lawyers now representing Appellant represented the earlier plaintiffs.⁸ The interests and goals of Appellant and the

⁸ See, Johnston v. Allis-Chalmers, 736 S.W.2d 544, 549 (Mo.App.E.D. 1987), applying *res judicata* and observing that the party precluded was represented by the same attorney

earlier plaintiffs are identical – to invalidate the same connection fees for the same newly-served areas of the same city. Clearly, “the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each.” Drainage Dist. No. 1 v. Matthews, 234 S.W.2d at 574. And the fact that the same attorneys have represented both the earlier plaintiffs and this Appellant evidences that there is no “adversity of interest” between Appellant and the prior plaintiffs. *Id.*

Respondent effectively plead the affirmative defense of res judicata. Respondent stated in its Amended Answer to Defendant Sites’ Counterclaim, “Plaintiff City of Sullivan states to the Court its affirmative defense to the Counterclaim set forth by the Defendant in this cause as the issues set forth therein have been adjudicated once before in a cause styled, Larson v. City of Sullivan, 92 S.W.3d 128 (Mo.App. 2002)...” [L.F. 24].

This statement sets forth the factual basis for the application of res judicata. While the statement did not mention “res judicata” by specific name, there is no requirement that it had to do so. Respondent’s pleading before the trial court no doubt set forth the factual basis for application of the doctrine and put Appellant and its counsel, who had litigated the previous case, on notice that the previous adjudication was being raised.

Moreover, under certain circumstances, a court may raise the issue of res judicata

who “vigorously pursued” the other litigation.

sua sponte. See, Patrick V. Koepke Construction, Inc. v. Woodsage Construction Company, 119 S.W.3d 551 (Mo.App.E.D. 2003):

Res judicata is an affirmative defense. Ordinarily, the party seeking to benefit by it must either plead in an answer, raise it by an amendment to the pleadings, or present it by motion to dismiss...However, ***it is a defense that not only benefits the defending party, but also benefits the court's ability to efficiently administer justice***... The federal courts recognize the power of a federal court to *sua sponte* dismiss on the ground of *res judicata*, even if the benefiting party has waived it as an affirmative defense, because it serves to promote judicial economy and avoid judicial waste...Although federal courts are to use caution in applying *res judicata sua sponte*, there are two exceptions: when the defense arises out of the court's own earlier judgment, or when the “demands of comity, continuity in the law, and essential justice” confront the court and all relevant records are before it...Although we are not bound by the pronouncements of the federal courts of appeals, ***we find the rationale for allowing the sua sponte application of res judicata in limited situations persuasive***. The circumstances in this case demonstrate that the trial court did not abuse its discretion in denying the motion for a creditor's bill by *sua sponte* applying *res judicata* and did not deprive plaintiff of due process. Further, plaintiff has shown no prejudice.

Koepke Construction at 555.

The Koepke Construction court cited Arizona v. California, 530 U.S. 392; 120

S.Ct. 2304; 147 L.Ed.2d 374 (2000), which states:

...the State parties argue that even if they earlier failed to raise the preclusion defense, this Court should raise it now *sua sponte*. Judicial initiative of this sort might be appropriate in special circumstances. Most notably, ‘if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised. This result is fully consistent with the policies underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.’

530 U.S. at 412 (quoting United States v. Sioux Nation, 448 U.S. 371, 432, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980) (REHNQUIST, J., dissenting)).

And, see, In the Estate of Laura Downs, 242 S.W.3d 729, 734 (Mo.App.W.D. 2008) ("A court has authority to *sua sponte* deny or dismiss a claim on grounds of *res judicata*, regardless of whether the benefiting party has waived it as an affirmative defense.")

If this Court determines that the terminology used in phrasing the City's affirmative defense was imperfect, the circumstances warranting the *sua sponte* application of *res judicata* are present in the case at bar and the doctrine should still be applied.

It has been thirteen years since the Board of Aldermen and the majority of Sullivan's voters approved this public health improvement and related fee system, all in

full compliance with governing statutes. Those who disagreed were given every opportunity to be heard in opposition before the Board of Aldermen, before the voters, and before the trial court and Eastern District Appellate Court.

Application of the doctrine in the instant case ensures that “a judgment for or against a municipal corporation . . . [is] binding and conclusive on all residents, citizens and taxpayers in respect to matters adjudicated which are of general or public interest such as questions relating to public property, contracts or other obligations.” Powell v. City of Joplin, 73 S.W.2d at 410.

The authority for the Court to examine the issue *sua sponte* coupled with the fact that Respondent plead the factual basis for application of the doctrine of res judicata in its pleadings before the trial court, allow application of the doctrine in this case.

Appellant’s claim is barred.

COLLATERAL ESTOPPEL

At the very least, portions of Appellant’s claim are barred by the doctrine of collateral estoppel. "The nature of collateral estoppel is such that a fact appropriately determined in one lawsuit is given effect in another case involving different issues." Hudson v. Carr, 668 S.W.2d 68, 70 (Mo.banc 1984).

The court in reviewing whether the application of collateral estoppel is appropriate should consider: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; and (3) whether the party against

whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication...Most courts have added a fourth factor to the three enunciated ...:whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit...Fairness is the overriding consideration in determining whether or not to apply the Doctrine of Mutuality. 668 S.W.2d at 70 (citing Oates v. Safeco Ins. Co. of America, 583 S.W.2d 713 (Mo. banc 1979))

Given the consideration and holding by the Eastern District Court of Appeals, it has already been determined that there was a reasonable basis to establish a separate connection fee in order to access to the new system constructed with the revenue bond proceeds and that the separate connection fee was not unreasonable, arbitrary or capricious. Larson, et al. v. City of Sullivan, Missouri, 92 S.W.3d 128 (Mo.App.E.D. 2002).

The affirmative defense of collateral estoppel was specifically pled by Respondent in its pleading before the trial. *See*, Amended Answer to Defendant Sites' Counterclaim, Paragraph 6 which states,

Plaintiff City of Sullivan states to the Court its affirmative defense to the Counterclaim set forth by the Defendant in this cause as the issues set forth therein have been adjudicated once before in a cause styled, Larson v. City of Sullivan, 92 S.W.3d 128 (Mo.App. 2002), and that the Defendant is collaterally estopped from bringing forth these issues in this matter as they have already been judicially

settled.

L.F. 24.

As the basis for the classification is an essential element of Appellant's challenge and Appellant's challenge is barred with respect to that element, the inquiry effectively ends under the doctrine of collateral estoppel.

CONCLUSION

The special connection fee established to provide adequate revenue to repay the revenue bonds issued for the construction of the new sewer system is not a special law under Mo.Const. art. III, Section 40. The fee classification includes all those similarly situated – those users who benefit from the new sewer infrastructure constructed with funds derived from revenue bonds.

Even if the connection fee at issue is determined to constitute a special law, the City has a substantial justification for imposition of such fee in that those having access to the new sewer system derive a special benefit and service from the new system. Larson v. City of Sullivan, 92 S.W.3d 128 (Mo.App.E.D. 2002).

The judgment of the trial court should be affirmed.

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Rule 84.06 Certificate

I hereby certify that Respondent's Brief contains 8,909 words and 896 lines and complies with the limitations contained in Rule 84.06(b). In addition, I hereby certify that Respondent's Brief has been transferred in Microsoft Word format to a CD-ROM which is IBM-PC compatible; the attached CD-ROM has been scanned for viruses using McAfee virus detection software and the CD-ROM is virus-free.

Stephanie E. Karr

Certificate of Service

I hereby certify that two copies of Respondent's Brief in printed form and a copy of Respondent's Brief in electronic form was mailed on this _____ day of August, 2010, by placing same in the U.S. Mail, postage paid, to: Dennis Owens, Attorney for Appellants, 7th Floor, Harzfeld's Building, 1111 Main Street, Kansas City, Missouri 64105; and John W. Waller, Co-Counsel for Appellants, Bank of Sullivan Building, 318 West Main Street, Sullivan, Missouri 63080.

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