

IN THE SUPREME COURT OF MISSOURI

Arbor Investment Company, LLC, et al.,	)	
	)	
Plaintiffs/Appellants,	)	
	)	
vs.	)	No: SC91109
	)	
City of Hermann,	)	
	)	
Defendant/Respondent.	)	

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Substitute Reply Brief of Appellants

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Appeal from the Circuit Court of Gasconade County  
The Honorable Gael D. Wood, Circuit Judge

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## ARGUMENT

The substitute brief submitted by the City of Hermann inexplicably fails to offer any response to most of the arguments advanced by the plaintiffs (as well as the Attorney General and the State Auditor), while it strenuously opposes claims that the plaintiffs do not advance. The *Keller* factors were not intended to be controlling in a case like this one, in which the undisputed facts show that municipal charges for necessary services were increased to yield a surplus for the purpose of funding the City's ordinary governmental expenditures. The City's failure to provide any defense of the *Keller* footnote factors shows that the judgment of the circuit court, which was based solely on the factors, should be reversed.

The plaintiffs have shown that the *Keller* footnote factors are inconclusive, vague, subject to manipulation, and unworkable. The City does not even attempt to argue to the contrary. The City also does not respond to the argument by the Attorney General and the State Auditor that the Court should not attempt to struggle with the *Keller* footnote considerations, which are demonstrated to be "vague and ambiguous . . . self-contradictory . . . unhelpful . . . problematic." The City merely repeats the footnote factors and cites cases from the Court of Appeals attempting to apply them, but never offers any rationale for why the *Keller* factors *should* or *must* be analyzed in this case (or any other). The City's silence speaks volumes about the lack of any logical or principled reason to attempt to apply the considerations listed in the *Keller* footnote, which are not relevant to the utility increases at issue in this case.

The City ignores the fact that, in the only two cases in which the Court has ever attempted to apply the *Keller* footnote factors, the Court has found them to be inconclusive. See *Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217 (Mo. banc 1993) (“In sum, application of the *Keller* test to the facts of this case provides no clear answer as to the nature of MSD’s charges.”); *Feese v. City of Lake Ozark*, 893 S.W.2d 810, 812 (Mo. banc 1995) (noting “the calculus did not produce a definitive answer”). And the City fails to address the Court’s holding that, if any genuine doubt exists as to whether the Hancock Amendment is applicable, the Court resolves any uncertainty “in favor of the voter’s right to exercise the guarantees they provided for themselves in the constitution.” *Beatty*, 867 S.W.2d at 221.

In attempting to persuade the Court -- without explanation or analysis -- to decide this case solely on the basis of the footnote factors, the City fails to acknowledge the clear holding of *Keller* that the Hancock Amendment prohibits “fee increases that are taxes in everything but name.” *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 303 (Mo. banc 1991). Because Section 22 of the Hancock Amendment is intended to prevent political subdivisions from circumventing the voting requirement by labeling a tax increase as a license or fee, courts are required to examine the substance of a charge without regard to the label used by the entity imposing it. *Id.* at 305. *Keller* holds that increases in local charges are subject to the Hancock Amendment if the object of the increase is to raise revenue to be paid into the general fund to defray customary governmental expenditures, rather than compensation of public officers for particular services rendered. *Id.* at 304 (quoting *Zahner v. City of Perryville*, 813 S.W.2d 855, 859

(Mo. banc. 1991)). Contrary to the plain language of the Hancock Amendment and the holding of *Keller*, the City invites the Court to ignore the substance of the increases at issue in this case, without any explanation.

Instead of responding to the issues presented to the Court, the City attempts to deflect the Court's attention. For example, the City and its allies declare that the plaintiffs are complaining about transfers from the City's electrical fund to its general fund. This claim is false. The Hancock Amendment is not concerned with a city's internal accounting or the amounts of interfund transfers. *See Pace v. City of Hannibal*, 680 S.W.2d 944 (Mo. banc 1984). As far as the Hancock Amendment is concerned, and subject to other requirements of law, a city is free to move money from fund to fund. The plaintiffs in this case, however, are contesting ***increases in local charges*** that are within the scope of the Hancock Amendment. Whether an increase in a local charge violates the Hancock Amendment is a separate question from whether money is properly moved between funds. *Id.* at 945-46. The City's transfers in this case are relevant to show the extent of the City's violations of the Hancock Amendment through raised utility charges, but the transfers in and of themselves are not Hancock Amendment violations.

Contrary to another contention of the City and its allies, the plaintiffs are not arguing that all municipal operations must be charged solely at cost. The plaintiffs in this case complain about governmental charges increased without a vote that are imposed by utilities that have a monopoly. If a city operates a snack stand at a municipal park, the amount it charges for snacks is not subject to the Hancock Amendment. A city can increase the charges for snacks without a vote of the people because the public has many

options for buying snacks, and a city's charges at a snack stand are not imposed on anyone. However, in a case such as this, where the necessities of life are subject to a governmental monopoly, the people have no real choice but to pay the increased charge. When such a charge is increased without a vote to raise general revenue, the Hancock Amendment is violated.

**I. The Court should abandon the *Keller* footnote factors.**

Instead of addressing the inadequacies of the footnote considerations, the City claims that “the question of abandoning the Keller factors is not properly before this Court.” Respondent’s Substitute Brief at 35. This is nonsense. The Supreme Court of Missouri is the *only* court with the power to revisit the factors discussed in its own *Keller* opinion. *See Beatty*, 867 S.W.2d at 220 (noting the Court will “continue to assess the wisdom and viability of *Keller*’s holding in appropriate cases”). The City’s suggestion that the plaintiffs were required to ask the Court of Appeals to declare that a portion of *Keller* should no longer be followed ignores the relationship between the two courts. The Court of Appeals is constitutionally bound to follow the decisions of this Court. *In re Pogue*, 315 S.W.3d 399, 403 (Mo. App. 2010).

In this case, the Court of Appeals noted that the plaintiffs contended “that we need not even examine the *Keller* factors.” *Arbor* at 6. The Court of Appeals rejected the argument that the *Keller* footnote should not be followed because this Court “had clearly adopted the five factor analysis” in *Beatty*. *Id.* This issue is properly before this Court to be decided.

A substitute brief allows a party to address issues that are unique to this Court:

The substitute brief provides an opportunity to hone and refine one's earlier brief. Moreover, the substitute brief allows one to address the Supreme Court -- the one empowered to reexamine and authoritatively declare the law of Missouri. Hence, the substitute brief should be utilized to set forth a more detailed analysis of the pertinent issues and to discuss, if relevant, the public policy and societal concerns pertinent to the issues.

Daniel P. Card II & Alan E. Freed, 24 *Mo. Practice* § 11.11 (2d ed. 2001).

The plaintiffs' substitute brief in this case appropriately addresses issues that are uniquely within this Court's power and discretion to consider. The City's argument to the contrary should be rejected.

The City's frivolous argument is based on Rule 83.08, which provides that a substitute brief in this Court may not "alter the basis of any claim that was raised in the brief filed in the court of appeals." The plaintiffs have not altered the basis of their claim, as shown by the point relied on in this Court, which is precisely the same one asserted in the Missouri Court of Appeals. No. ED92933, Appellants' Brief at 14; No. SC91109, Appellants' Substitute Brief at 18. Thus, the basis of the plaintiffs' claim before this Court is exactly the same as in the Missouri Court of Appeals.

In support of this identical point relied on in the Court of Appeals, and just as they do in this Court, the plaintiffs cited *Keller* and *Zahner* to show that the fundamental question in determining whether a fee increase is subject to the Hancock Amendment is whether it is paying for ordinary governmental expenditures or simply covering a city's costs to provide the service. No. ED92933, Appellants' Brief at 17. The plaintiffs argued that fees that citizens have no choice but to pay cannot be increased for the purpose of subsidizing ordinary governmental operations without violating the Hancock Amendment. *Id.* The plaintiffs argued that there is no need to consider the *Keller* footnote factors in this case where the undisputed facts shown that the fee increase is calculated to yield a surplus for the very purpose of funding ordinary governmental expenditures. *Id.* at 24-25. The plaintiffs argued that, even if they were applicable, the *Keller* footnote factors demonstrate that the City's fee increases violate the Hancock Amendment. *Id.* at 26.

In the Court of Appeals, the plaintiffs relied on *Zahner*, *Keller*, and *Beatty* in seeking to have the summary judgment in this case reversed, arguing that the *Keller* footnote should not be considered. This is precisely the basis of the claim asserted in this Court. The City's argument to the contrary is frivolous.

## **II. The City's argument shows the lack of utility of the *Keller* factors.**

To see how clearly the *Keller* footnote factors are divorced from the holding of *Keller*, the Court need only review the City's brief. The City's discussion of the factors leaves no doubt that the footnote should be abandoned.

As to the first factor (When is the fee paid?), the City mentions *Wright v. City of Pine Lawn*, ED94290 (Mo. App. 2010), in which the City of Hermann’s counsel in this case, Mr. Heinz, argued that while this first prong of the *Keller* footnote might be relevant in considering the validity of the initial *imposition* of a municipal charge, it has no relevance to consideration of a fee increase. See *Wright v. City of Pine Lawn*, No. ED94290 (Respondents’ Brief filed May 28, 2010, available through Westlaw as 2010 WL 2589205 at \*10). In the *Wright* case, Mr. Heinz’s clients claimed that the increase of a municipal fee was invalid without a vote. His brief for the complaining residents dismissed the first *Keller* factor in the context of a fee increase: “This factor might favor City in the issue of the original fee, but it has no relevance to this situation of a fee increase. In this case, Respondents receive no increase in service as a result of the increased fee as set forth in the 2005 Pine Lawn Ordinance. Respondents were entitled to an inspection fee of \$75.00. Under the new ordinance, the fee was increased to \$200.00 for the same inspection.” *Id.*

The plaintiffs in this case do not claim that the City of Hermann is bound by the logical and thoughtful argument advanced by the citizens in the *Wright* case. But that argument is consistent with the argument advanced by the plaintiffs in this case, as well as the brief of the Attorney General and the State Auditor, who note that when a fee is paid is not helpful in determining what portion of a utility charge is a true “user fee” under *Keller*. The City does not attempt to explain how the argument advanced by Mr. Heinz in the *Wright* case is in any way incorrect.

As to the second factor (Who pays the fee?), the City says that the fact “that the customers have to purchase utilities from the City does not form any part of the second Keller criterion.” If so, then what use is the second factor? If the fact that an increase is paid by citizens who must rely on a monopoly is irrelevant, why ask the question?

In addressing the second factor, the City says, “Compulsion to pay is not one of the indicia of a tax under Keller.” This is simply false. *Keller* makes it clear that fees or charges prescribed by law -- i.e., compelled -- to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not taxes, “unless the object of the requirement is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures rather than compensation of public officers for particular services rendered.” *Keller*, 820 S.W.2d at 303-04 (quoting *Zahner*, 813 S.W.2d at 859). Compulsion to pay an amount for general revenue disguised as a user fee is the *essence* of *Keller*.

As to the third factor (Is the amount of the fee affected by the level of goods or services?), the City claims that this question “refers to a relationship with receipt, not cost of service.” If this factor requires no relationship between the increased governmental charge and the cost of the service, it surely has no relevance to *Keller*, which holds that increased charges are subject to the Hancock Amendment if they “raise revenue to be paid into the general fund of the government.”

As to the fourth factor (Is the government providing a service or good?), the City claims that the test “requires nothing more than a consideration as to whether the City is providing a good or a service.” According to the City, it does not matter whether the

overwhelming majority of an increased charge for a good or a service is calculated to fund general revenue, as long as the citizen receives *anything* in return for the payment. As noted, this contention is squarely contrary to the holding of *Keller*.

As to the fifth factor (Has the activity historically and exclusively been provided by the government?), the City says that this “is basically an inquiry as to whether the activity is a governmental or proprietary function.” As discussed more fully below, after it decided *Keller*, this Court rejected any claim that the Hancock Amendment did not apply to proprietary functions. *Missouri Municipal League v. State*, 932 S.W.2d 400 (Mo. banc 1996). It is clear that Section 22 of the Hancock Amendment does not distinguish between governmental and proprietary activities. *Id.* at 403. Recognizing such a distinction would “thwart the purpose of the Hancock Amendment.” *Id.*; see *Loving v. City of St. Joseph*, 753 S.W.2d 49 (Mo.App.1988). If the City is correct about this *Keller* factor, then the factor has no relevance at all.

As noted, the City never explains how the *Keller* footnote factors are relevant to determining whether an increased charge is subject to the Hancock Amendment. The City’s argument shows why the City never undertook to defend the factors. The footnote factors do not aid the Court in determining whether a charge is within the scope of the Hancock Amendment as explained in *Keller*.

### **III. The Court’s test should be the holdings of *Keller* and *Zahner*.**

Apart from footnote 10 of the *Keller* case, this Court’s decisions provide the appropriate test to determine whether a charge imposed or increased by a local government violates Section 22 of the Hancock Amendment. *Zahner* and *Keller* hold

that increases in municipal charges that raise revenue to be paid into the general revenue fund to defray customary governmental expenditures, rather than to compensate public officers for particular services rendered, are effectively taxes and thus subject to the Hancock Amendment. As *Zahner* explains and *Keller* confirms, the Hancock Amendment does not apply to “an exaction demanded by the government for specific purposes and not intended to be paid into the general fund to defray general public needs or governmental expenditures.” *Zahner*, 813 S.W.2d at 859. This is the test, firmly rooted in the Court’s existing jurisprudence, that the Court should continue to apply.

This test is expressed well in the brief of the Attorney General and the State Auditor, who explain that “user fees” are either fees that have a direct relation to the costs of providing services, or that are voluntarily paid when a political subdivision sells in an open market. A charge or increase imposed by a municipality can qualify as a “user fee” in one of two ways.

First, the charge or increase can be limited to what the services cost. As the Attorney General and the State Auditor note, “though this and other courts have spoken of the costs to the political subdivision of providing goods or services, they have not required that every penny charged be justified by an expense already incurred; certainly political subdivisions must be allowed to estimate not just past and current but future costs of providing goods and services – just as private sellers do. And among the costs that are incurred are those relating to cash reserves. But utility cash reserves aren’t spent on fire trucks or playground equipment. Charges that are imposed in order to gather

revenue for ‘such general fund’ expenses cannot be characterized as ‘user fees’ under this approach.” Brief of Attorney General and the State Auditor at 5-6.

Second, “user fees” include charges (and increases of charges) for goods or services that the political subdivision offers in an open marketplace. This is because such payments -- unlike the increases at issue in this case -- are voluntary in that the purchaser can choose among competitive alternatives. Going without essential public services like the ones in this case is not a real choice, at least for most citizens and businesses. “Where a purchaser has a real choice, whatever the political subdivision can charge in the open market is logically treated as a ‘user fee’ outside of the Hancock Amendment. But where the political subdivision is the only legal or practical provider of an essential service – as with a utility that has an exclusive territory – the real ‘user fee’ is limited to the charge that covers costs of providing the service.” Brief of Attorney General and the State Auditor at 10.

As the plaintiffs have explained, they are not claiming that they should receive service from municipal utilities for free. Rather, they are claiming that charges for municipal utilities at the same rates as existed in 1980 are valid. Increases in charges for municipal utilities that are reasonably calculated to compensate for the costs of providing goods and services are not subject to the Hancock Amendment. But increases in charges for municipal utilities must be put to a vote of the people if they exceed compensation for costs and lead to payments into the general fund to defray general public needs or governmental expenditures.

Contrary to the contentions of the City and its allies, it is plain that the plaintiffs are not seeking to overturn *Keller* or *Zahner*. Those cases are and should remain good law -- true user fees are not subject to Hancock, but other fees and portions of user fees transferred to the general fund or used for governmental purposes are subject to Hancock if there is an increase after 1980.

In appropriate circumstances, Missouri law allows a local government to make a “profit,” or transfer an amount in lieu of a franchise fee to general revenue, or make PILOT payments. As shown in *Pace v. City of Hannibal*, 680 S.W.2d 944 (Mo. banc 1984), and *United States v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990), these concepts existed and were engrained in municipal finance long before the passage of the Hancock Amendment in 1980. *Keller* is not offended by *Pace* or *Columbia*.

In *Pace*, the City of Hannibal had a PILOT equal to 5.5 percent of gross revenue in place (before the adoption of the Hancock Amendment) “from the inception of the utility operation.” *Pace*, 680 S.W.2d at 945. This Court properly found that continuing this documented, consistent practice did not violate Hancock because the levy (rate) of the PILOT payment (the component of the utility charges that was not a true user fee) had not been increased after 1980. This is notably different than the situation in this case, where no gross receipts charge was imposed on gas receipts and the gross receipts charge on electricity was raised from five percent to ten percent without a vote, and other general-fund gap fillers like a communications fee and a billing/collection fee were transferred from the utility fund.

The Missouri Municipal League’s brief baldly misstates the meaning of *Pace*, falsely asserting that *Pace* “directly addressed the issue raised by Appellants here in upholding an increased utility rate which generated additional ‘revenue’ for the general fund due to transfers from the service fees in the approximate amount of a ‘franchise tax’ that a private utility would otherwise pay.” Brief of Missouri Municipal League at 10. The Missouri Municipal League falsely claims that *Pace* holds that utility “rate increases or transfers to the general fund did not come within the Hancock Amendment.” *Id.*

Quite to the contrary, *Pace* explicitly states that the issue before the Court in this case was not considered or decided: “It should be emphasized that the propriety of the rate increase is not placed in issue. It is specifically not asserted that the board lacked the authority to order an increase in utility rates, or that the increase required a vote of the electorate under the terms of the Hancock Amendment.” *Pace*, 680 S.W.2d at 945. Contrary to the false statements of the Missouri Municipal League, *Pace* does not address whether an increase in a municipal charge violates the Hancock Amendment.<sup>1</sup>

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<sup>1</sup> The Missouri Municipal League’s brief is also false in accusing the plaintiffs of misquoting *Keller* and misstating its holding. The phrase “prescribed by law” in *Keller* is a quote from *Zahner*, 813 S.W.2d at 859. The Missouri Municipal League fails to note that the “prescribed by law” language is not omitted from the plaintiffs’ brief, but rather is set forth at length in discussing *Zahner*. Appellants’ Substitute Brief at 34. Further, in this case, it is undisputed that the City’s utility charges are “prescribed by law” in the form of ordinances.

*Columbia*, which no published Missouri case has ever cited, is a federal tax case that does not even mention the Hancock Amendment. This is not surprising, because the Tax Injunction Act bars all federal courts from entertaining any suit relating to the collection of local taxes. 26 U.S.C. § 7421(a). *Columbia* explicitly states that it does not decide any issue relevant to this case: “This is not a case in which a party has challenged a municipality’s basic power to obtain some measure of profit from its utility enterprise. That a municipality may do so appears accepted.” *Columbia*, 914 F.2d at 155. *Columbia* holds, as a matter of federal law, that the federal government is not immune from paying a municipal utility charge that includes an existing PILOT to be paid to the city’s general fund in lieu of a franchise tax. *Id.*

*Columbia* does not purport to have anything to say about the Hancock Amendment or whether, as a matter of state law, a city can increase a “tax, license or fee” in order to fund general revenue without voter approval.

*Pace* and *Columbia* demonstrate how cities can act properly in connection with PILOTs or profits, by establishing clear and consistent practices based on ordinances and charter provisions. This is in stark contrast to the City of Hermann, where increases in the amount of utility charges generate huge surpluses that are transferred to the general fund are imposed without voter approval and as needed to plug holes in the budget. If cities want to increase the rate or amount of profit, PILOTs, or franchise fees over the amount currently in place as of 1980, they are free to do so with voter approval. The Hancock Amendment is a safeguard that citizens have reserved for themselves. Hancock does not alter or hamper the operations of a properly managed municipal utility.

In discussing its version of the history of its “charges” levied against its electric, water, sewer, and trash utilities, the City vindicates the people’s distrust of the determination and creativity of some local officials in attempting to circumvent the intent of Section 22 to prohibit the imposition or increase of taxes, licenses, or fees without voter approval. Contrary to the statements in the City’s brief, Ordinances 680 and 681 do not purport to impose a “charge,” Respondent’s Substitute Brief at 4, but expressly levy a “*tax*” of ten percent on gross receipts for water, sewer, and electric, L.F. 97-99 (emphasis added). While Ordinances 680 and 681 were adopted in 1977 (before Hancock), the City withholds reference to Ordinance 875, which was adopted in 1982 (after Hancock) and reduced the gross receipts *tax* on electric to five percent. Hancock Allows such a *reduction* without a vote, but does not permit the City’s attempt in Ordinance 1184 (in 1994) to raise the current levy of a gross receipts tax on electricity to ten percent without a vote of the people. See *Wenzlaff v. Lawton*, 653 S.W.2d 215 (Mo. banc 1983). The City also fails to mention additional transfers from the electric fund to other governmental operations (including parks, cemetery, and airport) totaling over \$425,000 from 2001 to 2003 or its arbitrary and unsupported transfers to the general fund labeled at “communications fees.” L.F. 1564-1566.

The record shows numerous blatant violations of the Hancock Amendment by the City with respect to the funds demanded for essential services, such as the imposition of a gross receipts “surcharge” on its gas utility in 2002, long after Hancock. L.F. 1689. In fiscal 2006, the City made transfers of over **\$829,000** from the gas utility to other funds (including general, cemetery, and parks). L.F. 1800. The City’s budget for 2007 called

for transfers from the refuse and water funds in the amount of \$55,000 to support cemetery and airport operations. L.F. 1773.

The plaintiffs agree with the Attorney General and the State Auditor that the Hancock Amendment does not bar a municipal utility from continuing to collect for general revenue a portion of its *existing* rate, but that a public vote is required if the utility seeks to *increase* the portion of the rate that is not being collected to pay the costs of the service. In an appropriate case, the plaintiffs might disagree with the argument that the contribution must always be expressed as a rate. The portion that constitutes a contribution to general revenue may be expressed as an amount (X dollars per year as a franchise fee or PILOT) or as a rate (X percent of utility charges as a franchise fee or PILOT), depending on the basis on which the municipality consistently expressed the contribution in 1980 or obtained voter approval thereafter.

#### **IV. Hermann's utility increases violate the Hancock Amendment.**

The City concedes that it increased its utility fees after November 4, 1980. The City concedes that it did so without a vote of the people. The City concedes that at least a portion of these increases is used to fund general revenue. Thus, the City's utility rate increases violate the Hancock Amendment.

The City does not dispute that the Hancock Amendment aspires to erect a comprehensive, constitutionally rooted shield to protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers on November 4, 1980, the date the Amendment was approved. *Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918 (Mo. banc 1995). Hancock reveals the voters' basic distrust of the ability of

representative government to keep its taxing and spending requirements in check. *Beatty*, 867 S.W.2d at 221.

The fundamental question in determining whether a fee increase is subject to the Hancock Amendment is whether it is paying for ordinary governmental expenditures or simply covering the city's costs to provide the service. *See Keller*, 820 S.W.2d at 301. As *Keller* explains, the Hancock Amendment requires a vote of the people for municipal increases in taxes, licenses, or fees that are to provide monies for general revenue after November 4, 1980.

**A. A charge need not be a tax to violate the Hancock Amendment.**

The City vigorously argues that its utility charges are not taxes. This vigor is misplaced. The plaintiffs do not claim that the utility charges are taxes. Rather, as explained at length in the plaintiffs' substitute brief, the increases in the City's utility charges are in violation of Section 22 of the Hancock Amendment. It is undisputed that such increases can violate the Hancock Amendment when enacted without a vote of the people. *See Ring v. Metropolitan St. Louis Sewer Dist.*, 969 S.W.2d 716 (Mo. banc 1998) (wastewater fee); *Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217 (Mo. banc 1993) (wastewater fee); *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo. banc 1995) (sewer charges).

The City and its allies would have the Court read the constitutional phrase "tax, license or fees," to mean "tax, tax, or tax." According to the City and its allies, if the charge is not a "tax" as defined by Black's Law Dictionary, then it is not controlled by the Hancock Amendment. This baseless theory is inconsistent with the plain language of

Section 22 and directly contrary to the Court's Hancock cases. If the people had meant to regulate only local taxes, the people would not have included "license or fees" in the prohibition. The prohibition must refer to more than taxes.

As the Court has noted, the Hancock Amendment is based on Michigan's Headlee Amendment, which imposes nearly identical restrictions on Michigan government. *Scholle v. Carrollton R-VII School Dist.*, 771 S.W.2d 336, 338 n.2 (Mo. banc 1989). The Michigan enactment, however, merely prohibits local governments from "increasing the rate of an existing tax." Mich. Const. art IX, § 31. The Hancock Amendment must go beyond taxes when it explicitly extends the prohibition to "tax, license or fees."

The City's contention that its utility increases are mere contractual payments that do not implicate the Hancock Amendment is contrary to the facts. It is plain that the City's increases are the levy of an increased fee within the meaning of Section 22 and *Keller*. To levy means to "impose or collect by legal authority" or "to require by authority." *American Heritage College Dictionary* 780 (3d ed. 1993). A levy is "a raising or collecting, as of money or troops, by authority or force; one who or that which is raised or collected in this manner." *Webster's Encyclopedic Unabridged Dictionary* 824 (1989).

Thus, the Hancock Amendment is concerned with increased charges that are imposed on the people. As the plaintiffs (as well as the Attorney General and the State Auditor) have explained, fees that citizens have no real choice but to pay cannot be increased for the purpose of subsidizing ordinary governmental operations without

violating the Hancock Amendment. If this case involved a contract, it would be an unenforceable contract of adhesion.

The City's claim that it does not have a monopoly is contrary to the facts. The City has a monopoly on electric, natural gas, public water, public sewer, and refuse services. L.F. 1607-08. No Hermann citizens are allowed to obtain their natural gas, electricity, public water, or public sewer services from any provider except the City. L.F. 1607-08, 1025. The citizens of Hermann have no choice but to pay whatever the City charges for utility services. L.F. 1607-08.

The City's claim is also contrary to the law. Section 91.010, RSMo, authorizes cities to operate water, gas, electric, and other utilities. Once a city provides electrical service, it is exclusive. *See* § 91.025.2, RSMo ( "other suppliers of electrical energy shall not have the right to provide service"). Chapter 250, RSMo, authorizes cities to provide and finance sewer services. Property owners of all buildings where people live, work, or assemble are required by law to provide for the sanitary disposal of sewage. § 701.031, RSMo. Similarly, solid waste management (trash pickup) is governed by Chapter 230, RSMo, requiring cities to have a plan that provides for trash collection and disposal. A city can provide the service or contract it out, but the city is responsible for providing this service within its jurisdiction. A city can charge fees for collection and/or impose taxes (by vote of the people) to cover the cost of this service.

These essential services are provided exclusively by either a municipal entity or a private utility company subject to public regulation. *See* § 386.010, RSMo (authorizing Public Service Commission to regulate private utilities, but not municipal utilities). As

explained by the Attorney General and the State Auditor, in any realistic sense, the people must use these services. And as a matter of fact, all Hermann citizens are City utility customers. L.F. 1595, 1012-1015.

The City has a monopoly on essential services. Increases in the charges imposed for these services without voter approval to fund general revenue are subject to the Hancock Amendment.

**B. The City’s governmental/proprietary distinction is irrelevant.**

Similarly, the City seeks to misdirect the Court by an argument based on the distinction between governmental and proprietary functions. This argument is squarely foreclosed by *Missouri Municipal League v. State*, 932 S.W.2d 400 (Mo. banc 1996), in which it was argued that the Hancock Amendment did not apply to proprietary functions. In *Missouri Municipal League*, the Court explained that the distinction between governmental and proprietary functions has little, if any, application outside of the tort liability of municipalities. *Id.* at 402-03. The Court noted that Section 22 of the Hancock Amendment does not distinguish between governmental and proprietary activities. *Id.* at 403. Recognizing such a distinction would “thwart the purpose of the Hancock Amendment.” *Id.*

In *Missouri Municipal League*, the Court cited with approval *Loving v. City of St. Joseph*, 753 S.W.2d 49 (Mo.App.1988), a case relied upon by the plaintiffs in their brief before this Court. In *Loving*, the Court of Appeals explained that Section 22 does not draw any distinction between governmental and proprietary activities and extends to increasing or levying *any* tax, license, or fee: “The constitutional provision is broad

enough to cover all functions of a municipality and not just those of a proprietary nature. This is consistent with the purpose of the amendment contained in Article X, Section 22, which was to rein in increases in governmental revenue.” 753 S.W.2d at 51.

Notably, the City fails to cite *Missouri Municipal League* or *Loving*. The plaintiffs’ brief before this Court cited *Loving*, and yet that legal authority directly adverse to the exact governmental/proprietary distinction advanced by the City goes unmentioned in the City’s brief.

**C. A city’s discretion to increase utility charges and make a profit cannot supersede the Hancock Amendment.**

Citing various pre-Hancock authorities, the City claims that “municipal utility rates are only subject to equitable jurisdiction for rates that are clearly, palpably and grossly unreasonable.” This is absurd. The City cites exactly zero authority for the contention that the Hancock Amendment -- part of the organic law of this state -- has any exemption for municipal utilities. To the contrary, the Court has recognized that Hancock applies in this context. *See Ring; Beatty; Feese*.

Ignoring the plain language of the Hancock Amendment and this Court’s jurisprudence, the City declares that allowing the people to vote on utility charges “would be unsustainable.” This unsupported contention is contrary to the evidence, which shows that the City did submit a previous utility increase to the people. L.F. 1035, 1003-04.

Further, the City’s argument is squarely contrary to the central purpose of the Hancock Amendment, which prohibits local tax or fee increases without popular vote. *See Buchanan v. Kirkpatrick*, 615 S.W.2d 6, 8 (Mo. banc 1981). It is well settled that it

is not within the power of the Court (or the City of Hermann) to judge the wisdom of the people in adopting the Hancock Amendment. *Id.* at 11. The wisdom and expediency of a constitutional amendment “are questions upon which the people are to pass, and over which the courts have no power.” *Edwards v. Lesueur*, 132 Mo. 410, 33 S.W. 1130, 1133 (banc 1896). The people chose to give themselves the right to vote on increases in local charges like the ones at issue in this case. Respectfully, it is not for the Court (or certainly the City violating the Hancock Amendment) to second guess that decision.

The plaintiffs cited *Buchanan* and *Edwards*, yet these cases go unmentioned in the City’s brief before this Court. The City fails to support its claim that the wisdom of the people should be ignored.

In a related argument, the City and its allies claim that municipal utilities are allowed to make a profit. While this contention is true enough in the abstract, such a profit cannot be obtained in violation of the Missouri Constitution. The City and its allies do not cite any authority showing that a municipal profit could ever be proper when obtained in violation of the Hancock Amendment.

**V. This case is not a tax protest.**

The City incorrectly contends that tax-protest procedures apply to all Hancock claims. Not all Hancock claims are tax claims. If that were true, then the words “license or fee” in the Missouri Constitution would be meaningless. By its terms, section 139.031, RSMo, which applies to tax protests, does not apply to Hancock claims challenging license or fee increases. Equity and fairness require that tax statutes not impede enforcement of constitutional rights against a municipality that does not label its

fees as taxes and insists that they are not taxes. L.F. 994; 1600-1601. Throughout this litigation, the City has loudly insisted that its charges are user fees, not taxes.

The City's argument that it lost the opportunity to set aside money for a refund is disproved by the record. The State Auditor provided the City with a report identifying numerous Hancock violations. L.F. 1558, 1568; 997-1006. The City understood the auditor's criticisms and recommendations. L.F. 1006. But the City did not set aside money for a refund. L.F. 1026; 1601-1602. It siphoned money out of utility accounts into general revenue and substantially raised electric rates. L.F. 1604; 1607-08.

The plaintiffs filed their petition in this case in 2006, giving the City further notice that its utility increases were unconstitutional. Did this prompt the City to set aside money for a refund at that time? No. L.F. 1601-1602. The City has never set aside money for a refund. L.F. 1026; 1601-1602. The decision not to do so was the City's, and not based on any lack of notice of its own Hancock violations.

The City's cited cases were brought by "taxpayers." *Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795 (Mo. App. 2005), is not a Hancock case -- it involves a claim that a tax violated the Commerce Clause. *S&P Properties, Inc. v. City of University City*, 178 S.W.3d 579 (Mo. App. 2005), is not a Hancock case -- it involved a challenge to tax bills arising out of failure to pay refuse collection fees. *Metts v. City of Pine Lawn*, 84 S.W.3d 106, 107 (Mo. App. 2002), involved taxpayer challenges to "taxes levied" and potential "tax liens" arising under ordinances that imposed an "assessment for collection of garbage and trash." The Court of Appeals affirmed dismissal of the challenge because it was not brought before the ordinance had been mooted by a

subsequent vote of the people and because the challengers did not comply with the tax protest procedures set forth in section 139.031. These cases involved taxpayers challenging taxes denominated as such. In this case, the City steadfastly denies that its utility increases are taxes.

Even if there were a protest requirement, the filing of the plaintiffs' action gave the City notice of the challenge to its utility rates, satisfying any protest requirement. *Koehr v. Emmons*, 55 S.W.3d 859, 863 (Mo. App. 2001). Notification of a tax protest may occur in ways other than the procedure specified in section 139.031. *See Board of Educ. v. Daly*, 272 S.W.3d 228 (Mo. App. 2008) (notice of appeal).

If the tax protest statute applied to this case (and it does not), that procedure is not an exclusive remedy. *Ingels v. Noel*, 804 S.W.2d 808, 810 (Mo. App. 1991). The statute does not preclude injunction claims. *Id.* The plaintiffs in this case expressly sought an injunction. L.F. 21-22. The plaintiffs' claim for an injunction would not be barred. *Vogt v. Emmons*, 158 S.W.3d 243, 252 (Mo. App. 2005). And the plaintiffs would still be entitled to a declaratory judgment. *Taylor v. State*, 247 S.W.3d 546, 548 (Mo. banc 2008).

#### **VI. The City's arguments about the city collector are baseless.**

The City's Point IV sets forth two frivolous arguments. The City seems to claim that its city collector should have been joined as a party on the theory that "Section 139.300 RSMo. provides that liability, if any, for alleged user charges may fall upon the City Collector." That statute actually states that every officer who refuses or knowingly neglects to perform any duty "relating to the assessment, levy and collection of taxes" is

liable on his or her official bond “for double the amount of the loss or damage caused thereby” and faces other potential fines. § 139.300, RSMo. As noted, and as the City insists, this case does not relate to taxes. Further, the City never asserted the absence of any necessary party in its answer; thus, this issue was waived. *Brady v. Ansehl*, 787 S.W.2d 823, 826 (Mo. App. 1990).

Similarly, the City claims that an action against any officer upon a liability in his or her official capacity must be filed within three years. This is not an action against an officer; it is an action against a city. Further, the City does not allege any date from which a statute of limitations should run. This argument provides no basis for relief.

#### **VII. The plaintiffs’ brief does not violate Rule 84.04.**

The City’s last argument is very odd. The City claims that the plaintiffs’ brief in the Court of Appeals violated Rule 84.04, and the City even favors the Court with a copy of the fervid motion to dismiss that the City filed in the lower court. Notably, the City does not mention that the Court of Appeals denied this motion to dismiss. *Arbor* at 2 n.1

The City also argues that some portion of the plaintiffs’ substitute brief in this Court is defective, without stating exactly which portion. The Court may note that the statement of facts in the plaintiffs’ substitute brief consists solely of facts and has at least one citation to the record for every factual statement (unlike the purported statement of facts in the City’s substitute brief, which is rife with argument and unsupported assertions of “fact”). While a reviewing court might dismiss an appeal because a brief is so egregiously deficient that it preserves nothing for appellate review, the plaintiffs’ substitute brief fully complies with Rule 84.04. This Court’s rules are to be liberally



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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief 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 7,740, except the cover, certificate of service, certificate required by Rule 84.06(c), and signature block.

The undersigned further certifies that the disk filed with this brief and the disks served on the parties were scanned for viruses and found virus-free through the Symantec anti-virus program.

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