In the Missouri Court of Appeals
Eastern District

ARBOR INVESTMENT COMPANY, LLC, et al.,	)	No. ED92933
	)	Appeal from the Circuit Court of Gasconade County
Appellants,	)	Hon. Gael D. Wood
CITY OF HERMANN,	)	Filed:
Respondent.	)	June 22, 2010

Arbor Investment Company, LLC, et al. ("Appellants") appeal from the trial court's grant of summary judgment in favor of the City of Hermann ("the City"). Appellants argue the trial court erred in entering summary judgment in favor of the City. Because we find there are genuine issues of material fact, we reverse and remand.

Appellants own real and personal property in the City and have paid all applicable city taxes and utility charges for gas, electricity, water/sewer and refuse/waste for several years. Appellants filed a motion for class certification, which was granted by the trial court. Appellants alleged the City charged them and the other citizens and utility users rates for electricity, water/sewer, natural gas and refuse/waste that have been grossly excessive. Appellants asserted the City inflated its rates to generate revenue to finance its ordinary governmental operations. Appellants maintained the City had, without a vote of the people, effectively levied hidden taxes on its citizens through the excessive charges

for services and utilities. Appellants argued this practice is and has been a violation of the Hancock Amendment, Mo. Const. Art. X, Section 22.

Appellants' petition included three counts: Count I, which sought a declaratory judgment, Count II, which sought injunctive relief including a refund of past overpayments, and Count III, which sought damages.

In response, the City filed a motion for summary judgment in which it argued: (1) the ordinance and utility billing practices preceded the adoption of the Hancock Amendment and intra-city transfers of funds or charges are not subject to the Hancock Amendment; (2) Appellants lacked standing because there was no tax levied upon them; (3) Appellants failed to exhaust their administrative remedies; and (4) it was entitled to judgment based on the statute of limitations.

Appellants also filed a motion for partial summary judgment on their claims for a refund, an injunction, and a declaration based on the City's utility fee increases alleged to be in violation of the Hancock Amendment.

The trial court, relying on the five factors used to help resolve Hancock Amendment issues from Keller v. Marion County Ambulance District, 820 S.W.2d 301 (Mo. banc 1991), found in favor of the City on four of the five factors and concluded the fees and charges paid by Appellants as set forth in their petition were not subject to the Hancock Amendment. Thus, the trial court granted the City's motion for summary judgment and denied Appellants' motion for partial summary judgment. This appeal follows.[1]

[1] The City's motion to dismiss due to violations of Rule 84.04, which was taken with the case, is hereby denied.

Appellate review of a trial court's grant of summary judgment is essentially *de novo*. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). We will review the record in the light most favorable to the party against whom judgment was entered. Id. We accord the non-movant the benefit of all reasonable inferences from the record. Id. The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially. Id. We will uphold summary judgment on appeal only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Id.

In their sole point, Appellants argue the trial court erred in entering summary judgment in favor of the City because the undisputed facts do not entitle the City to judgment as a matter of law in that the undisputed facts show, or, in the alternative, there is at least a dispute of material fact as to whether, the City increased utility fees in violation of the Hancock Amendment by setting charges at a level to increase the City's general revenue and to subsidize general government expenditures rather than to compensate for the provision of services.

Article X, Section 22 of the Missouri Constitution provides, in pertinent part:

> Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

The purpose of the amendment is "to limit taxes by establishing tax and revenue limits and expenditure limits for the state and other political subdivisions which may not be

exceeded without voter approval." Rohrer v. Emmons, 289 S.W.3d 600, 603 (Mo. App. E.D. 2009). The Hancock Amendment attempts 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. Id. At its essence, the Hancock Amendment reveals the voters' basic distrust of the ability of representative government to keep its taxing and spending requirements in check. Id.

Taxes are proportional contributions imposed by the state upon individuals for the support of government and for all public needs. Zahner v. City of Perryville, 813 S.W.2d 855, 859 (Mo. banc 1991). Taxes are not payments for a special privilege or a special service rendered. Id. Fees or charges prescribed by law 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. Id.

The Supreme Court found the following factors were critical in determining whether a revenue increase by a local government is an increase in a "tax, license or fees" that requires voter approval under the Hancock Amendment:

> 1) When is the fee paid?--Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.
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> 2) Who pays the fee?--A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged.

> 3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?--Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer.
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> 4) Is the government providing a service or good?--If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.
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> 5) Has the activity historically and exclusively been provided by the government?--If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment.
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> Keller, 820 S.W.2d at 304, Fn. 10.

Based on these criteria, property taxes, sales taxes, franchise taxes, and income taxes, among others, are subject to the Hancock Amendment. Id. The above criteria are helpful in examining charges denominated as something other than a tax. Id. No specific criterion is independently controlling; but, rather, the criteria together determine whether the charge is closer to being a "true" user fee or a tax denominated as a fee. Id. If the application of the Keller factors creates a genuine doubt as to whether a new or increased charge constitutes a "tax, license, or fee" covered by the Hancock Amendment, we resolve the uncertainty in favor of requiring voter approval. Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City, 231 S.W.3d 208, 212 (Mo. App. W.D. 2007).

Appellants argue it is undisputed that the City increased its electric, natural gas, water/sewer, and refuse/waste fees after November 4, 1980 without a vote of the people, which was in violation of the Hancock Amendment, and, as a result, the Hancock Amendment applies to and voids the City's utility rate increases. Appellants maintain that the City's attempt to cast the fee increases as "user fees" was prohibited by case law and the constitution. Appellants maintain the City used its increased utility fees to funnel money regularly and directly into its general revenue fund to pay for ordinary government expenditures, which is in violation of the Hancock Amendment.

The City, on the other hand, argues utility charges at issue are not subject to the Hancock Amendment because they are not taxes but rather are user fees.

Initially, we note the Keller factors are controlling in our determination of whether the charges at issue in this case constituted a tax subject to the Hancock Amendment. In Missouri Growth Ass'n v. Metroploitan St. Louis Sewer Dist., 941 S.W.2d 615, 624 (Mo. App. E.D. 1997), the appellants argued the Keller factors did not apply because, among other reasons, the charges were "taxes in everything but name . . . paid into the general fund of the government to defray customary governmental expenditures." However, the court rejected appellants' proposed non-Keller analysis because the Supreme Court had clearly adopted the five factor analysis of Keller in Beatty v. Metropolitan St. Louis Sewer Dist., 867 S.W.2d 217 (Mo. banc 1993). Id. at 625; see also Avanti Petroleum, Inc. v. St. Louis County, 974 S.W.2d 506, 511 (Mo. App. E.D. 1998) and Ashworth v. City of Moberly, 53 S.W.3d 564, 575 (Mo. App. W.D. 2001). Appellants make the same argument here, contending that we need not even examine the Keller factors in this case because the undisputed facts show the increase is

calculated to yield a surplus for the very purpose of funding ordinary government expenditures. However, we will apply the Keller factors to the facts of this case to aid our determination of whether the object of the fees is to raise revenue to cover ordinary governmental expenditures.

The first inquiry under Keller is "[w]hen is the fee paid?" The court in Keller informs us that "[f]ees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee." Keller 820 S.W.2d at 304, Fn. 10.

In this case, Appellants argue Dolores Grannemann, the City's clerk, testified the City's utility fees are paid at regular monthly intervals of time. However, the City contends utility customers receive bills for service only after the City provides the service.

In Beatty, which dealt with an increase in sewer charges, the court noted the fee was to be paid on a periodic—quarterly—basis, and because the first factor is concerned only with timing, the court found this factor weighed in favor of the fee being subject to the Hancock Amendment. Beatty, 867 S.W. 2d at 220; see also Feese v. City of Lake Ozark, Mo., 893 S.W.2d 810, 812 (Mo. banc 1995).

However, in Missouri Growth, the court found "although th[e] charge [was] billed [monthly], payment [was] due 'only on or after provision of a good or service,' making it more like a user fee than a tax." Missouri Growth, 941 S.W.2d at 623.

The court found the periodic nature of the billing in Beatty to be controlling. Beatty, 867 S.W.2d at 219. However, in Beatty, the utility charged a flat monetary fee

for service irrespective of the amount of service actually provided. Beatty, 867 S.W.2d at 219. On the other hand, where bills have been based on metered water readings and were thus due to be paid after the provision of an actual and specific good or service to the individual paying the fee, courts have found this factor to indicate that the Hancock Amendment does not apply. See Missouri Growth, 941 S.W.2d at 623 and Mullenix-St. Charles Properties, L.P. v. City of St. Charles, 983 S.W.2d 550, 562-63 (Mo. App. E.D. 1998).

While the fees in this case are periodic in nature, we find the fees are based on the amount of services received and are only charged after the services are provided. Thus, we follow the interpretation of the courts in Missouri Growth and Mullenix-St. Charles Properties, L.P. and find this factor must be resolved in favor of the City.

The second prong under Keller is "[w]ho pays the fee?" The court in Keller informs us that "[a] fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged." Keller 820 S.W.2d at 304, Fn. 10.

In Missouri Growth, the court found the fact that only the individuals who actually used the services paid the charges weighed in favor of the charges not being subject to the Hancock Amendment. Missouri Growth, 941 S.W.2d at 623; see also Beatty, 867 S.W. 2d at 220. On the other hand, in Feese, the city assessed its sewerage charges against property not connected to the sewerage system, and the court found those charges were a tax subject to the Hancock Amendment. Feese, 893 S.W.2d at 812.

In this case, Appellants contend Grannemann testified that if City residents want electricity, natural gas, public water, public sewer, and trash refuse services, they have to get them from the City and must pay the rates the City charges. However, Grannemann also testified that many residents are not customers of municipal gas, electric, or other utility services and are not charged for such usage. For example, owners of unimproved lots and vacant residences are not charged for utility service by the City, and, in addition, some residents use electricity rather than gas or do not use certain other services and those residents do not pay for the services they do not use.

The record makes it clear that utility fees are not blanket billed to all residents of the City. Instead residents only pay for those services they actually use. As a result, we find this factor weighs in favor of the City.

The third prong in Keller is "[i]s the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?" The court in Keller informs us that "[f]ees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer." Keller 820 S.W.2d at 304, Fn. 10.

In Beatty, the court noted in order for a governmental charge to appear to be a user fee, the charge imposed must bear a direct relationship to the level of services a "fee payer" actually receives from the political subdivision, and because the sewer fee at issue in Beatty was an estimated average, the court found this factor weighed in favor of the charge being subject to the Hancock Amendment. Beatty, 867 S.W.2d at 221.

However, in Missouri Growth, the customers were charged based on their water usage, and the court found this factor weighed in favor of the charges not being subject to the Hancock amendment. Missouri Growth, 941 S.W.2d at 624.

In this case, Appellants argue the amount of the fee depends on the category of rate payer and, in large part, on the amount of money the City is transferring out of its utility funds and into its general revenue fund. The City maintains the more a customer uses electricity, gas, and water, the higher the bill for each service. In other words, utility charges in the City are dependent upon the amount or level of goods or services provided to the utility customer. Appellants, however, contend even if the fee was affected in part by the amount or level of services, the degree to which the City was charging for the services as opposed to the degree to which the City was charging, if it was charging, to supplement its general fund was at least inconclusive, which weighs in favor of Appellants. While not controlling, Appellants' argument is supported by the State Auditor's conclusion in her report on the audit of the City that "[u]ser fees for electric, water, sewer, and natural gas have not been established at levels consistent with the costs of providing those services . . . [i]t appears the [C]ity has established higher than necessary utility rate structures in lieu of increasing general revenues or reducing services provided by the [C]ity."

In Keller, the court stated:

> Fees or charges prescribed by law 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 . . ..

Keller, 820 S.W.2d at 303-4. In Ashworth v. City of Moberly, 53 S.W.3d 564, 577 (Mo. App. W.D. 2001), the court, in making its determination on what the object of the fee requirement was, noted that "it [was] undisputed that the permit and inspection fee was not imposed to generate revenue for the general fund."

In this case, however, there is at least a genuine dispute as to whether and for what purpose part of the fee the City was charging was being assessed to supplement the City's general fund. Granneman testified that funds had been transferred into the general revenue fund from utility accounts to fund ordinary government operations, and that the utility charges were generating more funds than necessary to run the City's utilities[2]. However, she also testified she was unable to answer the question of whether the rates were designed to do that. Thus, it is unclear whether the object of the fee requirement was to generate revenue for the general fund. Therefore, we cannot determine at this point whether this factor weighs in favor of the City or Appellants.

The fourth factor in Keller is "[i]s the government providing a service or good?" The court in Keller informs us that "[i]f the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment." Keller 820 S.W.2d at 304.

[2] The City's annual report shows the gross receipts fee paid by the electric, water, sewer, and natural gas utilities to the general fund accounts for 35% of total general revenues.

In this case, the record clearly shows gas, electric, water, sewer, and refuse are all goods and/or services provided by the City. Appellants argue the City is providing a service for part of the fee, but part of the fee also funds ordinary government operations.

As in the third factor, the degree to which the City was charging for the services as opposed to the degree to which the City was charging, if it was charging, to supplement its general fund was inconclusive. Thus, there remain genuine issues of material fact with respect to this factor, and we cannot determine at this point whether this factor weighs in favor of the City or Appellants.

Finally, the fifth factor in Keller is "[h]as the activity historically and exclusively been provided by the government?" The court in Keller informs us "[i]f the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment." Keller, 820 S.W.2d at 304.

In this case, the City notes Grannemann testified "[e]lectricity and other forms of heating have historically been provided by private companies." Further, the City's statement of uncontroverted material facts states "[t]he provision of gas or electric services by [the City] is relatively recent and has not been historical or exclusive."

Appellants argue the City has historically and exclusively provided the utility services at issue and that inhabitants of the City have no choice but to use the City's utility. Grannemann also testified that the City has provided exclusive natural gas service since 1966, and the City is the only provider ever to provide gas service to the City. Grannemann also testified the City has provided exclusive electricity to its citizens since

1958. Grannemann also testified she thought the City had provided water, sewer, and refuse services since the 1940s or 1950s.

The record shows that there were some inconsistencies in Grannemann's testimony. Therefore, genuine issues of material fact exist with respect to whether the City has historically and exclusively provided the utilities. As a result, we find this factor is inconclusive.

In conclusion, we find two of the Keller factors weigh in favor of the City, and three involve genuine disputes of material fact. Therefore, the trial court erred in entering summary judgment in favor of the City because there is a dispute of material fact as to whether, the City increased utility fees in violation of the Hancock Amendment by setting charges at a level to increase the City's general revenue and to subsidize general government expenditures rather than to compensate for the provision of services. Point granted.

However, a respondent who does not cross-appeal may nevertheless defend the favorable judgment with any argument that is supported by the record, whether ignored by the trial court or simply rejected. McKnight v. Midwest Eye Institute of Kansas City, Inc., 799 S.W.2d 909, 919 (Mo. App. W.D. 1990). Along these lines, the City asserts in its brief three independent arguments supporting its right to summary judgment.

First, the City argues the trial court did not err in entering summary judgment in favor of it because Appellants lack standing in that it is undisputed that no tax was ever levied upon any consumer but rather only an accounting charge was made between municipal departments. We disagree.

The City contends the accounting charges are not taxes, and even if they were, they are imposed on the utilities and not levied on Appellants. However, we find the charges were paid by Appellants who are all taxpayers and utility customers of the City. Thus, the City is not entitled to summary judgment on this basis because Appellants have standing. See Missouri Growth, 941 S.W.2d at 620. Point denied.

Second, the City argues the trial court did not err in entering summary judgment in favor of it because even assuming *arguendo* that the utility charges were taxes, it is still undisputed that Appellants failed to exhaust administrative remedies for a tax protest under Section 139.031. We disagree.

The City contends Appellants were required to pay the taxes, assuming they were taxes, under protest, which they failed to do. Thus, the City maintains summary judgment must be entered in its favor.

The enforcement of the right to be free of increases in taxes that the voters do not approve in advance may be accomplished in two ways: First, taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined. Ring v. Metropolitan St. Louis Sewer Dist., 969 S.W.2d 716, 718 (Mo. banc 1998). Second, if a political subdivision increases a tax in violation of Article X, Section 22(a), and collects that tax prior to a final, appellate, judicial opinion approving the collection of the increase without voter approval, the constitutional right established in Article X, Section 22(a), may be enforced only by a timely action to seek a refund of the amount of the unconstitutionally-imposed increase. Id. at 718-19. Taxpayers who fail to protest property taxes under 139.031 cannot obtain refunds. Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 (Mo. App. E.D. 2002).

In this case, however, in Count I, Appellants sought a declaratory judgment; in Count II, they sought injunctive relief including a refund of past overpayments; and in Count III, they sought damages. In particular, Count II of Appellants' petition requested an injunction, which included a request for both a refund of past amounts paid as well as a prohibition on collecting fees in excess of the lawful rates going forward. For summary judgment purposes, we need only decide whether Appellants are entitled to some form of relief under Counts I, II, or III. We need not decide what form of relief Appellants are entitled to. In particular, we do not need to determine whether or not they are entitled to a refund because that question is not essential to our determination of whether summary judgment was proper.

Therefore, the City is not entitled to summary judgment because Appellants' failure to file a tax protest does not preclude Appellants' entitlement to other forms of relief requested in their petition. Point denied.

Third, the City argues the trial court did not err in entering summary judgment in favor of it because it is undisputed that Appellants' claim is barred by the three-year statute of limitations as to the City officers. We disagree.

The City contends Section 139.300, RSMo 2000,[3] provides that liability for user charges, if any, falls on the City Collector. The City further contends the City Collector is not a party to this action and cannot be joined due to the three-year statute of limitations in Section 516.130.

However, we find because this is a Hancock Amendment case seeking damages, a declaratory judgment, and injunctive relief as noted above, Appellants were not required to join the City Collector and the statute of limitations has no application here.

[3] All statutory references are to RSMo 2000.

Therefore, the City is not entitled to summary judgment for the reason that the City Collector was not a party to this case. Point denied.

In conclusion, we find the trial court erred in entering summary judgment in favor of the City because there is a genuine dispute of material fact as to whether and for what purpose the City increased utility fees in violation of the Hancock Amendment by setting charges at a level to increase the City's general revenue and to subsidize general government expenditures rather than to compensate for the provision of services. Therefore, the judgment of the trial court is reversed and remanded. If it is shown on remand that the object of the fees is to fund the City's general revenue, then this constitutes a violation of the Hancock Amendment and deserves an appropriate remedy under the Hancock Amendment.

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ROBERT G. DOWD, JR., Presiding Judge

Sherri B. Sullivan, J.and
Kurt S. Odenwald, J., concur.