

SC90866

IN THE SUPREME COURT OF MISSOURI

CITY OF SULLIVAN,

Respondent,

vs.

JUDITH ANN SITES,
Trustee of the
Judith Ann Sites Trust,

Appellant.

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

BRIEF OF MISSOURI MUNICIPAL LEAGUE (MML), AS *AMICI CURIAE* IN
SUPPORT OF RESPONDENT, CITY OF SULLIVAN

THE MISSOURI MUNICIPAL LEAGUE

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INTEREST OF THE MISSOURI MUNICIPAL LEAGUE

All parties to this appeal have consented to the filing of suggestions by *Amicus Curiae*, the Missouri Municipal League, as required by Missouri Court Rule 84.05(f)(2).

The Missouri Municipal League (hereinafter referred to as the “MML”) is an independent not for profit association of 660 municipalities in the State of Missouri. MML members are political subdivisions. The MML provides for cooperation in formulating and promoting municipal policy and administration of local government at all levels to enhance the welfare and common interests of its members and their citizens.

Most MML members own, operate and maintain a sewer and water system and may own and operate gas, and electric systems, (hereinafter collectively referred to as “utility systems”). MML members that operate utility systems establish charges for their utility customers by ordinance and may issue revenue bonds to own, build, and maintain utility systems. In some situations, MML communities may vote and issue revenue bonds to provide a utility service for a specific project area from the proceeds of a bond issue. Some MML members also belong to the Missouri Public Utility Alliance, which has about 120 member municipalities (50 water and sewer, 56 electric and 14 gas).

A municipality may consider, in the establishment of utility rates, the cost to serve a particular class of customers as well as other components for a class of customers including the cost to construct a project for a particular area. For example, MML municipalities may charge non-residents more than residents of the municipality, or they may establish impact fees, connection fees or special assessments based on the cost to serve a class of customers including the cost to construct facilities or the benefits to

customers in an area. In addition, utility rates may be higher in an area for a class of customer where a project has been constructed with the proceeds of a revenue bond or other utility revenues to reflect some or all of the cost of the project, which benefits utility customers in an area. Consequently, utility rates are not uniform for all municipal utility customers because the rates may reflect the cost to serve a particular class of customers, a particular geographic area, or the benefits to a particular area.

MML members that own and operate their own utility systems have a significant interest in Appellant's claim that the ordinance adopted by the City of Sullivan was special legislation and is void. Such a decision would prohibit charging higher rates to a class of customers based on consideration of the cost to serve a particular area or benefits to that area.

This case may also impact other political subdivisions who are not MML members such as public water and sewer districts that own and operate water and sewer systems as special purpose political subdivisions that establish rates for classes of customers and may also issue revenue bonds for specific projects. A decision holding that Ordinance No. 2581 adopted by the City of Sullivan was special legislation and void could impact how they establish rates for the use of their sewer and water systems.

SUGGESTIONS BY AMICUS CURIAE

The MML adopts the statement of facts set forth by Respondent, City of Sullivan, (hereinafter referred to as “City” or “Sullivan”) in its brief. The MML also fully supports and adopts the arguments set forth by the City. After hearing the evidence, the trial court entered a Judgment finding for Plaintiff; the City (L. F. 45, A1-4). Paragraph 9 of the Judgment stated that: “The only evidence adduced at trial was that the \$3,750 does not exceed the reasonable cost to Plaintiff for Defendant’s access to the sewer system” (L. F. 45, A1-4). Appellant appeals the Judgment of the trial court to this Court. Appellant’s sole issue on appeal is whether or not Ordinance No. 2581 (L. F. 11-18) violates Article III, Section 40(30) of the Constitution of the State of Missouri. Appellant argues that the tap fee to connect to the City sewer for customers located in the areas where the 1996 revenue bond issue was used to build new public sewers in Ordinance No. 2581 is a special law because it is higher than other areas of the City that already had sewers based on geography and historical facts. Ordinance No. 2581 requires persons who connect to the City sewer in the area where new sewers were constructed with the proceeds of the \$3,305,000.00 “1996 revenue Bond Issue” approved by the voters to pay a higher tap fee to connect to the public sewers than areas of the City that already had public sewers.

POINT NUMBER I

THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE ARTICLE VI, SECTION 27 IS SELF-EXECUTING AND THE BOND COVENANTS AND THE RATES CHARGED BY THE CITY PURSUANT TO ORDINANCE NO. 2581 WERE LAWFUL, REASONABLE AND AUTHORIZED AS REQUIRED BY THE SELF-EXECUTING PROVISIONS OF ARTICLE VI, SECTION 27 OF THE CONSTITUTION OF THE STATE OF MISSOURI.

Pursuant to Article IV, Section 27 of the Constitution of the State of Missouri, the voters of the City approved, by a majority vote, a revenue bond issue in the amount of \$3,305,000.00 for a project to extend and improve the City's combined waterworks and sewerage system (L. F. 30, Plaintiff's Exs. 1 and 2; Appx. A13). Prior to the vote, the City provided notice to the citizens of the City and mailed an informational brochure about the project that stated there would be a connection fee in the amount of \$3,750.00 or \$4,250.00 for customers in the area of the City where new sewers would be constructed from the proceeds of the bond issue (Plaintiff's Exhibit E; TR. 59-60). The City identified for the public the project areas where there were no public sewers, in which the proceeds from the bond issue would be used to build new sewers (Tr. 62; L. F. 30; Plaintiff's Ex. 1; Defendants Ex; Appx. A13). After a successful vote approving the revenue bond issue, the City adopted ordinance No. 2581. Section 802 of the bond covenants given by the City to the bond purchasers requires the City to fix and establish rates and charges for the use and the services of the System (Defendant's Ex. B, Ordinance No. 2574). Section 803 of the bond covenants adopted by the City in

Ordinance No. 2574, states that services provided by the System shall not be furnished by the City to any user "...without a reasonable charge being made therefor" (Defendant's Ex. B, Ordinance No. 2574). The bonds were issued and purchased with a covenant given to the purchasers of the bonds that the City would establish rates and charges for the use and the services of the System and that the City would not provide services "without a reasonable charge for the service." The proceeds of the 1996 revenue bond issue were used to construct new public sewers that served the area where Appellant's property was located. The trial court, in paragraph 9 of the Judgment, specifically found that "The only evidence adduced at trial was that the \$3,750 does not exceed the reasonable cost to Plaintiff for Defendant's access to the sewer system" (L. F. 45, A1-4). Appellant does not challenge any of the procedures with respect to the issuance of the bonds except for the validity of Ordinance No. 2581. Therefore, based on the record and the decision of the trial court, it is clear that the City has complied with all provisions of Article VI, Section 27 of the Missouri Constitution and sections 250.010 RSMo, et seq. in the issuance of the revenue bonds to build new sewers in an area that did not have public sewers.

Article VI, Section 27 of the Missouri Constitution provides in part that revenue bonds may be issued to pay "... all or part of the cost of purchasing, construction, extending or improving any of the following projects: (1) Revenue producing water, sewer, gas or electric light works, heating or power plants." This provision of the Constitution is self-enforcing and a municipality that issues revenue bonds under Article VI, Section 27 has the power to carry into effect its granted constitutional authority to sell

and issue its revenue bonds and provide covenants to induce purchasers to buy its revenue bonds.

“The constitutional grant to issue and sell revenue bonds carries with it by implication such other necessary powers as are needed to carry the granted authority into effect. The constitution being silent on the subject of the provisions to be recited in such bonds, and there being no statutory limitation applicable to the challenged provision, we think the city had the implied authority to prescribe, as one of the inducements to prospective holders, and thus favorably affect the value and marketability of the bonds, that any subsequent issue of like bonds should be junior and subordinate to the issue in question.” State ex rel. City of Fulton v. Smith, 355 Mo. 27, 35, 194 S.W.2d 302, 306 (Mo.1946).

To the same affect see also State ex rel. Mitchell v. City of Sikeston, 555 S.W.2d 281, 291 (Mo. banc 1977); and City of Hamilton v. Public Water Supply Dist. No. 2 of Caldwell County, 849 S.W.2d 96, 102 -104 (Mo. App. W.D. 1993). In Oswald v. City of Blue Springs, 635 S.W.2d 332 (Mo. banc 1982) the court again reaffirmed that Article VI, Section 27 was self-executing and that a city had the power to provide covenants to purchasers of the bonds under Article VI, Section 27 of the Missouri Constitution as an inducement to buy the bonds.

“Without covenant or assurance that the City would raise its water and sewerage rates to cover the expenses of operation and maintenance of the proposed facilities, few if any prospective bond purchasers would find these revenue bonds a suitable investment. We believe the City has the implied authority to assure the

continued “upkeep” of the water and sewerage system “as one of the inducements to prospective (bond) holders, and thus favorably affect the value and marketability of the bonds....” Citation omitted. Oswald v. City of Blue Springs, Lc 334.

In addition to the self-executing power to improve the city sewer system under Article VI, Section 27 of the Missouri Constitution, a city is granted the power to build sewers under RSMo sections 250.010 and 250.100. Section 250.120.1 provides that a city has a mandatory duty to fix and maintain rates “for the benefit of which such revenue bonds were issued” sufficient to pay the cost of the maintenance and operations and pay the principal and interest on all revenue bonds issued. Section 250.240 states that the purpose of chapter 250.010 et seq. is to enable cities, towns and villages and sewer districts to protect the public health and welfare by preventing or abating the pollution of water and that it shall have the power to do all things necessary or convenient to carry out such purpose, in addition to the powers conferred in this chapter. Section 250.250 states that Chapter 250 shall be construed as a cumulative and additional grant of power to cities, towns and villages and shall not be construed to repeal or modify any other act or statute nor shall it be construed to repeal or modify any power granted by the Constitution or statutes of the State of Missouri or by any special charter or constitutional charter.

In City of Maryville v. Cushman, 363 Mo. 87, 95-96, 249 S.W.2d 347, 351 (Mo. 1952) the 1951 Act (section 250.010 et seq.) authorizing the issuance of revenue bonds for public sewers was held to not violate Article VI, Section 27 of the Missouri

Constitution as not constituting local or special legislation citing Hall v. City of Sedalia, 232 Mo. 344, 134 S.W. 650, 651 (Mo. 1911).

The MML does not believe there is a conflict between Article VI, Section 27 and Article III, Section 40(30) because the provisions of Article VI, Section 27 are self-executing for the reasons stated above. Legislation, which is authorized by the constitution itself, cannot be regarded as local or special, within the meaning of the constitutional prohibition, against special legislation even though its application is purely local. City of Maryville v. Cushman, supra. See also Spaulding v. Brady, 128 Mo. 653, 31 S.W. 103 (Mo. 1895). Citing, State v. Walton, 69 Mo. 556, 1879 WL 8197 (Mo. 1879); Kenefick v. City of St. Louis, 127 Mo. 1, 29 S.W. 838 (Mo. 1895) for the proposition that: "...no law can be either local or special, within the meaning of the constitution, which results directly or indirectly from a specific constitutional requirement..."

If there is a conflict between Article VI, section 27 of the Missouri Constitution and Article III, Section 40(30), this conflict can be resolved by applying normal rules of statutory construction giving due regard to the primary objectives of the constitutional provisions under scrutiny. Rekart v. Kirkpatrick, 639 S.W.2d 606, 608 (Mo. banc 1982). Both provisions under consideration were part of the 1945 Missouri Constitution, although Article III, Section 40(30) has not been changed since 1945, Article VI, Section 27 has been amended on a number of occasions with the last amendment occurring on November 5, 2002. See V.A.M.S. Historical Notes following Article VI, Section 27 and Historical Notes Article III, Section 40(30) Missouri Constitution. The last provision of

the constitution that was amended controls. Wilson v. City of St. Robert, 714 S.W.2d 738, 740 -741 (Mo. App, 1986). Article VI, Section 27 was amended in 2002 and controls with respect to resolving any conflict between the two constitutional provisions.

In addition, any conflict can be resolved by applying the rule of statutory construction that the provisions of the law having special application to a particular subject will be deemed a qualification to another law which is general in its terms City of Raytown v. Danforth, 560 S.W.2d 846, 848-850 (Mo. 1977). In this case, revenue bonds authorized by article VI, section 27, a specific law, would control over the general law set forth in Article III, Section 40(30), which provides that a city cannot enact local or special legislation.

In carrying out its constitutional and statutory duties, Sullivan issued its sewer revenue bonds in the amount of \$3,305,000.00 that contained covenants that were provided to the purchasers of the bonds that a reasonable charge would be made for sewer service for the project, which was to provide public sewers to an area of the community that did not have public sewers. The trial court determined that the charges were reasonable. As noted in Oswald v. City of Blue Springs, supra, without assurances provided in the bond covenants it would be unlikely that a city could sell its revenue bonds. It is also unlikely that the voters would approve a revenue bond because implicit in Appellant's argument is that those who directly benefit from the new sewers should pay the same as other customers who already had sewers. As noted above, not only does the language of the constitution, statutes and case law require a different result than that urged by the Appellant, but logic and good public policy compels a conclusion that when

issuing revenue bonds a city may charge a different rate for customers who directly benefit from the project than others who do not receive a direct benefit. For the reasons stated, this Court should rule that Article VI, Section 27 is sufficient authority in and of itself to charge a higher tap fee to connect to the City sewer system for customers who were in the area where new sewers were constructed with the proceeds of the revenue bond issue than customers who are in areas where there were already existing sewers.

POINT NUMBER II

**THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED
BECAUSE THE CITY WAS ACTING IN A PRIVATE CAPACITY IN THE
SETTING OF THE TAP FEE TO CONNECT TO THE CITY SEWER SYSTEM
BASED ON A REASONABLE CLASSIFICATION AND A REASONABLE
CHARGE THAT APPLIED UNIFORMLY TO ALL CUSTOMERS WITHIN THE
CLASSIFICATION.**

When providing utility service, a municipality is acting as a private corporation and has the same right to make reasonable charges as a private corporation when serving the public. St. Louis Brewing Ass'n v. City of St. Louis, 140 Mo. 419, 37 S.W. 525, 527-528 (Mo. 1896); 12 McQuillin Mun. Corp. § 35:55 (3rd Ed.). The rates charged by a municipal utility must be fair, reasonable, just, uniform and nondiscriminatory, and the same rules in regard to the reasonableness of rates required for private utility companies apply. City of Maryville v. Cushman, 363 Mo. 87, 249 S.W.2d 347, 356 (Mo. 1952) and St. Louis Brewing Ass'n v. City of St. Louis, supra.

MML municipalities that own and operate public utilities establish rates for utility customers in the course of their operation and ownership, and generally follow well-recognized utility industry practices charging customers based on the cost to serve a class of customers although the cost to serve a class of customers is but one consideration in the determination of the reasonableness of the rate. Shepherd v. City of Wentzville, 645 S.W.2d 130, 133 (Mo. App. E.D. 1982).

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 difference, is a legislative function rather than a judicial function and as such 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, supra.

While the courts retain equitable jurisdiction to prevent a municipality from enforcing public utility charges, oversight is limited to charges that are “clearly, palpably and grossly unreasonable.” Forest City v. City of Oregon, 569 S.W.2d 330, 333 (Mo. App. 1978). There are no such allegations in this case, and even if there were, the trial court found the higher tap fee charged for customers in the area of the City to connect to the Sullivan sewer system where new sewers were constructed was reasonable. A municipality may classify its users for the purpose of fixing rates if the classification is reasonable and there is no discrimination within the class. Shepherd v. City of Wentzville, 645 S.W.2d 130, 133 (Mo. App. E.D. 1982) citing Beauty Built Construction Corp. v. City of Warren, 375 Mich. 229, 134 N.W.2d 214, 218 (Mich. 1965).

Tap fees to connect to a city sewer system may be authorized subject only to the qualification that the fees must be fair and reasonable and bear a substantial relationship to the cost in providing the service. 12 McQuillin Mun. Corp. § 35:55 (3rd Ed.). A tap fee to connect to a city sewer system may be charged where it is fair and equitable. Black v. City of Kileen, 78 S.W.3d 686 (Tex. App. Austin 2002).

In addition to having broad authority to establish utility rates while acting in a proprietary or private capacity, municipal corporations also have a long history of

utilizing a geographic component to charge based on the benefits or the cost to serve a particular area, which charges may vary based on the cost to serve or the benefits to a geographic area. The discussion in Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 70 S.W. 721, 726 (Mo. 1902) upholding a challenge to the incorporation of a drainage district is instructive with respect to uniformity.

“All that is required in such cases is that the charges shall be apportioned in some just and reasonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise.” Mound City Land & Stock Co. v. Miller, 70 S.W. 721, 725 (Mo. 1902).

Other examples of charges based on the location of property include: a charge for water service based on the aggregation of the amount of water used by several manufacturers within a two block area as a classification was upheld in St. Louis Brewing Ass'n v. City of St. Louis, 37 S.W. 525, 528 (Mo. 1896); An additional charge for the delivery of materials to a wharf for companies that did not pay city taxes was upheld as a proper classification in City of St. Louis v. St. Louis & N.O. Transp. Co., 84 Mo. 156 (Mo. 1884.); The issuance of sewer tax bills was upheld against a challenge that the enabling law was special or local, violating Article III, Section 40(30) of the Missouri Constitution. Hall v. City of Sedalia, supra. The right to charge non-residents more than residents for water service was based on geographic location and historical

facts. Forest City v. City of Oregon, supra; Projects built with bond issues like a parking garage Kansas City v. Fishman, 362 Mo. 352, 241 S.W.2d 377 (Mo. 1951); or a toll bridge may necessitate charging based on the particular toll bridge or the parking garage without regard to other bridges or parking garages in the community.

Examination of the cases cited by the Appellant show that the \$3,750 charge to connect a sewer in the area of the City where new public sewers were built was a reasonable classification under Article III, Section 40(30). 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 (all parties where new sewers were built with the proceeds of the “1996 Bond Issue”) is a reasonable classification that covers all who are similarly situated. A law is not a special law and must stand if it applies to all alike of a given class, provided the classification is not arbitrary or without a reasonable basis. City of Springfield v. Smith, *Id.* The test of whether or not a law is special is the appropriateness of the objects it excludes; it is not what a law includes that makes it special but what it excludes. Laclede Power & Light Co. v. City of St. Louis, 353 Mo. 67, 182 S.W.2d 70 (1944). Citing, Reals v. Courson, 349 Mo. 1193, 164 S.W.2d 306, 307. In City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. 2006) the court considered a law that by its exclusion could apply only to a few cities because inclusion was based on events that had already occurred; the adoption of an ordinance imposing the business license tax and its enforcement by a date certain that occurred prior to the effective date of the law. As a consequence, no other city could ever come within the classification. In this case, the Sullivan ordinance has a

higher fee to connect to the City sewer system in the area identified as the area where new sewers were built (2006 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

from the “1996 Revenue Bond Issue” is a logical classification reflecting the cost to serve and the benefits that these customers received from the availability of new sewers. The City, in adopting Ordinance No. 2581 was acting in a private capacity like a private utility company, in establishing a classification that was reasonable.

CONCLUSION

The charges and the classification of customers to connect to the City sewer system authorized by Ordinance No. 2581 were reasonable. The voters approved a revenue bond issue to build public sewers in an area where there were no public sewers and the City issued its revenue bonds pursuant to the Article VI, Section 27 of the Constitution of the State of Missouri covenanting to the purchasers of the bonds that the City would not provide any service without making a reasonable charge for the service. The trial court found the charge for Appellant to connect to the City sewer system in the area where new sewers were constructed was reasonable. Article VI, Section 27 of the Constitution of the State of Missouri is sufficient authority for the charges and the classification of utility customers set forth in Ordinance No. 2581. The City when establishing the charges in Ordinance No. 2581 was acting like a private utility, in a private capacity. A ruling that a municipality could not have a different charge for utility customers in an area that was the direct beneficiary of a project built with the proceeds from a revenue bond issue approved by the voters than customers who did not directly benefit from the bond issue, would have far reaching implications for municipalities. A ruling that a municipality could not impose a higher charge for utility customers when acting in a private capacity for improvements provided to customers in different areas of

the community based upon a reasonable charge and classification would have far reaching implications for municipalities. The MML on behalf of its member communities urges this Court for the reasons stated herein to affirm the trial court's decision.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the requirements of Rule 55.03; and the limitations set forth in Rule 84.06(b) in that it contains 5,349 words and was produced using Microsoft Word 2000 Version; and that the CD accompanying this brief has been scanned for viruses and is certified to be virus free.

Howard C. Wright, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy, along with a CD and email was provided to all attorneys of record by depositing same, postage prepaid with the United States Postal Service this ____ day of August, 2010, to:

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