

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 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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## JURISDICTIONAL STATEMENT

On December 26, 2006, Plaintiffs/Appellants Arbor Investment Company, LLC, CFV Plastics, LLC, Buzz Manley, and Donna Austin filed a petition for a declaratory judgment, an injunction, and money damages against Defendant/Respondent City of Hermann, Missouri, in the Circuit Court of Gasconade County, alleging violations of the Hancock Amendment. Legal File (“L.F.”) at 1.

On March 31, 2009, the circuit court entered summary judgment in favor of the defendant. L.F. at 307. On May 4, 2009, the plaintiffs filed a timely notice of appeal. L.F. at 309.

On July 22, 2010, the Missouri Court of Appeals issued an opinion reversing the judgment of the circuit court. On September 21, 2010, this Court sustained the plaintiffs’ application for transfer.

This Court has jurisdiction to hear appeals on transfer from the Missouri Court of Appeals under Article V, Section 10 of the Missouri Constitution.

## STATEMENT OF FACTS

Plaintiffs Arbor Investment Company, LLC, CFV Plastics, LLC, Buzz Manley, and Donna Austin brought this class action against Defendant City of Hermann for violations of the Hancock Amendment. L.F. at 14.

The plaintiffs alleged that they were Hermann property owners who had paid the City's utility charges. L.F. at 14-15. They alleged that the City had charged them (as well as the other citizens and utility users of the City) grossly excessive amounts for electricity, water/sewer, natural gas, and refuse/waste. L.F. at 15. The plaintiffs alleged that the City had also charged a "gross receipts tax," "billing collection fee," and "communication fee" to its utility customers, which generated revenue for the City and which were used to finance the City's governmental operations. L.F. at 15. The plaintiffs alleged that the City had set its utility rates and charges in order to generate revenue and to finance the City's general governmental operations. L.F. at 15. The plaintiffs alleged that the City had engaged in a practice of transferring large sums of money generated by its inflated utility rates and fees to other City funds. L.F. at 15.

The plaintiffs alleged that the City's practice of setting and collecting utility charges in excess of what was needed to provide the applicable services was in violation of the Hancock Amendment, Article X, Section 22 of the Missouri Constitution. L.F. at 17. The plaintiffs brought this action under the authority granted in Section 23 of the Hancock Amendment on behalf of themselves and all Hermann utility customers who paid utility charges and fees during the time period that the City was unlawfully

subsidizing its general city operations through the hidden tax of excessive utility rates and fees. L.F. at 18.

After the class was certified, the case was decided on cross motions for summary judgment. L.F. at 307, 70, 127. The facts established by the summary judgment record are as follows:

Each of the plaintiffs is a Hermann taxpayer and utility customer. L.F. at 973.

The City has a monopoly on electric, natural gas, public water, public sewer and refuse services. L.F. at 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. at 1607-08, 1025. The citizens of Hermann have no choice but to pay whatever the City charges for utility services. L.F. at 1607-08.

All Hermann citizens are City utility customers. L.F. at 1595, 1012-1015. They must pay the City's charges or "they would be turned off." L.F. at 1608. If a City utility customer fails to pay for any one utility, the City shuts off that customer from all City utilities within twelve days. L.F. at 1022, 1608.

Since the City began providing utilities, it has never permitted any other utility to provide Hermann citizens with electricity, natural gas, public water, or sewer services and trash refuse services. L.F. at 1025. The City has provided exclusive natural gas service to its citizens since 1966 and is the only provider ever to provide gas service to Hermann citizens. L.F. at 1599. The City has provided exclusive electric service to its citizens since 1958. L.F. at 1598, 1607. The City has provided exclusive public water

and sewer service since the 1940's. L.F. at 1597, 1608, 1025. The City has provided exclusive trash/refuse service for at least 30 years. L.F. at 1623, 1025.

In 2004 the State Auditor audited the City at the request of various residents. L.F. at 1557, 1561, 1228. The auditor gave the City a 31-page report. L.F. at 1557. The Auditor found that the City had raised its utility fees to generate surplus funds, which it was using to pay for ordinary governmental operations. L.F. at 1558, 1564-66. The auditor identified the City's raising of its utility fees as a violation of the Hancock Amendment. L.F. at 1568.

The City did not lower its utility rates in response to the Auditor's report. L.F. at 1608, 1006. The City knows that the rates are generating revenue beyond what is needed to run the utilities. L.F. at 989.

In 1984 the City recognized the necessity of voter approval when it submitted an electric rate increase to a vote among its citizens. L.F. at 1035, 1003-04. Since then, the City increased its utility fees numerous times without a vote of the people. L.F. at 1004, 1697, 1035. The City raised its electric rates on June 12, 2003, without a vote of the people. L.F. at 1607, 1813. The City raised its electric rates again on September 6, 2006, without a vote of the people. L.F. at 89, 115, 1607. The City raised its water rates on June 12, 2003, without a vote of the people. L.F. at 89, 101, 1607. The City raised its natural gas rates on September 11, 2000, without a vote of the people. L.F. at 124, 89, 1607. The City raised its refuse/waste rates on July 14, 2008, without a vote of the people. L.F. at 108, 89, 1607.

The City raised utility fees after the Hancock Amendment was passed and used the increases to generate millions of dollars in surplus to be used for ordinary governmental expenditures. L.F. at 1598, 1608, 976, 978, 989, 997, 1109. The City has transferred money from its utility accounts into its general revenue fund and used the funds to pay for ordinary governmental expenditures. L.F. at 976, 978, 989, 997, 1564, 1566. On a quarterly basis the City transfers ten percent of its gross receipts from sales of electricity, gas, and water into its general revenue fund. Ex. A. at 975-77, 989, 1001, 1017, 1021, 1034, 1565, 1507. “The gross receipts fee paid by the electric, water and sewer, and natural gas utilities to the general fund is also a significant source of general revenue. It accounts for 35% of total general revenues.” L.F. at 1507.

The City’s designee testified as follows:

Q. The City through the years has transferred some funds from its utility departments into its general revenue fund, would you agree with that statement?

A. Yes.

Q. And that – those funds that have been transferred into the general revenue fund, that money has been used to fund governmental operations beyond just provision of utility service, correct?

A. Correct.

Q. And the city also – we discussed the gross receipts charge, correct?

A. Correct.

Q. Those are transfers that come from certain utility accounts and go into the general revenue fund again, correct?

A. Correct.

Q. And those funds, after they are transferred into the general revenue fund, are used to fund other governmental operations besides just the running of the city's utilities, correct?

A. Correct.

\* \* \*

Q. You'll agree that in practice, the rates are generating revenue above and beyond what's being used just to run the city's utilities, correct?

A. Correct.

L.F. at 989.

The City's fee increases have resulted in millions of dollars being moved from its utility accounts into its general fund and other City accounts. L.F. at 992. The City's rate increases have posed involuntary hardships on its residents and businesses. L.F. at 1227, 1168-72, 1059.

The City also transfers utility revenue into the general revenue fund through imposition of a quarterly "communications fee" on some utility accounts. L.F. at 985-88, 1018, 1024, 1566, 1604, 1608. The communications fee costs certain utility accounts approximately \$100,000 every year. L.F. at 985-88. The communication fee is used to pay for a new "call center." L.F. at 985-88. The City's previous "call center" served the utilities without problem for around \$5,000-6,000 per year. L.F. at 985-88. The City's perceived problems with its previous call center had nothing to do with the utility departments. L.F. at 985-88.

The State Auditor's report advised the City to discontinue these practices and set its utility rates only to cover the costs of its utility operations. L.F. at 1564-66. The State Auditor's report stated: "Utility fees for electric, water and sewer, and natural gas have not been established at levels consistent with the cost of providing those services." L.F. at 1564. The State Auditor stated: "It appears the city has established higher than necessary utility rate structures in lieu of increasing general revenues or reducing services provided by the city." L.F. at 1564. The State Auditor stated: "The Board of Aldermen (board) uses utility funds, especially the Electric Fund, to help finance other city operations." L.F. at 1564. The State Auditor stated: "In total, the transfers from the

utility and refuse/waste funds represented approximately 15 percent of the revenues of these funds in fiscal year 2003.” L.F. at 1564.

The State Auditor stated: “WE RECOMMEND the Board of Aldermen discontinue subsidizing general city operations and the operations of other funds with utility funds.” L.F. at 1566 (emphasis in original).

The City agrees with the statement that its Board of Aldermen uses utility funds, especially the electric fund, to help finance other city operations. L.F. at 997. The City’s designee testified that it cannot agree or disagree with the Auditor’s statement that rates for electric, water, sewer and natural gas have not been set at levels consistent with the cost to providing those services. L.F. at 997. The City has not lowered any of its utility rates since the State Auditor’s report. L.F. at 1011, 1608. Rather, the City raised its electric rates after receiving the Auditor’s report. L.F. at 974, 1607-08.

The amount of the City’s utility fees depends in part on the amount of money that the City transfers out of its utility accounts into its general revenue fund. L.F. at 1598, 976, 978, 989, 1564-66.

The City does not consider its monthly bills to be taxes. L.F. at 1600. The City’s utility bills do not contain the word “tax,” except to mention a sales tax. L.F. at 1600.

The City’s designee testified as follows:

Q. As we sit here today, would you agree that in at least some of those ordinances, the term is described as gross receipts tax, not gross receipts charge or surcharge?

A. I will agree to that, they do say tax, yes.

Q. Despite the fact that some of them say the words gross receipts tax, your contention on behalf of the City is that they are not taxes, is that a fair statement?

A. Correct.

Q. Why do you say that?

A. Because they have never been -- it has never been voted on for the people as actually having a tax imposed.

\* \* \*

Q. So in your mind, the reason why they're categorized by the city as surcharges and not taxes is because there had not been a vote; true statement?

A. Yes.

L.F. at 978.

On March 31, 2009, the circuit court entered summary judgment in favor of the City. L.F. at 307. The court held that it was sympathetic to the plaintiffs' claims, but that it was bound to consider the case in light of the five factors listed in footnote 10 of this Court's *Keller* case:

While sympathetic to Plaintiffs' position, the Court is bound in its assessment of the motions for summary judgment by the case of *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo.banc 1991) and its progeny. *Missouri Growth Association v. Metropolitan St. Louis Sewer District*, 941 S.W.2d 615 (Mo.App. E.D. 1997).

L.F. at 307-08.

On May 4, 2009, the plaintiffs filed a timely notice of appeal. L.F. at 309.

On June 22, 2010, the Court of Appeals issued an opinion reversing the judgment of the circuit court. *Arbor Investment Co. v. City of Hermann*, No ED92933 (June 22, 2010) (slip op.). The Court of Appeals summarized the issue on appeal:

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.

*Arbor* at 3.

The Court of Appeals held that it was required to consider the *Keller* factors:

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. Metropolitan 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 . . . . 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.

*Arbor* at 6-7.

Upon consideration of the *Keller* factors, the Court of Appeals held that the judgment of the circuit court should be reversed: “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.” *Arbor* at 13.

The Court of Appeals remanded the case to the circuit court with these instructions:

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.

*Arbor* at 16.

On September 21, 2010, this Court sustained the plaintiffs' application for  
transfer.

POINT RELIED ON

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT BECAUSE THE UNDISPUTED FACTS DO NOT ENTITLE THE DEFENDANT 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 DEFENDANT INCREASED UTILITY FEES IN VIOLATION OF THE HANCOCK AMENDMENT (MO. CONST ART X, § 22) BY SETTING CHARGES AT A LEVEL TO INCREASE THE DEFENDANT'S GENERAL REVENUE AND SUBSIDIZE GENERAL GOVERNMENTAL EXPENDITURES RATHER THAN TO COMPENSATE FOR THE PROVISION OF SERVICES.

Mo. Const. art. X, § 22.

*Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991).

*Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217 (Mo. banc 1993).

## ARGUMENT

THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE DEFENDANT BECAUSE THE UNDISPUTED FACTS DO NOT ENTITLE THE DEFENDANT 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 DEFENDANT INCREASED UTILITY FEES IN VIOLATION OF THE HANCOCK AMENDMENT (MO. CONST ART X, § 22) BY SETTING CHARGES AT A LEVEL TO INCREASE THE DEFENDANT’S GENERAL REVENUE AND SUBSIDIZE GENERAL GOVERNMENTAL EXPENDITURES RATHER THAN TO COMPENSATE FOR THE PROVISION OF SERVICES.

The Missouri Court of Appeals reached the correct result in reversing the trial court’s summary judgment in favor of the City, but employed the incorrect analysis. After winning in the Missouri Court of Appeals, the plaintiffs sought transfer so that this Court could determine whether the factors set forth in footnote 10 of *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991), are controlling in determining whether the charges at issue in this case are subject to the Hancock Amendment.

*Keller* holds that the Hancock Amendment prohibits “fee increases that are taxes in everything but name.” *Id.* at 303. Section 22 of the Hancock Amendment is intended to prevent political subdivisions from circumventing the Hancock Amendment by labeling a tax increase as a license or fee; thus, courts are required to examine the

substance of a charge to determine if it is a tax without regard to the label used by the governmental entity imposing it. *Id.* at 305. The holding of *Keller* is that fees or charges to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not subject to the Hancock Amendment, ***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.* at 303-04; *see also Zahner v. City of Perryville*, 813 S.W.2d 855, 859 (Mo. banc. 1991).

Cases since *Keller* have caused confusion by ignoring the holding of *Keller* and declaring that the factors mentioned in footnote 10 of the *Keller* case are controlling in ***all*** cases in which a court determines whether a charge is subject to section 22 of the Hancock Amendment. In this case, for example, the circuit court stated that it was “bound in its assessment . . . by the case of *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo.banc 1991) and its progeny.” L.F. at 307. In its opinion in this case, the Court of Appeals declared that “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.” *Arbor* at 6.

The circuit court and the Missouri Court of Appeals were both incorrect in declaring that the five factors mentioned in footnote 10 of the *Keller* case control the determination of whether the charges at issue in this case were subject to the Hancock Amendment. The *Keller* footnote factors are pure dicta and were not even used to resolve the dispute in *Keller*. As the Court explained in footnote 10, the factors were

merely intended to be “helpful” in determining whether a charge “is closer to being a ‘true’ user fee or a tax denominated as a fee.” *Keller*, 820 S.W.2d at 304 n.10.

This Court has never held or even suggested that the *Keller* footnote factors must be used in all fee cases. It has only listed the factors without applying them (in *Keller*), considered them in connection with a sewer district’s charge (in *Beatty v. Metropolitan St. Louis Sewer Dist.*, 867 S.W.2d 217 (Mo. banc 1993)), and relied on the holding in *Beatty* to declare without analysis that a city’s sewer charge was subject to the Hancock Amendment (in *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo. banc 1995)). This Court has never elevated the *Keller* footnote to the blanket rule that the opinions of the Missouri Court of Appeals have declared it to be in this case and others.<sup>1</sup>

The reason that the Court has not returned to the *Keller* footnote is plain. The footnote factors are inconclusive and frequently provide no clear answer. *See Beatty*, 867

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<sup>1</sup> Indeed, in recently representing clients who sued the City of Pine Lawn for a Hancock Amendment violation, the counsel for the respondent in this case, Kenneth J. Heinz, argued persuasively that the *Keller* footnote test can be relevant in considering the validity of the *imposition* of a municipal charge, “but it has no relevance to this situation of a fee increase.” *Wright v. City of Pine Lawn*, No. ED 94290 (Respondents’ Brief filed May 28, 2010, available through Westlaw as 2010 WL 2589205). On September 7, 2010, the Missouri Court of Appeals affirmed a judgment against Pine Lawn and in favor of Mr. Heinz’s clients.

S.W.2d at 221. The factors are vague, subject to manipulation, and unworkable. *Id.* at 222 (Holstein, J., concurring in result).

The *Keller* factors were certainly not intended to be controlling in a case like this one, in which the undisputed facts show that a fee increase is calculated to yield a surplus for the purpose of funding ordinary governmental expenditures. As discussed within, footnote 10 of the *Keller* opinion has caused nothing but confusion and inconsistency in the opinions of the Missouri Court of Appeals that have attempted to apply it.

This case is an example of the inadequacy of the *Keller* footnote factors. In 2004, the State Auditor came to the City of Hermann at the request of residents who petitioned for an audit. The Auditor discovered that the City had raised its utility charges to generate surplus funds, which it was using to pay for ordinary governmental operations.

Hermann is not alone in this kind of activity. The Auditor has identified a few other cities, including Salem and Marceline, that have padded their general revenue by increasing utility charges without a vote of the people.<sup>2</sup> Notably, there are over one hundred members of the Missouri Public Utility Alliance, the organization that represents municipally-owned electric, natural gas, water, wastewater, and broadband utilities.<sup>3</sup> As far as the State Auditor has determined, it appears the abusive practices in Hermann, Salem, and Marceline have only been adopted by a minority of municipal utilities.

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<sup>2</sup> <http://www.auditor.mo.gov/press/2010-08.pdf> (City of Salem);

<http://www.auditor.mo.gov/press/2010-40.pdf> (City of Marceline).

<sup>3</sup> [http://www.mpua.org/Members\\_Directory.php](http://www.mpua.org/Members_Directory.php)

The Auditor gave Hermann a 31-page report that identified the problems discovered during the audit. The first listed problem was the City's improper raising of its utility charges, which violated Article X, Section 22(a) of the Missouri Constitution (commonly known as the "Hancock Amendment"). The City did not resolve the issues raised in the Auditor's report. The City did not lower its utility rates. Instead, it boldly raised some of those rates soon thereafter.

After the City failed to curb its violations in response to the Auditor's report, the plaintiffs brought this action on behalf of a class of City utility customers, seeking a declaration that the City's utility increases violated the Hancock Amendment. The plaintiffs also sought a refund and an injunction to prevent the City from collecting the unconstitutional increases. The trial court certified this matter as a class action, with the plaintiffs representing a class of Hermann citizens and businesses subject to the unconstitutional charges imposed by the City without a vote of the people.

The people of Hermann are being burdened by utility rates that are, in some instances, nearly twice what most of the state pays. The City maintains that it should be able to spend whatever it wants, and to pay for these governmental expenditures by raising utility fees whenever it wants, and in whatever amount it wants. Its captive utility customers must pay whatever the City charges because they have no choice -- there are no other utility providers in Hermann. The City intentionally uses utility charges to fund ordinary governmental operations, as shown by the fact that it *budgets* for large transfers from the utility accounts into the general revenue fund. "The Constitution would be

impotent indeed if such a transparent effort could succeed in defeating a constitutional provision.” *Loving v. City of St. Joseph*, 753 S.W.2d 49 (Mo. App. 1988).

It is undisputed that the City’s utility rates generate millions of dollars in excess revenue, which the City then transfers to its general revenue fund. It is undisputed that the City used those funds to pay for ordinary governmental expenses. It is undisputed that the City did not have a vote of the people before its utility fee increases. *Zahner, Keller*, and *Beatty* hold that 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. The undisputed facts demonstrate that the City’s utility fee increases are subject to the Hancock Amendment, and thus required a popular vote. As the City did not obtain the voters’ approval before raising its fees to generate huge surpluses, the fee increases violate the Hancock Amendment.

The facts show that the trial court should have entered summary judgment in favor of the plaintiffs based on the clear holding of *Keller*, and without regard to the dicta in footnote 10. At the very least, there is a fact dispute precluding summary judgment for the City. The Court should reverse the judgment in this case and remand the matter to the circuit court. Despite incorrectly attempting to apply the *Keller* footnote considerations in this case, the Missouri Court of Appeals was entirely correct in its holding: “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.” *Arbor* at 16.

## **I. Standard of review.**

This Court reviews grants of summary judgment de novo. *Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust*, 304 S.W.3d 112, 116 (Mo. banc 2010). Summary judgment is only proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; Rule 74.04(c)(6). The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. *Moore Automotive Group, Inc. v. Goffstein*, 301 S.W.3d 49, 52 (Mo. banc 2009). Because the trial court’s judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court’s order granting summary judgment. *Id.* The record is reviewed in the light most favorable to the party against whom judgment was entered. *Derousse v. State Farm Mut. Auto. Ins. Co.*, 298 S.W.3d 891, 893-94 (Mo. banc 2009).

## **II. The Hancock Amendment expresses the will of the people of Missouri.**

This Court was well acquainted with the Hancock Amendment even before the measure became effective. In *Missouri Farm Bureau Federation v. Kirkpatrick*, 603 S.W.2d 947 (Mo. banc 1980), the Court recounted that a petition containing 167,363 signatures had been submitted to the Secretary of State to cause a proposed amendment to be added to the ballot at the election of November 4, 1980. The Court characterized the proposal as an amendment “to limit state and local government spending.” *Id.* at 948. The Court issued a writ of mandamus, holding that certain signatures in support of the initiative petition should be counted, and the measure was placed on the ballot.

The Court first considered the substance of the Hancock Amendment in *Buchanan v. Kirkpatrick*, in which the appeal was commenced shortly before the 1980 election (on October 17, 1980), and argued in this Court shortly after the election (on January 29, 1981). 615 S.W.2d 6, 8 n.1 (Mo. banc 1981). In *Bucanhan*, the Court took judicial notice that on November 4, 1980, the Hancock Amendment was approved by the people by a vote of 1,002,935 to 807,187 (a margin of more than 195,000 votes). *Id.* at 8-9.

The Court noted that the framers of the Missouri Constitution recognized the inherent right of the people to amend it. *Id.* at 11. The very first section of the very first article of the Constitution provides, “That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.” Mo. Const. art. I, § 1. Article I, Section 3, provides that the people “have the inherent, sole and exclusive right to . . . alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness.” In Article III, Section 49, the people reserved to themselves the power to propose and enact “amendments to the constitution by the initiative, independent of the general assembly.”

In *Buchanan*, the Court stated that, generally, the central purpose of the Hancock Amendment is to establish limits for the state and other political subdivisions that may not be exceeded without voter approval. *Buchanan*, 615 S.W.2d at 13. The official ballot title submitted to the voters included the provision that the Amendment “prohibits

local tax or fee increases without popular vote.” *Id.*<sup>4</sup> This is the issue “on which the electorate actually voted.” *Id.* at 14.

The Court held that the Hancock Amendment was not unconstitutional, emphasizing that it was not within the power of the Court to judge the wisdom of the people in adopting the Amendment. *Id.* at 11. The Court cited *Edwards v. Lesueur*, 132 Mo. 410, 33 S.W. 1130 (banc 1896), a case in which the Court considered a proposed constitutional amendment that would have moved the state capital from Jefferson City to Sedalia. In considering whether this proposed amendment should be placed before the voters, the Court stated that courts “have nothing to do with the wisdom or policy of such proposal.” *Id.*, 33 S.W. at 1133. The Court held that when a constitutional amendment has been submitted, the Court’s only inquiry is whether it received the sanction of popular approval, in the manner prescribed by law. *Id.* The wisdom and expediency of

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<sup>4</sup> This is the entire ballot title:

Limits state taxes except for yearly adjustments based on total incomes of persons in Missouri or emergencies; prohibits local tax or fee increases without popular vote. Prohibits state expansion of local responsibility without state funding. No savings or costs to the state or local governments can be determined because of the definitions, formula provisions and the exceptions allowed in the proposal.

*Buchanan*, 615 S.W.2d at 13.

an amendment “are questions upon which the people are to pass, and over which the courts have no power. . . . The people have placed no limitation on their own power in this respect.” *Id.* at 1133-34.

The Court’s next Hancock Amendment case set forth the general rules of constitutional interpretation for the Amendment that are consistent with the requirement to defer to the wisdom of the people. *See Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982). The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment. *Id.* at 324. The Court stated that rules applicable to constitutional construction are the same as those applied to statutory construction, except that the Constitution is given a broader construction, due to its more permanent character. *Id.* In determining the meaning of a constitutional provision, a court “must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted.” *Id.* The meaning conveyed to the voters is presumed to be the ordinary and usual meaning of the words. *Id.* The grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed. *Id.* Due regard is given to the primary objectives of the provision in issue as viewed in harmony with all related provisions, considered as a whole. *Id.*

**III. Section 22 of the Hancock Amendment bars increases in charges by subdivisions of the state without a vote of the people.**

The Hancock Amendment has three main substantive provisions (in addition to definitions and enforcement provisions).

First, the Amendment imposes a limit on the total amount of state taxes that may be imposed by the General Assembly. *See* Mo. Const. art. X, §§ 18-20. The Court has considered this portion of the Hancock Amendment numerous times. *See, e.g., Missouri Merchants & Manufacturers Ass'n v. State*, 42 S.W.3d 628 (Mo. banc 2001).

Second, the Hancock Amendment forbids unfunded mandates, providing that the state cannot reduce state funding for any existing activity or service required of political subdivisions, and the state cannot impose a new burden on political subdivisions without providing state funding for any increased costs. *See* Mo. Const. art. X, § 21. The Court has also considered this section of the Hancock Amendment many times. *See, e.g., School Dist. of Kansas City v. State*, 317 S.W.3d 599 (Mo. banc 2010).

Third, the portion of the Hancock Amendment at issue in this case forbids local governments from levying or increasing any tax, license, or fees without a vote of the people:

Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that

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

*See* Mo. Const. art. X, § 22(a).

#### **IV. The Court’s pre-*Keller* cases defined “tax, license or fees.”**

In the years after the passage of the Hancock Amendment, the Court entertained several cases addressing the meaning of Section 22(a) of the Hancock Amendment, culminating with *Keller v. Marion County Ambulance District* in 1991.

In *Roberts v. McNary*, 636 S.W.2d 332, 334 (Mo. banc 1982), St. Louis County passed a budget for the 1982 calendar year (after the passage of the Hancock Amendment) that included increases in fees for numerous county services, such as parks and building inspection. A resident and taxpayer of St. Louis County filed an action for a declaratory judgment seeking to prevent St. Louis County from implementing the fee increases, alleging that the increases violated Section 22 of the Hancock Amendment because they were not submitted to the voters for approval. *Id.*

St. Louis County argued that its charges were not within the scope of the “tax, license or fees” mentioned in Section 22. St. Louis County contended that the purpose of the Hancock Amendment -- limitation of taxation -- required that “tax, license or fees” be read to include “only those levies which seek to generate general revenue,” not “user” fees or “regulatory” fees that support only the service for which they are collected. *Id.* at 334-335. The plaintiff argued that a plain reading of Section 22 “would include all licenses or fees, regardless of the use to which the funds generated are put.” *Id.* at 335.

Relying on the dictionary definitions of the terms used in Section 22 and the Court’s own recent jurisprudence on the meaning of the word “tax,” the Court unanimously held that St. Louis County’s attempts to increase “user” fees were invalid because the increases were required to be authorized by the voters:

Reading the words examined here for their ordinary and customary meanings, they present a sweeping list of the types of pecuniary charges a government makes. Quite simply, this exhibits an intent to control any such charges to the extent that the voters must approve any increase in them. Therefore, the charges which appellants seek to enact by county ordinance are governed by Art. X, § 22(a).

*Id.* at 336.

The Court stated that this holding was consistent with the objectives of the Hancock Amendment as clearly understood by voters -- to rein in increases in governmental revenue and expenditures. *Id.* The Court noted that the official ballot title for the Hancock Amendment specifically informed voters that the amendment “prohibits local tax or fee increases without popular vote.” *Id.* The unanimous Court held, “Limiting the ability of counties to increase licenses or fees is certainly in harmony with the objectives of the Amendment as a whole.” *Id.*

The Court’s unanimity in *Roberts* was a rarity. The Court was divided in its other Hancock Amendment cases in this period. *See Missouri Farm Bureau* (one dissenting judge); *Buchanan* (two dissenting judges); *Boone County* (three dissenting judges). The meaning of “tax, license or fees” appears to be the one topic on which all members of the Court at the time of the passage of the Hancock Amendment could agree.

In *Zahner v. City of Perryville*, 813 S.W.2d 855 (Mo. banc 1991), the Court considered whether a street assessment was within the meaning of “tax, license or fees” under Section 22 of the Hancock Amendment. Pursuant to statutory authority, the City of Perryville improved a street and issued an assessment against the abutting property for the cost of curbs, gutters, and storm water control. *Id.* at 857. A property owner paid his assessment under protest and filed an action against Perryville, arguing that Perryville increased existing fees and charges for street improvements without voter approval in violation of Section 22.

The Court held that the dispositive question was whether the assessment was a tax or fee within the meaning of the Hancock Amendment. The Court explained that the term “special assessment” is generally understood to be related either to a specific property or a specific purpose. *Id.* at 858. The special assessment in *Zahner* “comports with the general understanding of a special assessment and does not comport with the definition of either tax or fee as the meanings of those words derive from the dictionary and from previous interpretation by this Court.” *Id.*

The Court held that the assessment was not a “fee,” which is (as defined in *Roberts*) “a fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; a charge fixed by law for services of a public officer.” *Id.* The Court held that the special assessment for improvement to a street abutting an owner’s property is not a fee: “From the commonly understood meaning recognized in *Roberts*, it is apparent that the assessments at issue are not fees.” *Id.*

The Court held the assessment was also not a tax. *Id.* at 858-59. Taxes are not payments for a special privilege or a special service rendered. *Id.* at 859. 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.* Under *Roberts*, “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 is not a tax.” *Id.* The Court held that the assessment against abutting properties fit none of the established definitions of a tax -- the payments made by the residents were for a specific purpose, there was a special benefit to property owners as a result of the street improvements, the amount of each assessment was determined by the cost of the improvements, and there was no payment into the city’s general fund. *Id.*

**V. *Keller* attempted to clarify the meaning of “tax, license or fees.”**

Shortly after *Zahner*, the Court decided *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991). An ambulance district increased its charge for various services without a vote of the people, and a group of taxpayers in the district filed an action alleging that the increased charges violated Section 22.

Consistent with *Zahner*, the Court in *Keller* explained that not all revenue increases by local governments are subject to the Hancock Amendment. *Id.* at 303.

Along with local tax increases without voter approval, Section 22 of the Hancock Amendment prohibits “fee increases that are taxes in everything but name.” *Id.*

In *Keller*, the Court stated that *Roberts* “speaks far too broadly” in suggesting that that all revenue increases, including “fee” increases, are subject to the Hancock Amendment: “The phrase ‘license or fees’ in § 22 indicates an intent to prevent political subdivisions from circumventing the Hancock Amendment by labeling a tax increase as a license or fee. This language requires courts to examine the substance of a charge, in accordance with this opinion, to determine if it is a tax without regard to the label of the charge. To the extent that *Roberts* is inconsistent with this opinion, it is overruled.” *Id.* at 304-05 (internal citations omitted).

Quoting *Zahner*, the *Keller* Court confirmed the distinction between “true” user fees and taxes denominated as fees as being that charges paid 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.* at 303-04. The Court rejected the contention that all fees -- whether user fees or “tax-fees” -- are subject to the Hancock Amendment. *Id.* at 304.

In a footnote that played no role in the resolution of the case, *Keller* listed “criteria” that it characterized as “helpful in examining charges denominated as something other than a tax. 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.* at 304 n.10. (Due to the length of footnote 10, it is not reproduced verbatim here. For the Court’s convenience, the entire *Keller* opinion is included in the appendix to this brief. The factors mentioned in the footnote are discussed in detail below.)

The *Keller* dissent noted that “the majority has failed to analyze this case by its criteria found in footnote 10 of its opinion.” *Id.* at 311 (Holstein, J., dissenting). The dissent was prescient in warning that the footnote “assures continued uncertainty and expensive, protracted litigation as political subdivisions and taxpayers struggle to sort out prohibited fees from unprohibited fees. . . . The subtleties and nuances that distinguish ‘true’ fees from ‘nominal’ fees will give rise to repeated lawsuits, perhaps allowing different courts to reach different results under similar facts.” *Id.* at 310-11. As noted below, the *Keller* footnote factors have led to extensive litigation with conflicting results.

#### **VI. *Beatty* identified the limitations of the *Keller* footnote factors.**

Two years after *Keller*, in *Beatty v. Metropolitan St. Louis Sewer District*, 867 S.W.2d 217, 218 (Mo. banc 1993), the Court stated, “In this case we return to our continuing struggle to define the perimeters of the Hancock Amendment and particularly of Article X, Section 22(a) of the Missouri Constitution.” In 1990, a sewer district sought voter approval to increase its sewer charges. The voters rejected the increase. After *Keller* was issued in 1991, the sewer district increased its wastewater charges by \$4.00 per month without voter approval.

*Beatty* noted that, to assist in determining whether a governmental charge is a tax within the meaning of Article X, Section 22(a), or a user fee not subject to constitutional

controls, “*Keller* suggested a five-pronged analysis.” *Id.* at 220. The taxpayer in *Beatty* urged the Court to overrule *Keller* as wrongly decided, but the Court declined to go so far: “While the Court will continue to assess the wisdom and viability of *Keller*’s holding in appropriate cases, we need not decide *Keller*’s ultimate fate in this case. Application of the *Keller* test requires that MSD submit its sewer charge increase to the voters for approval in advance of implementation.” *Id.*

After finding the *Keller* footnote criteria to be inconclusive as applied to the sewer district’s charge, the Court explained that the Hancock Amendment “reveals the voters’ basic distrust of the ability of representative government to keep its taxing and spending requirements in check. As an additional bulwark against local government abuse of its power to tax, the voters amended the constitution to guarantee themselves the right to approve increases in taxes proposed by political subdivisions of the state. Whether a governmental charge is a tax is the issue with which *Keller* struggled. And as *Keller* shows, the language employed in Article X, Section 22(a), is ambiguous.” *Id.* at 221.

The Court held that it must attempt to ascertain the intent of the voters from the language they adopted and to resolve doubts as to meaning in favor of that intent: “Where, as here, genuine doubt exists as to the nature of the charge imposed by local government, we resolve our uncertainty in favor of the voter’s right to exercise the guarantees they provided for themselves in the constitution.” *Id.*

In light of this presumption that uncertain cases should be resolved in favor of the public’s right to vote on increases in local charges, the Court held that the sewer district’s increase would have to be put to a vote before being enforced: “As we have previously

said, the facts of this case do not clearly define the nature of [the sewer district's] charges. . . . Thus, we resolve our doubts in favor of the taxpayers and hold that [the sewer district's] charges are subject to Article X, Section 22(a), and may not be increased without prior voter approval.” *Id.*

In a concurrence, Judge Holstein again noted the deficiencies of the factors in the *Keller* footnote: “I do not here suggest abandonment of the fundamental holding in *Keller*. At the same time, I believe that the five criteria noted in footnote 10 of the *Keller* opinion are so vague and subject to manipulation that they will necessarily result in repetitive litigation and are unworkable.” *Id.* at 222 (Holstein, J. concurring in result). After discussing each factor, Judge Holstein stated, “Four of the five factors are highly subject to manipulation so that fees charged for a service in one community must have voter approval, but a fee for the same service in another community need not have voter approval. The fifth factor is almost always inconclusive. We should find objective standards by which to distinguish fees from taxes. Only if we are wholly unable to articulate workable standards should overruling *Keller* be considered. I again predict that we have not seen the last of this type of litigation.” *Id.* at 223.

#### **VII. The *Keller* factors proved to be inconclusive and inconsistent.**

*Beatty* is one of only two cases in which this Court has ever tried to apply the *Keller* footnote analysis. As noted, in *Beatty* the Court found the factors to be inconclusive and resolved the case in favor of the people’s constitutional right to vote on increases in local charges.

*Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo. banc 1995), was similar to *Beatty* in that a local resident filed an action to invalidate a local sewer charge imposed without a vote of the people. In *Feese*, the Court admitted the difficulties it had experienced in enforcing Section 22 of the Hancock Amendment: “Whether a tribute demanded by a political subdivision of the state is a tax, license or fee within the meaning of Section 22(a) is a question that has defied bright-line resolution by this Court.” *Id.* at 812. The Court reiterated the presumption that, when the *Keller* calculus does not produce a definitive answer, the Court resolves its uncertainty in favor of the voter’s right to approve or disapprove local fee increases. *Id.* Without much analysis, the Court found that the facts in *Feese* were virtually identical to the facts in *Beatty* and held that the sewer service charges were a “tax, license or fee” within the meaning of Section 22. *Id.*

Since *Beatty* and *Feese*, this Court has not addressed the meaning of “tax, license or fee” within the meaning of Section 22(a). The Missouri Court of Appeals has made many attempts to apply *Keller*, with mixed results. Consistent with the warnings in the *Keller* dissent and the *Beatty* concurrence, the *Keller* footnote soon proved to lead to inconsistent results and to be subject to manipulation by local government actors.

In *Beatty* and *Feese*, this Court held that periodic local sewer charges were subject to the Hancock Amendment. In a later case involving the same sewer district from *Beatty*, the district repealed the ordinance that this Court found to be invalid in *Beatty* and passed a new ordinance to capture the same charges. *Missouri Growth Ass’n v. Metropolitan St. Louis Sewer Dist.*, 941 S.W.2d 615, 620 (Mo. App. 1997). The Missouri Court of Appeals noted that the new ordinance repealed the invalid ordinance

and “changes the method of billing” for the same fees. *Id.* The court stated, “The *Keller* factors are used to determine whether a revenue increase by a local government is an increase of a tax, license, or fee which requires voter approval under the Hancock Amendment.” *Id.* at 622.

The *Missouri Growth* court specifically rejected an argument based on the *holding* of *Keller* that the sewer charges were taxes in everything but name, holding that the court was compelled to consider the *Keller* footnote factors: “We reject appellants’ non-*Keller* analysis because our Supreme Court clearly adopted this five-factor analysis in *Beatty II* when it decided whether MSD’s previous user charges were subject to the Hancock Amendment. We are bound by the decisions of the Missouri Supreme Court.” *Id.* at 624-25. The court in *Missouri Growth* considered the footnote factors and went on to find that the sewer district’s manipulation was successful, resulting in charges that were not required to be approved by a vote of the people. *Id.* at 624. Citing *Missouri Growth*, the Missouri Court of Appeals went on to find that periodic sewer charges like those in *Beatty* and *Feese* were not subject to the Hancock Amendment in *Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d 550 (Mo. App. 1998).

The *Keller* footnote has produced inconsistent results in other cases. For example, in *Ashworth v. Moberly*, 53 S.W.3d 564 (Mo. App. 2001), the Missouri Court of Appeals considered the factors and held that a city’s annual inspection fee, imposed without a vote of the people, “was a user fee not subject to the Hancock Amendment.” Applying the same factors, the same court considered an identical city fee for annual inspections and held that the “*Keller* factors weigh in favor of finding a violation of the Hancock

Amendment.” *Building Owners & Managers Ass’n v. Kansas City*, 231 S.W.3d 208 (Mo. App. 2007). Hermann’s counsel, Mr. Heinz, argued persuasively in another recent case that an increase in a similar city inspection charge was a violation of the Hancock Amendment. *See Wright v. City of Pine Lawn*, No. ED94290 (Respondents’ Brief filed May 28, 2010, available through Westlaw as 2010 WL 2589205).

The Missouri Court of Appeals has taken *Keller* and *Beatty* as a directive to apply the *Keller* footnote considerations without regard to the context of the individual case. Thus, the lower court has considered the factors in cases in which the local charge is very clearly subject to the Hancock Amendment under the holding of *Keller*. In *Avanti Petroleum, Inc. v. St. Louis County*, 974 S.W.2d 506 (Mo. App. 1998), a county imposed a new annual license fee without a vote and without purporting to provide any service in exchange for the fee. The court rejected an argument that the *Keller* footnote factors were ill suited to consider an obvious license fee (as opposed to a purported fee in exchange for a government service), considered the factors anyway, and declared, “All five factors weigh in favor of finding the fee is a tax subject to voter approval under the Hancock Amendment.” *Id.* at 510-11.

Similarly, the Missouri Court of Appeals has applied the *Keller* footnote in cases in which the local charge is very clearly not subject to the Hancock Amendment under the holding of *Keller*, like the one-time ambulance fee for service in *Keller* and the one-time assessment for street improvements in *Zahner*. *See, e.g., Larson v. City of Sullivan*, 92 S.W.3d 128 (Mo. App. 2002) (one-time fee for sewer connection); *Home Builders*

*Ass'n v. City of Wildwood*, 32 S.W.3d 612 (Mo. App. 2000) (subdivision fee described as a “one-time fee for a one-time service”).

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

Since *Beatty*, this Court has not addressed the practical effect of footnote 10 of the *Keller* decision. As shown, it is plain that the footnote has not provided any helpful or useful guidance for the lower courts. Rather, the footnote has bred only confusion and inconsistency.

Further, the footnote has subverted the will of the people as expressed in their enactment of Section 22 of the Hancock Amendment. As the Court has noted, the ballot on which the people voted promised that the Hancock Amendment “prohibits local tax or fee increases without popular vote.” *Buchanan*, 615 S.W.2d at 13. The Court explained in *Beatty* that the Hancock Amendment reveals the voters’ basic distrust of local government and its abuse of the power to tax, so the voters guaranteed themselves “the right to approve increases in taxes proposed by political subdivisions of the state.” *Beatty*, 867 S.W.2d at 221.

The courts are explicitly made the guardians of the public’s rights under the Hancock Amendment, which provides, “Notwithstanding other provisions of this constitution or other law, any taxpayer of the state, county, or other political subdivision shall have standing to bring suit in a circuit court of proper venue and additionally, when the state is involved, in the Missouri supreme court, to enforce the provisions of sections 16 through 22, inclusive, of [the Hancock Amendment].” Mo Const. art X, § 23.

Under this authority, Missouri courts have long recognized and guarded against the ingenuity of local governments in attempting to skirt the Hancock Amendment. In *Loving v. City of St. Joseph*, 753 S.W.2d 49 (Mo. App. 1988), a city owned a tennis complex and charged no fees for the use of the tennis courts. After the enactment of the Hancock Amendment, the city passed an ordinance authorizing an agreement granting a private entity the right to manage the tennis complex. The agreement contained a schedule of fees for the use of the complex by members of the public, and the private entity was required to collect the fees and remit a portion to the city. The ordinance was passed for the purpose of raising revenue for the city.

The Missouri Court of Appeals, before *Keller* was decided, cited *Roberts* and held that the City was expressly prohibited from imposing a fee for the use of the tennis complex without a vote of the people when such a fee was not in effect at the time the Hancock Amendment was passed. *Id.* at 51. The court rejected the city's claim that a private entity was collecting the fees, noting, "Such attempts at deception are as old as recorded history. . . . The Constitution would be impotent indeed if such a transparent effort could succeed in defeating a constitutional provision." *Id.* The *Loving* court held that the city's agreement with the private entity "in an attempt to get around the provisions of Article X, Section 22" was ineffective. *Id.*

The *Keller* factors have proven to be nothing but a guide for some local governments to follow in crafting charges to undermine the intent of Section 22 of the Hancock Amendment. The *Missouri Growth* and *Mullenix* cases show that the *Keller*

footnote does not *prevent* increases in local charges without a vote of the people -- it *facilitates* these increases.

In *Beatty*, the Court said that it would continue to assess the wisdom and viability of *Keller*. *Beatty*, 867 S.W.2d at 220. The time has come to revisit footnote 10 of the *Keller* opinion and declare that it does not protect the people's rights under the Hancock Amendment. The Court should order that footnote 10 should no longer be followed, and that courts should be guided by the clear holding of *Keller*: Section 22 of the Hancock Amendment prohibits "fee increases that are taxes in everything but name." *Keller*, 820 S.W.2d at 303. Section 22 "indicates an intent to prevent political subdivisions from circumventing the Hancock Amendment by labeling a tax increase as a license or fee. This language requires courts to examine the substance of a charge, in accordance with this opinion, to determine if it is a tax without regard to the label of the charge." *Id.*

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

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.

As shown by the facts of this case, that distrust is fully justified in the City of Hermann. Judged by any standard (*Roberts*, the *Keller* holding, or the *Keller* footnote), Hermann's increased utility charges violate Section 22 of the Hancock Amendment.

Section 22(a) imposes limitations on a political subdivision's ability to increase a tax or fee, providing "Counties and other political subdivisions are hereby prohibited 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." Mo. Const. art. X, § 22(a). Thus, 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.

It is undisputed that the City increased its electric, natural gas, water/sewer, and refuse/waste fees after November 4, 1980, to fund general revenue rather than to pay for services. It is undisputed that the City did so without a vote of the people. It is undisputed that these increases are used to fund general revenue. The Missouri Constitution applies to and voids the City's utility rate increases after November 4, 1980.

In the circuit court, the City sought to circumvent the language of the Missouri Constitution by characterizing its utility fee increases as "user fees." However, the City's "user fee" argument is foreclosed by the constitution and the relevant case law.

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 (fees that raise revenue to be paid into the general fund to defray customary governmental expenditures, rather than to compensate public officers for particular services rendered, are effectively taxes); *see also Zahner* (finding no Hancock violation where there was no

payment into the city's general fund); *c.f. President Riverboat Casino-Missouri v. Missouri Gaming Comm'n*, 13 S.W.3d 635, 628 (Mo. banc 2000) (drawing same distinction in a non-Hancock Amendment case).

Generally, if the fee increase (or a portion of the increase) funds government expenditures that have nothing to do with the service for which the fee is charged, then the fee increase is doing what the Hancock Amendment prohibits. *See Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982). *Roberts* explains (and *Keller* confirms) that the words "license or fees" were added to "tax" in section 22(a) to prevent the government from generating general revenue to compensate for the funds lost through the tax-limiting aspect of the Hancock Amendment.

Missouri courts have not hesitated to apply the Hancock Amendment to strike down fee increases without voter approval where the fee payers have no real choice but to pay the fee. *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); *Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982) (building inspection fees) (overruled by *Keller* to extent it suggested all revenue increases are subject to Hancock Amendment); *Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City*, 231 S.W.3d 208 (Mo. App. 2007) (fire inspection fees); *Avanti Petroleum, Inc. v. St. Louis County*, 974 S.W.2d 506 (Mo. App. 1998) (license fee to sell tobacco); *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo. banc 1995) (sewer charges).

Although an essential fee might be raised without violating the Hancock Amendment if necessary to pay for the costs of operation and maintenance of a particular service, *see Oswald v. City of Blue Springs*, 635 S.W.2d 332 (Mo. banc 1982) (increases to pay for maintenance and operation are not prohibited), increases that generate surpluses to fund ordinary governmental expenditures violate the Hancock Amendment.

This is a case in which the citizens have no choice but to pay the City's utility fee increases for electricity, natural gas, trash removal, public water, or public sewer services. The City has a monopoly on those utility services. No Hermann citizens are allowed to obtain their natural gas, electricity, trash removal, public water, or public sewer services from any provider except the city.

The City raised utility fees after the Hancock Amendment was passed and used the increases to generate millions of dollars in surplus to be siphoned off for ordinary governmental expenditures without voter approval. That is a clear violation of the Hancock Amendment.

The plaintiffs do not contend that all fee increases that generate general revenue for a city are necessarily barred by the Hancock Amendment. For example, if a city generates enough revenue from an increased municipal pool admission fee to be able to shift some excess money from swimming pool operations into its general revenue fund, that probably would not be a Hancock violation. It is unlikely that such an increase would yield more than de minimis revenue. *See, e.g., Koehr v. Emmons*, 55 S.W.3d 859, 864 (Mo. App. 2001) ("such an insubstantial sum [\$4.04] does not provide a proper foundation for finding a Hancock violation").

But more fundamentally, the Hancock Amendment is concerned with the “levy” of a local charge -- that is, a charge *imposed* on the people that must be paid. Missouri citizens have many choices when it comes to swimming, and swimming is not a basic need. Citizens need not pay for increased pool fees if they are too high.

However, 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. This is obvious because the increase of such fees beyond what is needed to pay the city’s costs to provide the service is effectively a forced contribution of wealth to meet the expenditures of government. This is the definition of a tax. *See Zahner v. City of Perryville*, 813 S.W.2d 855, 858 (Mo. banc 1991).

One clear indication that a fee increase is being used to fund ordinary governmental operations is that it results in money flowing into a city’s general revenue fund. *See Zahner*, 813 S.W.2d at 859 (special assessment did not result in payment into the city’s general fund; therefore it was not subject to Hancock Amendment). It is undisputed that the City has used its increased utility fees to funnel money regularly and directly into its general revenue fund to pay for ordinary governmental expenditures.

The City has used various methods to achieve this diversion. Sometimes it simply and unabashedly transfers money from utility accounts into the general revenue fund. L.F. at 989, 992, 1000. On a quarterly basis it accomplishes the transfer into the general fund to pay for ordinary governmental expenditures by way of a 10% gross receipts charge or surcharge, which it imposes on the electric, gas and water accounts, as the City’s designee testified:

Q: The city currently imposes a gross receipts tax, correct?

A. There's a gross receipts charge.

Q. Okay. Tell me what you mean by that?

A. Actually an accounting adjustment that we use that we do for the utilities.

Q. What do you mean by accounting adjustment?

A. It is -- it's funds that we actually transfer from the -- from the electric, water and gas to the general fund on a quarterly basis on the revenue that's collected for that commodity only.

Q. And why do you call it an adjustment? What do you mean by an adjustment?

A. Well, I don't call it -- it is not classified as a tax and has never been.

Q. We'll come back to that. Just your adjustment, I'm wonder what you mean by adjustment?

A. It's actually funds that are -- that are transferred from one fund to another, basically.

Q. Okay. So when you say accounting adjustment, that just really means a transfer of money in one account into another account?

A. Yes.

Q. You said that's done quarterly?

A. Yes.

Q. And you said it was based on revenue collected?

A. Yes.

L.F. at 976.

The City's Annual Report shows that "the gross receipts fee paid by the electric, water and sewer, and natural gas utilities to the general fund is also a significant source of general revenue. It accounts for 35% of total general revenues." L.F. at 1507.

The City's designee testified unequivocally that transfers from utility funds are used to subsidize ordinary, non-utility, governmental operations:

Q. The City through the years has transferred some funds from its utility departments into its general revenue fund, would you agree with that statement?

A. Yes.

Q. And that – those funds that have been transferred into the general revenue fund, that money has been used to fund governmental operations beyond just provision of utility service, correct?

A. Correct.

Q. And the city also – we discussed the gross receipts charge, correct?

A. Correct.

Q. Those are transfers that come from certain utility accounts and go into the general revenue fund again, correct?

A. Correct.

Q. And those funds, after they are transferred into the general revenue fund, are used to fund other governmental operations besides just the running of the city's utilities, correct?

A. Correct.

\* \* \*

Q. You'll agree that in practice, the rates are generating revenue above and beyond what's being used just to run the city's utilities, correct?

A. Correct.

L.F. at 989.

The City achieves additional transfer of utility revenue into the general revenue fund through imposition of a quarterly "communications fee" on some utility accounts, even though it is clear that the utilities get no benefit from this "fee." L.F. at 985-88, 1566, 1608. The communications fee costs certain utility accounts approximately \$100,000 every year. L.F. at 985-88.

Regardless of the method the City uses to siphon money from utility accounts into its general fund, the effect is the same. The increased fees are obviously being used to fund ordinary, non-utility governmental operations. That is precisely the kind of fee increase that the Hancock Amendment prohibits.

**A. The City's increases are subject to the Hancock Amendment.**

In the circuit court, the City claimed that its utility charges were immune from the Hancock Amendment. This argument incorrectly focuses on the existence of the charges themselves, not the *increases* at issue in this case. The Hancock Amendment does not outlaw charges. It outlaws increases, and particularly increases that are used to prop up the government. If the City were correct, the Court would only need to decide whether the City's customers were getting *something* in return for the charges. If so, according to

the City, the City would then have unlimited discretion to raise charges to any level without voter approval, even though the customers would have no choice but to pay the increased charges or move away. That construction would render the term “fees” meaningless in the Hancock Amendment. The City’s contention should be rejected.

The City cited *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301 (Mo. banc 1991), in support of its “user fee” argument. As noted, *Keller* considered whether an ambulance district’s increased service fee was subject to the Hancock Amendment. The Court explained that the crucial inquiry was whether the fee increase would raise revenue to be paid into the general fund to defray customary expenditures rather than compensation of public officers for particular services rendered. *Id.* at 303-04.

In *Keller*, the answer to that question was obvious because the ambulance district was not a general government like a city or a county. It was, as the Court explained, a “quasi-governmental organization” that collected revenue for the sole purpose of providing services for subscribers to its services. *Id.* at 304. It could never transfer money into a general fund because it was not in the general business of governing -- all it did was operate an ambulance service.

The *Keller* court noted that fee increases subject to the Hancock Amendment are “fee increases that are taxes in everything but name.” *Id.* at 303. The lesson from *Keller* is that if the fee increase is obviously generating money to be paid into the general fund, it is subject to the Hancock Amendment. The facts show that this is just such a case.

**B. The City’s increases are void under the *Keller* factors.**

Although *Keller* resolved a fairly easy question, it envisioned more difficult cases in the future. In an effort to answer future questions for cases where the result was less obvious, *Keller* set forth in a footnote some factors to help determine whether a fee increase was subject to the Hancock Amendment. The footnote questions are intended to help answer the fundamental question of whether a fee increase is funding ordinary government operations (and thus functioning as a tax increase). If it is obvious (as in this case) that the fee increase does just that, there is no need to ask the *Keller* footnote questions. Indeed, as noted, the Court did not even apply those factors to decide *Keller*.

Nevertheless, the circuit court considered those footnote factors in determining that that the City’s utility fees are “user fees” immune from the Hancock Amendment. L.F. at 307. As noted, the City erroneously focuses on the fee itself instead of whether the fee increases are propping up the City’s general fund. There is no need to consider the *Keller* footnote factors in a case (such as this one) where the undisputed facts shown that the fee increase is calculated to yield a surplus for the very purpose of funding ordinary governmental expenditures.

If they were applicable, the *Keller* footnote factors would demonstrate that the City’s fee increases at issue in this case violate the Hancock Amendment.

**1. When is the fee paid?**

The opinion of the Court of Appeals is incorrect in declaring that “this factor must be resolved in favor of the City.” *Arbor* at 8. The opinion states, “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.” *Id.* The conclusion that billing after services rendered this factor in favor of the City is directly contrary to the dictates of *Keller* and *Beatty*, which make it clear that this factor is concerned only with whether the payments are periodic. The utility fees at issue in this case are paid periodically, at regular monthly intervals. L.F. at 1607. According to *Keller*, application of this factor to this case demonstrates that the fees are “probably subject to the Hancock Amendment.”

In addition to the *Keller* footnote’s general lack of utility, as discussed above, the plaintiffs in this case agree with the view expressed by the counsel for the respondent in this case, Mr. Heinz, who argued persuasively in another recent case that the first prong of the *Keller* footnote might be relevant in considering the validity of the initial imposition of a municipal charge, but 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 this context: “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.*

Similarly, in this case the plaintiffs do not complain about charges for utility services, but rather increases without a vote to fund the City’s general revenue.

## 2. Who pays the fee?

The second *Keller* factor asks, “Who pays the fee?” *Keller* states that a fee subject to the Hancock Amendment is likely to be billed to all or almost all of the residents of the political subdivision. 820 S.W.2d at 304. In this case, the City Clerk, who was also the City’s designated witness, clearly stated that all Hermann citizens are City utility customers. L.F. at 1595, 1012-1015.

The increased fees are paid by all citizens of the City, since all Hermann citizens are City utility customers, and all City users of electricity, natural gas, public water, and public sewer services pay the increased fees. The City has a monopoly on electric, natural gas, public water, public sewer, and refuse services. L.F. at 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. at 1607-08, 1025. The citizens of Hermann have no choice but to pay whatever the City charges for utility services. L.F. at 1607-08.

According to *Keller*, application of this factor to this case demonstrates that the fees are probably subject to the Hancock Amendment, but the opinion of the Court of Appeals finds this issue in favor of the City. *Arbor* at 9. This is a summary judgment case. It is improper to find this issue in favor of the City in light of the City Clerk’s testimony.

### 3. Is the amount of the fee affected by the level of services?

The amount of the fees depends on the category of rate payer and, in large part, the amount of money that the City is transferring out of the utility funds into its general revenue fund. Accordingly, this factor favors the plaintiffs.

Even if the City's charges are affected *in part* by the level of goods or services, this factor would at worst be inconclusive, and should therefore be decided in favor of the party bringing the Hancock claim. *See Feese*, 893 S.W.2d at 812 (where a genuine doubt exists as to the nature of the charge imposed by a local government, the court resolves the uncertainty in favor of the voter's right to exercise the guarantees they provided for themselves in the constitution). The Court of Appeals was correct in stating, "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." *Arbor* at 11.

The City's designee testified that the City cannot agree or disagree with the State Auditor's statement that rates for electric, water, sewer, and natural gas have not been set at levels consistent with the cost to providing those services. L.F. at 997. In light of the City's sworn testimony on this issue, any argument that the fee is affected by the level of goods or services is entirely baseless.

The facts show that Hermann's utility rates are set to generate revenue beyond what is needed to pay for the goods and services used. The resulting surplus enabled the City to transfer amounts that funded huge portions of the city's total general revenues. For example, the "gross receipts" charge alone accounted for 35% of total general

revenues in the City's 2006-2007 tax year. L.F. at 1507. That same year, the City transferred another \$185,000 from its gas fund and \$30,000 from its refuse and waste fund into its General Fund and "Other Governmental Funds." L.F. at 1517, 1521.

By the City's logic it could increase rates to any level without *ever* losing this factor, so long as the rates have any connection to usage levels. This is nonsense. If the City were right, its argument would only serve to show why the *Keller* footnote factors have no place in a case like this where the Hancock violation is so obvious and egregious.

In the *Wright* case, Mr. Heinz explained that this third factor favors the residents in a Hancock case when the increased municipal charge does not increase service, but merely increases the city's revenue: "There is no higher level of inspection service made to the property owner due to the increase from \$75 to \$200. The increase is purely a revenue measure to increase the city's general fund." *See Wright v. City of Pine Lawn*, No. ED94290 (Respondents' Brief filed May 28, 2010, available through Westlaw as 2010 WL 2589205 at \*11).

#### **4. Is the government providing a service or good?**

The City is, in part, providing a service, but the fee increases are also, in very large part, funding ordinary governmental operations and the City's general fund. This factor, which is closely related to factor 3, again favors the taxpayers, or, at worst, is inconclusive. Doubts are decided in favor of the party bringing the Hancock claim. *Feese*, 893 S.W.2d at 812.

In the *Wright* case, Mr. Heinz agreed with this analysis in the context of the increase of a municipal fee: "In this case, no additional service or good is provided by

the 2005 Pine Lawn Ordinance. Ordinances already provided for a \$75 inspection fee, the amount was just raised to \$200, with no additional service or good. Therefore, the fourth factor of the *Keller* test also favors a finding that the increased fees are invalid under the Hancock Amendment.” See *Wright v. City of Pine Lawn*, No. ED94290 (Respondents’ Brief filed May 28, 2010, available through Westlaw as 2010 WL 2589205 at \*11).

In this case, the Court of Appeals correctly held that this point could not be ruled in favor of the City: “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.” *Arbor* at 12.

**5. Has the activity historically and exclusively been provided by the government?**

Finally, the facts show that the City has historically and exclusively provided the utility services at issue. Since the City began providing utilities, it has never permitted any other utility to provide Hermann citizens with electricity, natural gas, public water or sewer services and trash refuse services. L.F. at 1025. The City has provided exclusive natural gas service to its citizens since 1966 and is the only provider ever to provide gas service to Hermann citizens. L.F. at 1599. The City has provided exclusive electric service to its citizens since 1958. L.F. at 1598, 1607. The City has provided exclusive public water and sewer service since the 1940s. L.F. at 1597, 1608, 1025. The City has

provided exclusive trash/refuse service for at least 30 years. L.F. at 1623, 1025.

According to *Keller*, application of this factor to this case demonstrates that the fees are “probably subject to the Hancock Amendment.” The Court of Appeals held that this issue was at least inconclusive. *Arbor* at 13.

Even though the Court need not apply the *Keller* footnote factors to decide this case, when applied they yield the same result. The City’s utility fee increases violate the Hancock Amendment.

**C. The *Keller* factors are not exclusive.**

Courts have applied other factors in considering Hancock Amendment fee-increase cases. Application of those factors to this case further demonstrates the unconstitutionality of Hermann’s utility fee increases.

In *Beatty*, 867 S.W.2d at 221, a case in which the Court found the *Keller* factors to be inconclusive, the Court was troubled by the fact that unpaid sewer charges triggered liens on real property by operation of law. That factor helped tip the balance in favor of the sewer rate payers, even though it was not one of the five footnote factors from *Keller*. In this case the effect of not paying is no less severe -- if a City utility customer fails to pay for any utility, the City shuts off that customer from *all* City utilities within twelve days. L.F. at 1022, 1608. The compulsory nature of the City’s fee increases is clear.

## CONCLUSION

In 2004, the State Auditor informed the City that its utility rate increases violated the Hancock Amendment. The City was advised to cease subsidizing general city operations and other funds with utility receipts. In response, the City did not rescind its rate increases, but rather *raised* rates again after receiving the Auditor's report.

Only after the audit and the City's continued violations did these plaintiffs come forward as class representatives to seek redress for the violation identified by the audit. In light of the undisputed facts, the trial court's summary judgment in favor of the City and against the people's right to vote on such fee increases should be reversed.

If the Court is left in doubt as to whether the fee increases violate the Hancock Amendment, it should resolve that doubt in the plaintiffs' favor. In such a case, the Court has explained, "Where, as here, genuine doubt exists as to the nature of the charge imposed by local government, we resolve our 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 this case there is no doubt. The City's utility fee increases were subject to and violated the Hancock Amendment.

In *Beatty*, the Court said that it would continue to assess the wisdom and viability of *Keller*. *Beatty*, 867 S.W.2d at 220. The time has come to declare that footnote 10 should no longer be followed, and that courts should be guided by the clear holding of *Keller* that the Hancock Amendment prohibits "fee increases that are taxes in everything but name." *Keller*, 820 S.W.2d at 303. Political subdivisions are barred from circumventing the Hancock Amendment "by labeling a tax increase as a license or fee.

This language requires courts to examine the substance of a charge, in accordance with this opinion, to determine if it is a tax without regard to the label of the charge.” *Id.*

For the foregoing reasons, the judgment of the circuit court should be reversed. In light of the undisputed facts, the Court should remand the case for entry of judgment in favor of the plaintiffs on liability for violations of the Hancock Amendment, Rule 84.14, with the trial court being instructed to award an appropriate remedy for the City’s violations.

Respectfully submitted,

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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 14,800, except the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

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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