IN THE SUPREME COURT OF MISSOURI

ARBOR INVESTMENT COMPANY, LLC, et al., Appellants,	)	
vs.	)	Appeal No. SC91109
CITY OF HERMANN, Respondent.	)	

Substitute Brief of Respondent City of Hermann, Missouri

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

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Jurisdictional Statement

Respondent City of Hermann, Missouri ("Hermann" or "City") concurs with Appellants' Jurisdictional Statement.

Statement of Facts

Here, as in the Court of Appeals, Appellants' Statement of Facts is riddled with inaccuracies and misstatements in violation of the Missouri Rules of Civil Procedure, and the City must again provide an accurate statement of facts for this Court. Further, Appellants have inserted over five pages of objectionable diatribe in their Argument section (between the Point Relied On and the Standard of Review), which contains **not one** single reference to the record or Legal File and contains numerous misstatements of facts that were pointed out by City in its Motion to Dismiss Appeal.[1] Appellants seemingly believe that by not including these objectionable assertions in their Statement of Facts, they do not have to vouch for their accuracy nor follow the rules of appellate procedure. However, Rule 84.04(i) Mo. R. Civ. P. requires that "[a]ll statements of fact and argument shall have specific page references to the legal file or transcript."

The City of Hermann now offers the following as an accurate Statement of Facts:

Procedural Background

In December 2006, Appellants filed their class action petition against Hermann for injunction and damages alleging that the rates the City charges to its consumers for electricity, water, sewer, natural gas and refuse/waste violate the Hancock Amendment,

[1]A Copy of the Motion to Dismiss Appeal is provided in the Appendix at p. A19.

Article X, Sections 16 - 22 of the Missouri Constitution, adopted in 1980. Legal File ("LF") at 14.

After extensive discovery had been conducted, City filed a Motion for Summary Judgment, Statement of Uncontroverted Material Facts and an Affidavit of the City Clerk Dolores Grannemann. LF at 70-98. Appellants filed a Motion for Partial Summary Judgment and Statement of Additional Facts (LF at 162), to which the City responded with additional Uncontroverted Facts. LF at 193.

Readers of this Brief presumably are aware of the history of the passage of the constitutional amendment (the Hancock Amendment) relating to "Taxation" in November 1980. Article X, Section 16 expresses the purpose of the Amendment to limit property taxes and other local taxes. Article X, Section 22 prohibits levying or increasing the current levy without popular vote. In Roberts v. McNary, 636 S.W.2d 332 (Mo. 1982), this Court held that the language prevented the County of St. Louis from raising fees such as park admission fees, resulting in lengthy and confusing long municipal ballot issues. See R. Thomas, The Hancock Amendment, 42 UMKC L. Rev. 22, 25 (1983). Roberts v. McNary was overruled in Keller v. Marion County Ambulance, 820 S.W.2d 301 (Mo. banc 1991) wherein the majority of this court held that the words "tax, license and fees" must be considered in the context of the frequent use of the word "levy" or "levied" and concluded that user fees do not require a vote under the Hancock Amendment. Keller has been the law of Missouri for nearly a generation of Missourians.

The City's Motion for Summary Judgment was primarily premised upon the grounds that under existing case law: (1) the utility service charges are not in the nature

of a tax and thus not subject to the Hancock Amendment; (2) even it the charges were considered a tax, Appellants failed to file the requisite notice of tax protest and timely protest lawsuit as required by law; and (3) Appellants' suit was barred by the statute of limitations. LF at 70-73.

The trial court granted Summary Judgment in favor of the City, finding the following to be uncontroverted material facts: (1) the fees for the municipal services are charged only after the services are provided; (2) only individuals and entities who use the various utility services pay the utility charges; (3) that the amount of the utility charge paid is and was clearly affected by the level of goods and services provided; (4) the city is providing a service or a good; and (5) some of the utility services have been historically and exclusively provided by the City, but some have not. LF at 307-308. Based upon these uncontroverted facts, the trial court entered summary judgment in favor of the City and ruled that the first four of the five factors under existing case law were conclusively resolved in favor of Hermann and that therefore there was no genuine issue of material fact that the municipal charges are not subject to the Hancock Amendment. LF at 308.

Appellants filed timely Notice of Appeal. LF at 309. On June 22, 2010, the Eastern District filed an Opinion which would have reversed and remanded the trial court's award of Summary Judgment, agreeing with the trial court and the City on the first two Keller factors but finding that material facts were still in dispute as to three of the five Keller factors. Appendix, at A3. This Court accepted transfer, thereby vacating the opinion of the Eastern District.

Municipal Utility Charges

In 1975, prior to the passage of the Hancock Amendment, the City of Hermann enacted Ordinances 680 and 681 which makes a 10% charge against the City's water, sewer and electrical utility funds. LF at 96-99. The City also makes transfers of intracity funds to reimburse the City's general fund for billing and communications. LF at 94.

In 1994, the City enacted ordinance 1182 which established new monthly rates to be charged for the use of water service, said rates are dependent upon each customer's usage. LF at 102-03. Ordinance 1182 also set the sewer service charges at a rate dependent upon individual water usage. LF at 104. In 2003, the City enacted Ordinance 1399 increasing the charge for water services but the water rates remained dependent upon the customer's usage. LF 103.

In 2006, due to dramatic increases in electrical supply costs incurred by the City, the City adopted a purchased power cost adjustment to its electrical utility charges. LF at 110.[2] Ordinance 1583 states that the City's revenue from operations of the electric utility was less than the amount paid by the City to purchase electricity from suppliers. LF at 111. The ordinance allows the City to increase or decrease rates due to the supply cost incurred by the City to purchase electricity at wholesale and resell to the City's electrical utility customers. LF at 111. Later in 2006, after considerable study of alternatives, the

[2] This is a common mechanism to recognize variations in gas costs which allows fuel rates to be raised or lowered based on supply price. State ex rel. Laclede Gas Company v. Public Service Commission, WD72179 (10/19/10).

City modified its electrical power rates, through Ordinance 1616, due to significant increases in supply cost incurred by the City and retained the purchased power cost adjustment which adjusts monthly. LF at 115-16. The electric utility customers continued to be billed upon usage. LF 116-117.

In 2000, the City set the rates for natural gas service by Ordinance 1343. LF 124. Natural gas customers are charged based upon individual usage. LF 124. The rates vary with fluctuations in natural gas cost to the City.

In 2008, the City enacted Ordinance 1751, which altered the rates for solid waste collection, based upon a new solid waste collection agreement with a third party collector, which is generally based on usage. LF 108.

In 2008, the City also reduced its gross receipts assessments for certain utility funds to 9%. LF at 1608.

RESPONDENT'S RESPONSE TO APPELLANTS' SOLE POINT RELIED ON

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY, AS THE UNDISPUTED FACTS OF THIS CASE DEMONSTRATE THAT THE UTILITY CHARGES ARE NOT SUBJECT TO THE HANCOCK AMENDMENT IN THAT: (A) UTILITY CHARGES ARE NOT IN THE NATURE OF A TAX; (B) THE TRIAL COURT WAS CORRECT IN DETERMINING THAT AT LEAST FOUR OF THE FIVE KELLER FACTORS WERE RESOLVED IN FAVOR OF RESPONDENT; (C) APPLICATION OF THE KELLER FACTORS PRODUCE CONSISTENT RESULTS; AND (D) MUNICIPALLY OWNED UTILITIES ARE NOT REQUIRED TO BE OPERATED AT "COST."

Article X, Sections 16-24 of the Missouri Constitution

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

Junior College District of St. Louis v. City of St. Louis, 149 S.W.3d 442 (Mo. banc 2004)

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

Missouri Growth Ass'n v. Metropolitan St. Louis Sewer District, 941 S.W.2d 615 (Mo. App. E.D. 1997)

RESPONDENT'S ADDITIONAL POINTS RELIED ON

II. APPELLANTS ARE PRECLUDED FROM SEEKING THE ABANDONMENT OF THE KELLER FACTORS BY RULE 83.08 MISSOURI RULES OF CIVIL PROCEDURE, AS THEY FAILED TO RAISE THE ISSUE ON APPEAL BEFORE THE EASTERN DISTRICT AND THEREFORE SUCH ARGUMENT IS OUTSIDE THE PERMISSIBLE SCOPE OF ITS SUBSTITUTE BRIEF.

Rule 83.08 of the Missouri Rules of Civil Procedure

Essex Contracting, Inc. v. Jefferson County, 277 S.W.3d 647 (Mo. banc 2009)

Linzenni v. Hoffman, 937 S.W.2d 723 (Mo. banc 1997)

III. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY ON APPELLANTS' DAMAGE CLAIM BECAUSE EVEN IF THE UTILITY CHARGES WERE CONSIDERED TO BE TAXES, APPELLANTS ARE BARRED BECAUSE THEY FAILED TO COMPLY WITH SECTION 139.031 RSMO. BY FILING THE REQUISITE TAX PROTEST AND A TIMELY TAX PROTEST LAWSUIT.

Section 139.031 RSMo

Metts v. City of Pine Lawn, 84 S.W.3d 106

Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795 (Mo. App. E.D. 2005)

IV. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY AS APPELLANTS' CLAIMS WERE ALSO BARRED BY THE THREE YEAR STATUTE OF LIMITATION AS TO CITY OFFICERS.

Section 139.300 RSMo

Section 516.130 RSMo

V. APPELLANTS' APPEAL SHOULD BE DISMISSED DUE TO REPEATED NONCOMPLIANCE WITH RULE 84.04 MISSOURI RULES OF CIVIL PROCEDURE BOTH IN THIS COURT AND THE COURT OF APPEALS.

Rule 84.04 of the Missouri Rules of Civil Procedure

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY, AS THE UNDISPUTED FACTS OF THIS CASE DEMONSTRATE THAT THE UTILITY CHARGES ARE NOT SUBJECT TO THE HANCOCK AMENDMENT IN THAT: (A) UTILITY CHARGES ARE NOT IN THE NATURE OF A TAX; (B) THE TRIAL COURT WAS CORRECT IN DETERMINING THAT AT LEAST FOUR OF THE FIVE KELLER FACTORS WERE RESOLVED IN FAVOR OF RESPONDENT; (C) APPLICATION OF THE KELLER FACTORS PRODUCE CONSISTENT RESULTS; AND (D) MUNICIPALLY OWNED UTILITIES ARE NOT REQUIRED TO BE OPERATED AT "COST."

The trial court made a proper and lawful determination that at least four of the five Keller[3] factors were resolved in favor of Respondent and therefore, the trial court properly granted Summary Judgment.

Standard of Review

"Appellate review of summary judgment is *de novo*." Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 (Mo. banc 2007). "Summary Judgment is appropriate where the moving party has demonstrated on the basis of facts as to which there is no genuine dispute, a right to a judgment as a matter of law." Id. "A genuine issue that will prevent summary judgment exists where the record shows two plausible,

[3] Keller v. Marion County Ambulance District, 820 S.W.2d 301 (Mo. Banc 1991)

but contradictory, accounts of the essential facts and the genuine issue is real, not merely argumentative, imaginary, or frivolous." Id. (Internal quotations omitted).

A. Utility charges are not taxes by nature

1. The 10% gross receipts charge imposed by the City on its own utility funds generally predated the Hancock Amendment

Appellants seek to confuse the concept of an intracity gross receipts charge with utility charges to customers throughout their Brief. In 1975, **before** the 1980 vote to approve the Hancock Amendment, Hermann enacted Ordinances 680 and 681 assessing a 10% charge against the municipal water, sewer and electrical light and power funds respectively. LF at 97 - 99. No ordinance imposed such a charge on natural gas receipts in 2002 but the City began an intracity operating transfer to provide parity with other utility funds. This charge serves to replace the loss of revenue that the City would have otherwise received from a similar charge on investor owned utilities. LF at 93.

The charge is **not** a tax levied on the utility customers. It is only an operating fund transfer, not the levy of any tax, license or fee. Appellants seek to attack these intra-city fund transfers which predate the Hancock Amendment, in order to bolster their fallacious claims that the City is charging rates significantly above cost. Appellants' Brief at 10–11. The utility fund charges paid by the utilities themselves are not paid by utility customers. The gross receipt utility charges are a valid component of providing utility service. Further, Hermann has in fact reduced its gross receipts charge to 9%. LF at 1608.

As a general rule, a governmental agency need not refund taxes voluntarily paid. Sprint Communications Co., L.P. v. Director of Revenue, 64 S.W.3d 832, 834 (Mo. 2002). In the Sprint case, this Court held that only the party responsible for paying a tax was the proper party in interest, even if the tax was passed on to the consumer. In Hermann, the gross receipts charge is a fund transfer from the municipal utility, not imposed on the consumer. Appellants wrongly argue that the municipal utilities of the City are forced to pay a "gross receipts" charge and a charge for billing, collection and communication services. No one forces anyone else to pay these charges. The City's Board of Aldermen adopts a balanced budget for all city departments and activities. It is a voluntary payment to properly reflect the services provided to utility departments by employees operating under the general revenue accounting fund. Copies of the original ordinances imposing such charges on its own utilities under the Hancock Amendment were presented. LF at 88-89. There is no levy or increased levy of a tax on consumers. These charges do not even recover the considerable effort made by the City Administrator, Mayor and Board of Aldermen in dealing with the many major issues attributable to the various utilities.

2. Missouri law has long recognized that utility charges are contractual and not in the nature of a tax

It has been well established for over a century in Missouri that charges of a municipal utility are contractual and not in the nature of a tax. See St. Louis Brewing Association v. City of St. Louis, 37 S.W. 525 (Mo. 1896); See also 12 McQuillin, Municipal Corporations. §35:69 ("The rates of a public utility owned by a municipality

are ordinarily not classified as taxes… Rates are not taxes even if some of the proceeds are used as general revenue."). In furnishing gas or water, a city acts in a private rather than a governmental capacity, and has the same right to make reasonable charges therefor that a private corporation has when serving the public. St. Louis Brewing Association at 527. "A city may be expressly authorized, in its discretion, to erect a public wharf, and charge tolls for its use, or to supply the inhabitants with water or gas, charging them therefor, and making a profit thereby." Id. "The rate a governing body of a municipal utility is allowed to charge is not in the nature of taxation, which is a demand of a sovereignty; but is in the nature of a toll, which is a demand on proprietorship." State ex rel. City of Springfield v. Public Service Commission of State of Mo., 812 S.W.2d 827 (Mo. App. 1991) (overruled on separate grounds).

"Generally, an act of a municipality performed for the common good of all is classified as a governmental function." Parish v. Novus Equities Company, 231 S.W.3d 236, 242 (Mo. App. E.D. 2007). "Acts performed by the municipality as an agent of the state, including the establishment and operation of schools and hospitals, the creation of municipal fire departments, and the exercise of legislative or judicial powers, have been found to be governmental functions." Id. Conversely, "[p]roprietary functions are those actions performed for the special benefit or profit of the municipality acting as a corporate entity." Junior College District of St. Louis v. City of St. Louis, 149 S.W.3d 442 (Mo. banc 2004) (internal quotations omitted). This Court in Junior College recognized that a city selling water to residential, commercial and industrial consumers was a proprietary function. Id. at 448.

Both Parish and Junior College pertain to the applicability of the doctrine of sovereign immunity. There is a legitimate connection between the doctrine of sovereign immunity and the ability for municipally owned utilities to operate at a profit and not simply at cost as Appellants urge. Appellants' approach would effectively prohibit any municipality from providing non-governmental services to those citizens wishing to pay for it. No utility company can effectively operate solely at cost as it would not be able to expand or improve the utility services it provides. The City would not be able to build reserves for the payment of unforeseen costs, natural disasters, litigation or comply with public policy mandates. Such unbudgeted costs instead would have to be borne by money generated from the City's general tax revenue, in violation of Article VI, Section 23, of the Missouri Constitution which places limits on the expenditure of public monies. Sovereign immunity ensures that public money is not spent for a private benefit, except in those exceptional circumstances where the legislature has expressly determined that the doctrine of sovereign immunity is not applicable, such as an injury caused by the condition of city property. Section 537.600 RSMo.

3. Rate setting for municipal utilities is a legislative function

This Court has recognized that "[w]here the utility is municipally owned, the legislative function of fixing rates is in the municipality to be in no way affected by any regulation except the will of its own citizens." Lightfoot v. City of Springfield, 236 S.W.2d 348, 352-353 (Mo. 1951) (internal citations omitted); 29 C.J.S. Electricity §56. "Generally the appropriate legislative officers of the municipality fix the rates and change them from time to time as the operation of the utility may require." Lightfoot at 353.

Setting utility rates is not a "levy" in common parlance. No one speaks in terms of "I just paid my electric levy" or "I just got my sewer levy".

Requiring rate increases to be approved by the electorate would be unsustainable as the utility services would not be able to respond to fast changing and volatile economic conditions in the supply side market place. Further, it would create the inequitable scenario where primarily non-utility customers are able to vote for an increase that may not affect them. For instance, Hermann has only 641 natural gas customers out of a population of 2,700. LF at 91; 1595 Therefore, it is certainly possible that in an election for a City natural gas rate increase those non-customers would outvote customers, which would allow the non-customers to dictate the rate paid by customers. The City's Board of Aldermen and Mayor, however, are elected by and answer ultimately to all of the citizens of Hermann.

The Missouri legislature has purposefully not conferred upon the Public Service Commission jurisdiction over municipal utility rates within a City. See Section 91.025 RSMo; Public Service Commission v. City of Kirkwood, 4 S.W.2d 773 (Mo. 1928). Cities are, however, subject to statutory regulation outside their boundaries, including the necessity of the City being required to pay a non-municipal utility company if new service is extended into their area of service. Section 386.800 RSMo. Even if the Public Service Commission did have jurisdiction, Section 393.270 RSMo. requires the PSC to set maximum rates considering all facts that have any bearing, including a reasonable average return upon capital and the necessity of making reservations out of income for surplus and contingencies.

Missouri case law holds that municipal utility rates are only subject to equitable jurisdiction for rates that are clearly, palpably and grossly unreasonable. Forest City v. City of Oregon, 569 S.W.2d 330, 333 (Mo. App. 1978). Appellants, however, did not file such a claim. A complete cost-of-service analysis such as those heard by the Public Service Commission would allow the City to have adequate reserves for disasters such as earthquakes, tornados, floods or major storms and could also include major improvements plus depreciation computed as part of its rates, not just the actual cost of purchasing gas and electricity. Cost of service is only one factor in rate determinations. Mullenix-St. Charles Properties, L.P. v. City of St. Charles, 983 S.W.2d 550 (Mo. App. E.D. 1998). If Appellants had brought such a claim, it would be Appellants' burden to prove cost of service and unreasonableness. Shepherd v. City of Wentzville, 645 S.W.2d 130, 133 (Mo. App. E.D. 1982). The City is not arguing that the rates it charges are not ever subject to judicial review, but that Appellants have improperly brought a class action for monetary damages based upon inapplicable constitutional provisions, which is not the proper method for reviewing municipal utility rates.

C. There is no genuine issue as to the material facts supporting the trial court's resolution of the Keller factors in favor of Respondent

This Court, in Keller set forth five "critical" factors for determining whether a revenue increase by a local government is subject to the Hancock Amendment. Keller at 304. Those factors are: (1) When is the fee paid; (2) Who pays the fee; (3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer; (4) is the government providing a service or good; and (5) has the activity historically and

exclusively been provided by the government? Id. The trial court determined that at least factors (1) through (4) were resolved in favor of the City. LF at 308.

The Eastern District did not completely support the trial court with regards to the third and fourth factor stating that it could not determine conclusively whether "the object of the fee requirement [is] to generate revenue for the general fund." Appendix, at A3-A18. Such a consideration does not form any part of either the third or fourth part of the Keller analysis. The Eastern District improperly interjected an intent element to the determination of whether a fee is subject to the Hancock Amendment. To that end, City concurs with Attorney General and State Auditor that the Hancock Amendment does **no**t envision an evaluation of intent. Amici Brief at 24. The five part test has been established by this Court as the test for determining whether the Hancock Amendment applies to disputed fees, and a consistent body of case law has followed Keller for almost twenty years. [4]

(1) When is the fee paid?

Those fees that are paid on a periodic basis are likely subject to the Hancock Amendment, whereas those fees due only on or after the provision of a good or service to the individual paying the fee are likely not subject to the Hancock Amendment. Keller at 304. **Both** the circuit court and the Eastern District correctly decided this factor in favor of the City. It is undisputed that an individual only pays the fees after they subscribe to a utility service and have received said service. LF, p. 91. Appellants' argue that this factor should have been resolved in their favor as "[t]he utility fees at issue in this case

[4] Beatty v. Metropolitan St. Louis Sewer District, 867 S.W.2d 217 (Mo. banc 1993)

are paid periodically, at regular monthly intervals." Appellants' Brief at 55. While some bills are sent at monthly intervals, the City bills only after a service is provided. LF at 91. Appellants' interpretation of the billing requirement would require instantaneous or perhaps spasmodic billing at ever changing intervals to avoid falling into the trap of being billed "periodically."

Appellants, throughout their Brief make multiple irrelevant references to Mr. Heinz's arguments made in Wright v. City of Pine Lawn, ED94290 (Mo. App. 2010), an (unpublished memorandum). Appellants contend that Mr. Heinz argued that this first factor has no particular relevance in the case of an inspection fee increase. Appellants' Brief at 55. Appellants cite no legal authority that the City of Hermann is bound to arguments one attorney made for a different client in an unrelated case involving unrelated issues. Secondly, this statement was taken completely out of context. In Wright, the City arbitrarily increased a building inspection fee, which in Pine Lawn's case was exclusively and historically governmental, from $75.00 to $200.00 per house. The Plaintiffs filed a Statement of Undisputed Facts to which the City did not respond. Mr. Heinz in Wright argued that the first Keller factor may indeed weigh in the City's favor as to the implementation of the original $75.00 governmental inspection fee, as said fee is paid in exchange for the inspection. Appellants should have instead heeded Mr. Heinz's arguments in Metts v. City of Pine Lawn, 84 S.W.3d 106 (Mo. App. E.D. 2002), wherein he successfully defended against a Hancock challenge to the City of Pine Lawn's trash collection charge, which was nearly identical to Appellants' misdirected challenge

to the City of Hermann's trash collection charge. Appellants' selective attacks are an attempt to mislead this Court.[5]

Further, this Court acknowledged in Keller that "[n]o 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. This recognizes that in certain cases the Court may give certain factors more weight than others.

Appellants claim they "do not complain about charges for utility services, but rather increases without a vote to fund the City's general revenue." Appellants' Brief at 55. However, Appellants alleged in their petition that "[i]f a city's user charge exceeds the actual cost so as to provide additional revenue for the general support of the city, it is a tax by a different name and subject to the Hancock Amendment." LF at 20. Appellants

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[5] It is also noteworthy that Appellants' Counsel Mello and McPherson, in representing a fire district to which the City of Hazelwood paid a fee for fire protection service, argued that "the Supreme Court held [in Keller] that charges for services actually provided by a district are not subject to the Hancock Amendment," and that "it is undisputed that Hazelwood pays the agreed fee to the District in exchange for the District providing fire protection service, ambulance service and other emergency service to Hazelwood. Because Hazelwood's fee is paid in exchange for a specific service, **it could not be subject to the Hancock Amendment**." City of Hazelwood v. Peterson, 48 S.W.3d 36 (Mo. banc 2001); the Reply Brief is available at 2000 WL 34547012 (Emphasis added).

sought as part of its claim that the court enter an order "directing the City to recalculate its past, present and future utility rates and fees based on the City's actual costs to provide utilities and services." LF at 22.

This first factor was properly resolved in favor of the City because bills are only sent to those that use the particular utility and only for service already rendered during the previous usage period. Both the trial court and Eastern District ruled correctly in favor of the City on the first Keller factor.

(2) Who pays the fee?

Fees that are blanket-billed to all or nearly all residents of the political subdivision are likely to be subject to the Hancock Amendment, whereas fees that are charged only to those who purchase a good or service will likely not be subject to the Hancock Amendment. Keller at 304. It is undisputed that only users of a particular utility service are charged by the City of Hermann. LF at 307. Owners of unimproved lots and vacant residences are not charged for any utility services by the City. LF at 86. The record reflects that Hermann has a population of approximately 2,700 residents, 1,200 residential households and 300 businesses. LF at 1595. Out of this population there are a little over 1,000 water and sewer customers, 1,178 electric customers and only 641 natural gas customers. LF at 91. No one utility charge is paid by all or "nearly all" residents.

Appellants argue that this second factor should have been resolved in their favor as the City has an alleged "monopoly" over the utility services. Appellants' Brief at 56. Appellants characterize the position of the City as not "allowing" competing utility

providers but the record, however, establishes the simple fact that no other utility provider has ever approached the City or otherwise attempted to overbuild utility services to the area. LF 1025. The small population numbers would make it a difficult proposition to have multiple utilities in Hermann. Even large municipalities in Missouri have little natural competition.

Appellants' contention that the customers have to purchase utilities from the City does not form any part of the second Keller criterion. This Court in Zahner v. City of Perryville, 813 S.W.2d 855 (Mo. banc 1991) concluded that a special street assessment, which the complaining resident had no real choice to pay was not a tax subject to the Hancock Amendment. Compulsion to pay is not one of the indicia of a tax under Keller. See e.g., Missouri Growth Ass'n v. St. Louis Sewer District, 941 S.W.2d 615 (Mo. App. E.D. 1997); and Mullenix, *supra.*

Hermann citizens are not compelled by law to pay increases for municipal utilities. If they don't pay, their service may be stopped eventually, but that is no different than any other private contractual service. AT&T will not continue phone service with unpaid bills. Hermann utility customers also have the choice to conserve and reduce their usage or choose other services or suppliers such as bottled gas, propane, well water, solar panels, wind power, coal, wood heat, etc. Major metropolitan areas have had steam heat available for over a hundred years. Certainly the advent of new sustainable energy sources diminishes any reliance on City energy sources. Indeed, the "Net Metering and Easy Connection Act" of 2007 (Section 386.890 RSMo.) makes it the public policy of this State that a consumer be allowed to generate his, her or its own electricity and even

force the existing electrical supplier to pay the consumer for it. This Act specifically applies to municipal utilities. Section 386.890.10 RSMo. The Act specifically includes renewable energy, such as wind, solar, hydroelectric, photovoltaic and hydrogen fuel cells. Section 386.890.2(6) RSMo. Similarly, Sections 393.1020 to 393.1030 RSMo. provide Renewable Energy Standards and Proposition C adopted in 2008 and Sections 393.1040 *et seq*. express a clear public policy of the State of Missouri to reduce energy consumption and build new generation capacity to comply with renewable energy mandates.

The City cannot be expected to make the expenditures to fulfill these worthy public policy objectives of developing sustainable energy and increased generation if it can only charge energy at cost. Opposing counsels' scare tactics of monopoly considerations are more fit for the early 20th Century than for the early 21st Century.

Both the trial court and the Eastern District correctly resolved this second factor in favor of the City.

(3) Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?

Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer. Keller at 304. In this case, it is undisputed that the more a customer chooses to use municipal electricity, water, sewer and gas services, the higher the bill for each service. LF 92; LF 104.

"In order for a governmental charge to appear to be a user fee under *Keller's* third criteria, the charge imposed must bear a **direct** relationship to the level of services a "fee payer" actually receives from the political subdivision." Beatty. (Emphasis added). Note that the language refers to a relationship with receipt, not cost of service. The Eastern District, however, expanded the analysis under this third prong and considered what the intent was behind the user fee, stating:

> "[I]t is unclear whether the object of the fee requirement was to generate revenue for the general fund. Therefore, we cannot determine at this point whether this factor weighs in favor of the City or Appellants." Appendix at A3-A18.

The only appropriate consideration under this third Keller factor is whether the level of the goods or services provided affects the amount of the fee paid by the individual consumer. The user fees charged by the City to the individual consumers are affected by the individual's usage.

In Missouri Growth, *supra*, the Court considered a fact pattern where the consumers were billed based upon water usage and not upon estimates and held that this method of billing was a user fee and not a tax subject to voter approval. Missouri Growth at 624. The fee payers alleged that all customers were being billed on a flat fee basis for the construction of an overflow system that would not benefit all customers. Id. at 23. All customers were charged a flat fee of $.37 for "billing and collection" and $3.72 for "system availability." Id. Customers were then additionally charged for individual consumption at a rate of $.99 per 100 cubic feet of contributed wastewater volume. Id. at

623-24. The individual consumer's consumption was calculated either through a water meter or an estimated use based upon the number of rooms and fixtures at the property. Id. at 624. The Court in Missouri Growth concluded that this method of billing "bears a direct relationship to the services provided. This factor is also resolved in favor of [the utility provider]." Id. The facts are almost identical to the City of Hermann's billing practices. Hermann customers are billed for sewer service at a rate of "fifty cents ($0.50) per one thousand (1,000) gallons or fraction thereof of water billed to such customer for the same billing month." LF 104.

Appellants have argued, without citation to the record, that the City charges utility fees for the sole purpose of raising general revenue.[6] Appellants' claims ignore the fact that the City's fluctuations in its utility rates are generally in response to increases and decreases in supply-side costs (LF at 1211). Rates move up and down. The City has undertaken rate studies at considerable expense in order to assess whether its current utility rates are proper. LF at 1212. Further, Appellants ignore the fact that the City has in fact lowered its gross receipts charge to 9%. LF at 1608.

If the City takes time to respond to increased supply prices and thereby loses money for months or years, it is entirely unjust to allow plaintiffs to sue for and collect damages from the City in later years when supply prices decline and the City is able to make a profit to recover from losses in prior years.

Appellants' unsubstantiated allegations seemingly contributed to the Eastern District's erroneous observation "that the utility charges were generating more funds than

[6] Appellants Brief at 23.

necessary to run the City's utilities." Appendix at A3-A18. No part of the third prong of the Keller test involves an examination of the cost of providing service in the determination of whether the charges fall under the Hancock Amendment.

Appellants also aver in their improper "Argument" that the former State Auditor's "first listed problem was the City's improper raising of its utility charges." Appellants' Brief at 23. (Once again, Appellants fail to make a citation to the record). Not once did the State Auditor mention the Hancock Amendment.

The State Auditor has now come to this Court asking that the law be changed. Opposing counsel have proposed a "proportional method" of determining whether a fee is subject to the Hancock Amendment. Amici Brief at 20. This proportional method would allow municipal utilities to increase their user fees, without being subject to the Hancock Amendment, if such an increase does not increase the proportion of that fee that is currently profitable. Amici Brief at 23-24. They envision that such an analysis will be based upon projections of anticipated figures based upon expected revenue increases. Amici Brief at 23-24. Amici argue that this test would be an objective test but there is nothing "objective" about this test, as analysis would necessarily involve apportioning and weighing the various reports and projections concerning fluctuations in utility charges. Further, this proportional method will be highly susceptible to litigation abuse by opponents of municipal utility rate increases, causing unnecessary costs to taxpayers of small communities.

Amici, also liken the sales tax authorized under Section 144.032 RSMo. to utility charges, remarking that both are tied to actual usage. Amici Brief at 13-14. This

argument is completely without merit, as a sales tax is not a fee in exchange for a service but a tax on a seller for the privilege of engaging in business; Section 144.021 RSMo; Fabick & Co. v. Schaffner, 492 S.W.2d 737, 743-744 (Mo. 1973). Utility fees are paid by customers directly in exchange for the provision of a utility service. The fact that a seller of utilities pays a higher sales tax based upon selling more utility services does not render it any way, shape or form similar to the utility charges paid by the City's utility customers.

The trial court correctly resolved the third Keller factor in favor of the City.

(4) Is the government providing a service or good?

The Eastern District disagreed with the trial court when it opined that "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." Appendix at A3-A18. This approach would add an additional extraneous consideration to the fourth Keller factor by requiring that the funds received from the utility charges go entirely to providing that utility service and cannot be transferred to the general revenue of the City for the benefit of all.

The fourth element of the Keller test is a narrow one, it requires nothing more than a consideration as to whether the City is providing a good or a service. In fact this Court's entire discussion of the fourth prong in Beatty was as follows:

> "The fourth Keller factor asks whether the charge paid by the "fee payer" is directly related to a service provided by a political subdivision. This factor distinguishes non-Article X, Section 22(a) fees from taxes generally, the

latter being paid without relation to any specific service provided by government. On this fourth factor, [the utility provider] prevails, it clearly provides a service in return for a direct payment." Beatty, at 221.

The Beatty court performed no analysis as to the whether the fee charged was excessive, or whether any money received went to the utility's general revenue. Even though the sewer district was charging a flat fee and not a fee based upon the individual's consumption, this Court resolved the fourth factor in favor of a user fee. The Court in Missouri Growth specifically rejected the plaintiff's argument that the sewer charges were taxes because the revenue went into the general fund, holding that the Supreme Court's five part analysis in Keller prohibits any non-Keller analysis. Missouri Growth at 625.

The Eastern District noted "the record clearly shows gas, electric, water, sewer and refuse are all goods and/or services provided by the City." (Appendix at A3-A18). That determination alone requires the fourth Keller factor to be resolved in favor of the City, as the trial court correctly determined.

(5) Has the activity historically and exclusively been provided by the government?

If the government has historically and exclusively provided the good, service, permission or activity, the fee is more likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment.

A plain reading of the fifth criterion leads to the conclusion that it is basically an inquiry as to whether the activity is a governmental or proprietary function. Governmental functions are those that are "historically and exclusively" provided by political subdivisions. In Avanti Petroleum, Inc. v. St. Louis County, 974 S.W.2d 506 (Mo. App. E.D. 1998), the court adopted the trial court's discussion of the Keller factors in regard to the fifth factor and concluded that "the prosecution of violations of criminal, or quasicriminal enactments is **exclusively a governmental function**." Id at 511. (Emphasis added). This conclusion did not look at whether factually the county had "historically and exclusively" prosecuted criminal violations, it considered whether generally such actions are "exclusively" governmental functions. Id.

Removing the subjective element of this test allows the well established jurisprudence of this Court on the distinction between governmental and proprietary functions to help resolve this fifth factor. Using objective rather than subjective considerations for the fifth Keller factor renders it less susceptible to manipulation by unusual fact patterns concerning a particular municipality's provision of a good or service. For example, if a city provides a municipally owned orchestra or municipal zoo, and has owned it for one hundred years, a subjective reading of the fifth Keller factor would suggest that it is a governmental function, truly an absurd result. Conversely, an objective consideration of those same facts would lead to the conclusion that a municipally owned orchestra or zoo is a proprietary function.

In the instant case, the provision of utility service to consumers is considered a proprietary function. See e.g., Junior College, *supra*, at 447.

Appellants' shotgun attack on all Hermann utilities makes the fifth Keller factor a bit more difficult to apply. On the issue of whether a service is "historical" there are some variations. Electricity has been used since discovery at the time of Benjamin Franklin. Municipal electricity dates back to Thomas Edison. Historically, electricity was not government owned but privately owned. It was not until the 1950's that the City of Hermann bought out the electric grid from an investor utility. This was nearly 150 years after the City (and the State of Missouri) was founded. The City does not generate its own electricity. It buys it from electricity suppliers. In the majority of Missouri cities, investor companies such as Union Electric, now AmerenUE, supply most consumers.

With natural gas, the City laid its pipelines in the 1960's. It has to pipe natural gas from suppliers. Laclede Gas, an investor utility, is a large supplier in Missouri.

Trash collection has been of fairly recent origin, of course trash heaps or dumps predate recorded human history.

Water and sewer date back to the 1800's but certainly throughout Missouri major municipal suppliers of water, such as Missouri American, supply millions of customers. See Mullenix at 562. Likewise, private sewer districts have numbered in the thousands throughout Missouri, although many have been consolidated by larger sewer companies such as MSD in St. Louis City and County.

D. Application of the Keller factors have produced generally consistent results

Appellants argue that the application of Keller has produced inconsistent results. Appellants' Brief at 38-42. However, Keller has produced generally consistent law when applied properly.

Appellants argue that in Building Owners and Managers Association of Greater Kansas City v. City of Kansas City, 231 S.W.3d 208 (Mo. App. 2007), the Western District found an inspection fee identical to the one determined to be a user fee in Ashworth v. City of Moberly, 53 S.W.3d 564 (Mo. App. E.D. 2001), to be a tax subject to the Hancock Amendment. Appellants' Brief at 40. The inspection fees in those cases were not identical.

The unusual record in Building Owners and Managers Ass'n should not be ignored. In that case the City conducted free fire inspections of properties in response to complaints or upon their own discretion. Id. at 210. Thereafter, an ordinance required businesses and multifamily dwellings to obtain an annual "Fire Inspection Certificate." Id. at 211. The facts before the Court demonstrated that the new annual fee was for the purpose of raising general revenue and not in exchange for the previous free good or service.

Based upon those facts in the record, the Western District applied the Keller factors, determining that: (1) the fee was a mandatory yearly fee which favored a tax; (2) that the record did not reflect that the fee was billed to all or almost all residents, which

favored a user fee;[7] (3) that the $100 cap on the inspection fee, which was based upon square footage, prevented a "direct relationship" between the level of service and the fee, which favored a tax; (4) based upon the facts, it was determined that the fee was not charged in exchange for a good or service but as a means for the City to enforce its fire code, which favored a tax; and (5) enforcement of the fire code is a governmental function, which favors a tax. Id. at 212-14. Consequently, the court concluded that four of the five Keller factors favored a tax, and therefore the fee was subject to the Hancock Amendment. Building Owners and Managers at 214.

In Ashworth, the record demonstrated that the inspection fee was to prevent housing conditions that adversely affect or are likely to adversely affect City residents. Id. at 568. Applying the Keller factors, the court in Ashworth concluded that: (1) the imposition of an annual fee favored a tax; (2) the fee was not blanket-billed, favoring a user fee; (3) the inspection fee was based upon size of the dwelling and the number of re-inspections required, if any, which favored a user fee; (4) based upon the facts, the court determined that the fee was in exchange for the required inspection, a service, which favored a user fee; and (5) the regulation of public health and safety is a governmental

[7] The Court distinguished Missouri Growth recognizing that MSD's monthly user fee was based on a customer's water usage and that if no water was used for a period of time, the water would be turned off and no fees would be owed. Building Owners and Managers Ass'n of Greater Kansas City at 212. This also distinguishes Hermann's utility fees from those in Building Owners and Managers Ass'n of Greater Kansas City.

function, which favors a tax. Id. at 574-578. Having resolved three of the five Keller factors in favor of a user fee, the court determined that the inspection fee was not subject to the Hancock Amendment. Id. at 578.

The cases involving sewer service rates demonstrate that when properly applied, the Keller factors produce consistent results. In Beatty, *supra*, and Feese v. City of Lake Ozark, Missouri, 893 S.W.2d 810 (Mo. banc 1995), this Court was faced with flat rate sewer fees, that were not related to the users' consumption. In Feese the fee was charged by the City to residents who were not even on the sewer system. Id. at 812. In both cases this Court determined that the fees were taxes subject to the Hancock Amendment.

Conversely, in Missouri Growth and Mullenix, the Court considered sewer fees that were based upon actual usage by the subscriber and concluded that those fees were not taxes subject to the Hancock Amendment. In both cases, this Court rejected the applications for transfer.

Interestingly, Appellants seek to support their argument as to inconsistent results by arguing that it has been applied in cases "in which the local charge is very clearly not subject to the Hancock Amendment." Appellants' Brief at 41. Appellants cite Keller, Zahner,[8] Larson v. City of Sullivan, 92 S.W.3d 128 (Mo. App. E.D. 2002) and Home Builders Association of Greater St. Louis v. City of Wildwood, 32 S.W.3d 612 (Mo.

[8] Actually decided before Keller.

App. E.D. 2000).[9] In none of these "clear" non-tax cases, does the application of the Keller factors result in the conclusion that the fee is subject to the Hancock Amendment.

When the Keller factors are properly applied, they produce consistent results.

E. Municipal utilities are not required to be operated solely at cost

The concept that municipally owned utilities are required to be operated at cost conflicts with over one hundred years of Missouri jurisprudence. See St. Louis Brewing Association, *supra*.

Cities are statutorily authorized to set fees so that funds can be transferred to provide for other municipal services. Section 250.150, RSMo. allows for the transfer to the general revenue of fees received from the provision of water and sewer services, but restricts such transfers until all costs for the provision of said services have been paid. This statutory authority clearly allows fees to be set at rates that exceed bare cost. These transfers are necessary as public entities have other costs that are inextricably intertwined with the provision of municipal services, such as police protection, the use of right of ways by travelers, businesses and utilities and the use of streets and other city property among many others. Additionally, Section 250.190, RSMo. authorizes a municipal body providing sewer and water services to charge higher rates for non-resident customers than for resident customers. Implied in such authority is the right of municipal utility providers to set rates above the cost to provide the service. The effect of a requirement that municipally owned utilities be operated at cost would render Section 250.150 and 250.190 RSMo. meaningless.

[9] This case does not seem to discuss the Keller factors at all.

In the case of United States vs. City of Columbia, Missouri, 914 F.2d 151 (8th Cir 1990), the Eighth Circuit upheld the City of Columbia's operation of water and electrical utilities at a rate so as to yield a profit. The Court rejected the federal government's claim pointing out "[w]hen the United States purchases water, electricity, and related services, and then pays the utility bill, it does so as a vendee pursuant to a voluntary, contractual relationship with the City. The City imposes a charge not in its capacity as a sovereign, but as a vendor of goods and services." Id. at 155-56. This decision was cited with approval in General Textile Printing and Processing Corporation v. City of Rocky Mount, 908 F. Supp. 1295 (E.D. N.C. 1995), where the Court concluded that the city's inclusion of a profit component in its utility rates does not convert the rates into unauthorized taxes. Id. at 1311. The Court observed that the setting of utility rates is best left to the legislature and the electorate. Id. at 1312.

What is profit anyway? With any business there is chance for profit and risk of losses. Who pays for losses? If a County or City fair or festival sets its admission fees based on attendance projections, whether historical or otherwise, what happens if attendance drops 50% because of unbearable 100+ degree heat, torrential periods of rain or even ill or otherwise absent headline performers? Who pays for the loss? Ultimately, it is the City. If the loss cannot be absorbed by a specific fund, the general revenue will kick in. The bills for the costs are the liability of the City, not restricted to certain funds.

Breaking even on costs has not been the motivating factor for municipalities to act. Many of us from smaller cities and towns remember the thrill of having the first flush toilets and being able to avoid the unpleasantness of "outhouses". Many others

remember being able to hook up with "city water" and avoid the pumping, unreliability and often unsanitary other sources of water. We were glad to get the services and did not worry about whether it was city owned or investor owned, or whether it made a profit.

II. APPELLANTS ARE PRECLUDED FROM SEEKING THE ABANDONMENT OF THE KELLER FACTORS BY RULE 83.08 MISSOURI RULES OF CIVIL PROCEDURE, AS THEY FAILED TO RAISE THAT ISSUE BEFORE THE EASTERN DISTRICT AND THEREFORE SUCH ARGUMENT IS OUTSIDE THE PERMISSIBLE SCOPE OF ITS SUBSTITUTE BRIEF.

Rule 83.08(b) of the Missouri Rules of Civil Procedure provides that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." This Court has consistently held that the failure to raise a claim before the court of appeals precludes review of the issue by the Supreme Court. Linzenni v. Hoffman, 937 S.W.2d 723, 726-727 (Mo. banc 1997) (Citing Rule 83.08(b) of the Missouri Rules of Civil Procedure, this Court refused to consider issues not raised before the appellate court as "an appellant may not alter the basis of any claim that was raised in the brief filed in the court of appeals); Essex Contracting, Inc. v. Jefferson County, 277 S.W.3d 647, 656 (Mo. banc 2009) (This Court ruled that an argument which "appeared nowhere in the brief to the court of appeals… will not be considered by this Court).

Appellants in their sole point relied on before the Eastern District did not seek the abandonment of the Keller factors. Appellants merely argued that there was "no need to

consider the factors in a case such as this one."[10] This cursory reference is insufficient to allow Appellants to advocate, as they have done at appreciable length, for the abandonment of the Keller factors. Even if it could be considered that the Appellants alluded to the abandonment of the Keller factors, that alone is insufficient to preserve such an argument for this Court's review. Schmidt v. Warner, 955 S.W.2d 577, 584 (Mo. App. 1997) ("Issues to which an appellant alludes only in the argument portion of his brief are not presented for review.") As such the question of abandoning the Keller factors is not properly before this Court, for its review.

III. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY ON APPELLANTS' DAMAGE CLAIM BECAUSE EVEN IF THE UTILITY CHARGES WERE CONSIDERED TO BE TAXES, APPELLANTS ARE BARRED BECAUSE THEY FAILED TO COMPLY WITH SECTION 139.031 RSMO. BY FILING THE REQUISITE TAX PROTEST AND A TIMELY TAX PROTEST LAWSUIT.

Standard of Review

Where the facts relevant to a plaintiff's compliance with Section 139.031 RSMo, are not in dispute, as in the instant appeal, the appropriate standard of review is *de novo.* Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005).

[10] Appellants Eastern District Brief at 24.

Further, where the review implicates the trial court's subject-matter jurisdiction, the appropriate standard of review is *de novo*. Id.

A. Appellants failed to comply with the procedure set forth by Section 139.031 RSMo. for the filing of a tax protest and filing a timely tax protest lawsuit.

Appellants brought suit on December 29, 2006 complaining of high utility fees back to the year 2000. LF at 92. Assuming *arguendo*, that said utility fees were taxes as Appellants contend, (which Respondent denies), then Appellants would have been required to pay said taxes under protest pursuant to the provisions of Section 139.031 RSMo., which they did not do. LF at 92; LF at 1035. In connection with the filing of the tax protest, Appellants would have also have been required to file a lawsuit within ninety days for recovery of allegedly illegal "taxes" paid under protest. Section 139.031 RSMo; Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795 (Mo. App. E.D. 2005).

"It is well-settled that Section 139.031 must be strictly construed and enforced." Ford Motor Co., at 798. "The statutory sections providing the tax appeal procedure must be meticulously followed." Id. "Section 139.031 provides the taxpayer with an exclusive remedy, and therefore, failure to strictly comply with this section bars recovery of controverted taxes." Id. In the instant case, Appellants have never made any payment under protest or filed a written protest pursuant to Section 139.031 RSMo. and therefore cannot be considered by any means to have "meticulously" followed Section 139.031 RSMo.

In Ford Motor Co., this Court held that Section 139.031 RSMo. had not been adequately complied with where the payment was made a little over a month prior to the written protest, although both the payment and the protest were made prior to the tax becoming delinquent. Id. at p. 802. The Court concluded that the payment and the protest had to be concurrent in order to comply with Section 139.031 RSMo. Similarly in State ex rel. National Investment Corp. v. Leachman, 613 S.W.2d 634 (Mo. banc 1981), a challenge was deemed not in compliance with Section 139.031 RSMo. where the written protest was made ten days after the payment, but both the payment and the protest were made before the delinquency date.

The filing of a protest triggers the City setting aside the money for the refund. Section 139.031 RSMo. This protest payment triggers the statutory mechanism for escrowing the funds. Further, Section 139.031.4 RSMo. allows for the accrual of interest to be paid to the prevailing party to compensate either the taxpayer for the overpayment of "taxes" or the city for having its revenue escrowed during the pendency of the tax protest litigation. The payment of funds under protest allows for a clearly identifiable source of funds at the conclusion of the tax protest litigation. Section 139.031 RSMo. allows for the protection of both the tax payer and the taxing authority.

Appellants have intentionally refused to comply with the tax protest statutes in this case and the City has, without any such protest or escrow, annually approved budgets and appropriated funds to provide city services, such as roads, bridges, police protection, fire protection, planning and zoning administration, and various economic development incentives, many of which Appellants have been able to avail themselves. LF at 93.

Allowing belated claims for refund of user fees would cause chaos to the City and would jeopardize the continued ability of the City to provide police, streets, lighting, gas, electricity, refuse disposal, water and sewer to its residents, businesses and visitors. How could a city ever budget for expenses and services if the revenues could much later be reduced retroactively? Should a city have to wait five or ten years after receiving revenues before being confident that it could spend them on city services without fear of lawsuits that could bankrupt a City? No government could operate that way. Policemen and firemen cannot be expected to repay salaries to the city. This Court has refused to allow lawsuits such as the one filed by Appellants. Lane v. Lensmeyer, 158 S.W.3d 218 (Mo. 2005). See also S & P Properties, Inc. v. City of University City, 178 S.W.3d 579, 584 (Mo. App. E.D. 2005); Metts, *supra.*

Missouri case law holds that litigants cannot be allowed to seek refunds where they have knowingly accepted the benefits of rate charges, such as sewerage rates. Mullenix, 983 S.W.2d at 558; City of Lexington v. Seaton, 819 S.W.2d 753, 759 (Mo. App. W.D. 1991).

IV. THE TRIAL COURT DID NOT ERR IN ENTERING SUMMARY JUDGMENT IN FAVOR OF THE CITY AS APPELLANTS' CLAIMS WERE ALSO BARRED BY THE THREE YEAR STATUTE OF LIMITATION AS TO CITY OFFICERS.

While all of the foregoing should warrant sustaining the judgment in the City's favor, the City also points out that Section 139.300 RSMo. provides that liability, if any,

for alleged user charges may fall upon the City Collector. Appellants have failed to join such City Collector in this action.

In addition, Section 516.130 RSMo. provides that an action against any officer upon a liability incurred by the doing of an act in his official capacity and by virtue of his office or by the omission of an official duty shall be filed within three years. No such action has been brought. LF 92-93.

V. APPELLANTS' APPEAL SHOULD BE DISMISSED DUE TO REPEATED NONCOMPLIANCE WITH RULE 84.04 MISSOURI RULES OF CIVIL PROCEDURE, BOTH IN THIS COURT AND THE COURT OF APPEALS.

Appellants have repeatedly failed to provide citations for its highly argumentative and improper statements concerning the intent of Hermann to charge grossly excessive utility fees, or any citations to support their allegations that Hermann's utility fees are in fact excessive. It is clear that the Eastern District was misled by the unsubstantiated arguments of "fact" offered by Appellants and that their failure to properly cite to the record should have resulted in the dismissal of their Appeal by the Eastern District.

An appellant may not simply recite his or her version of events, but is required to provide a statement of facts most favorable to the court's judgment. Failure to provide such a fair statement is basis for dismissal. In re Smith, 283 S.W.3d 271, 273-274 (Mo. App. E.D. 2009); Porter's Ready-Built, Inc. v. Plummer, 685 S.W.2d 236, 237 (Mo. App. 1985).

CONCLUSION

Appellants have expended considerable effort attempting to elevate what is simply a philosophical accounting debate into allegations of constitutional violation. They have taken fund accounting principles and twisted them into a damages claim inflicted on the citizens of Hermann. Not content with this effort, they now seek to have the Court return to the distant days of Roberts v.McNary, when parks had to close because the admission fees could not be raised. A proper application of this Court's well-reasoned Keller factors should result in affirming the trial court's award of Summary Judgment. The trial court's decision is consistent with cases such as Beatty, Missouri Growth and Mullenix where the Keller factors were correctly applied to the facts of the case. Municipal utilities have relied upon these precedents. Uncertainties of the Keller factors result from misapplication, and not from their substance.

Further, a class action for monetary damages is not the proper means for challenging a municipal utility provider's service rates; such review is only to be brought pursuant to the equitable jurisdiction of the Missouri courts. Keller provides guidance for determining whether a particular fee is a "tax" or a "user fee," it is not intended to assess whether a user fee is set at an appropriate rate.

If this Court should determine that municipal utilities are to be operated at cost only, it would have grave consequences on the ability of municipalities to continue to operate municipalities. Simply put, municipally owned utilities may have to cease operating or sell to investor owned utilities who can charge cost plus a profit. Further, the return to the pre-Keller days would cast great uncertainty for all manner of "fee"

charged by a governmental entity, even those fees that are clearly not taxes. It would lead to huge losses for municipalities that justifiably relied on the precedents that have followed *Keller* over the past two decades. Appellants urge a reversion to the long and overwhelming ballots that were common place before Keller and loss of government credit ratings.

As has been often observed, the rule of law requires continuity and respect for precedent. This case does not justify "abandonment of the fundamental holding in Keller." Beatty at 222 (Holstein concurring).

For the reasons set forth herein, Respondent respectfully requests that this Court affirm the award of Summary Judgment issued by the trial court in this matter.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of November, 2010, two copies of the foregoing Brief and Appendix, and a disk containing a copy of the Brief and Appendix, were served upon Appellants and all Amicus Curiae by placing the same in the U.S. Mail, postage pre-paid to the following attorneys of record:

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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 10,481, excluding the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

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

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