SC92581

IN THE SUPREME COURT OF MISSOURI

WILLIAM DOUGLAS ZWEIG, et al.
On behalf of themselves and all others similarly situated

Plaintiffs-Respondents/Cross-Appellants

v.

THE METROPOLITAN ST. LOUIS SEWER DISTRICT,

Defendant-Appellant/Cross-Respondent

SUBSTITUTE

BRIEF OF THE MISSOURI MUNICIPAL LEAGUE, THE MISSOURI ASSOCIATION OF MUNICIPAL UTILITIES, THE MISSOURI JOINT MUNICIPAL ELECTRIC UTILITY COMMISSION, AND THE MUNICIPAL GAS COMMISSION OF MISSOURI, COLLECTIVELY REFERRED TO AS MUNICIPALS, AS *AMICI CURIAE* IN SUPPORT OF THE DEFENDANT-APPELLANT/CROSS-RESPONDENT, THE METROPOLITAN ST. LOUIS SEWER DISTRICT

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MUNICIPALS

STATEMENT OF INTEREST

This brief is filed pursuant to Leave granted by this Court in its Order of December 14, 2012, by *Amici Curiae*, the Missouri Municipal League ("MML"), The Missouri Association of Municipal Utilities ("MAMU"), the Missouri Joint Municipal Electric Utility Commission ("MJMEUC"), and the Municipal Gas Commission of Missouri ("MGCM"), who are collectively referred to at times as the "Municipals."

The Missouri Municipal League is an independent not-for-profit association of about 667 municipalities in the State of Missouri representing ninety-five percent (95%) of the urban population of the state. The Metropolitan St. Louis Sewer District, (hereinafter referred to as "MSD") is an Associate Member of the MML. The MML provides for cooperation in formulating and promoting municipal policy and administration of local government at all levels to enhance the welfare and common interests of its members and their citizens. MML members are political subdivisions subject to the Hancock Amendment.

The Missouri Association of Municipal Utilities ("MAMU"), is an association of political subdivisions that represents 111 electric, natural gas, water, wastewater and broadband utilities owned by political subdivisions that work together through cooperative action as members of the MAMU for the benefit of their respective political subdivision. Many members of the MAMU are also members of the MML. Any political subdivision that owns a utility may belong to the MAMU. The MAMU has two closely aligned, yet distinct, operating affiliates that have joined in the *amici curiae* brief because

of concern with respect to the potential impact of a decision in this case on its members. The Missouri Joint Municipal Electric Utility Commission ("MJMEUC") has a membership of 67 electric systems owned by political subdivisions that supply electricity to approximately 347,000 retail customers in Missouri. The Municipal Gas Commission of Missouri ("MGCM)" has 11 political subdivision members who operate gas utilities for about 7,300 customers in Missouri. The members of the MGCM cooperate in the bulk purchase of gas for resale to member cities.

Many of these organization members are subject to state and federal mandates with respect to stormwater, and members who are political subdivisions would be impacted by the decision in this case because as political subdivisions they are subject to the Hancock Amendment. Whether or not an impervious surface runoff charge (designated in the MSD Ordinance as a "Stormwater User Charge") is a fee or tax under the utility model as utilized by MSD is of great interest and importance to the MAMU, its affiliates, and the MML. All political subdivisions will also be impacted if attorney fees can be multiplied under section 23 of article X of the Missouri Constitution and if refunds are required to be made under section 23 of article X.

Municipal members own, operate, and maintain stormwater systems that transport stormwater safely away from populated and developed areas to streams and rivers of Missouri and the United States. Stormwater also accumulates debris, chemicals, sediment or other pollutants that could adversely affect water quality. MSD is both a wastewater utility and a stormwater utility created in 1954 under a special provision of the Missouri Constitution (article VI, section 30(a)) through the adoption of a Charter Plan by the

voters of St. Louis City and County that provides services to most of St. Louis County and the City of St. Louis. MML members in St. Louis County and the City of St. Louis have an interest in this case because MSD provides stormwater services in their jurisdictions. In addition, most MML members are required by federal and state law to meet certain mandated standards with respect to the collection and transportation of stormwater in their stormwater systems; some of which are performed by MSD. 33 U.S.C. Sec. 1342; The Missouri Clean Water Act, Chapter 644 et seq. RSMo.

Some political subdivisions throughout the United States and Missouri have established stormwater utilities to provide comprehensive stormwater programs, which charge customers a user fee for the collection and transportation of stormwater. The trial court's holding in this case that the MSD Stormwater User Charge was a tax, not only affects Municipals members in St. Louis County and the City of St. Louis, but also several other Municipals members outside the MSD area who have adopted a similar user fee or who may want to consider the adoption of a impervious stormwater charge.

The enhancement of attorneys' fees through the application of a multiplier of two to the lodestar computation of attorneys' fees is an issue of first impression in this state and the court's decision with respect to the meaning of "reasonable attorneys' fees" in article X, section 23 could be precedent for interpreting other laws that apply to MML members which allow "reasonable attorneys' fees." Refunds of payments made under a law that violates section 22(a) of the Hancock Amendment could create enormous uncertainty with respect to financing of bonds and in general the financial well-being of

all political subdivisions. Consequently, the decision in this matter will have far-reaching implications on Municipals well beyond this case.

SUGGESTIONS

The Municipals adopt the statement of facts set forth by Defendant-Appellant/Cross-Respondent, MSD in its brief. The Municipals also fully support and adopt the arguments set forth by the MSD.

STANDARD OF REVIEW

On July 9, 2010 the trial court entered its Judgment finding that the Stormwater Ordinances enacted by MSD were invalid and unconstitutional under section 22(a) of article X of the Missouri Constitution because they were a tax violating all five of the Keller factors. (J. at 35-37 (LF1575-77;A35-37)). On November 23, 2010, the Trial Court entered its judgment that certified a class for the refund claims, entered judgment in favor of MSD and against the class on its claims for a $90.8 million refund, and enjoined MSD from collecting its already-suspended Stormwater User Charge. (LF1805-06) On February 3, 2011, the trial court entered its Judgment and Decree awarding Plaintiffs' counsel the sum of $4,357,756 in attorney fees and $471,072.28 in out-of-pocket expenses from which MSD appeals. The February 3, 2011 Judgment included an enhancement of attorneys' fees by a multiplier of two, except for the fees related to Plaintiff's fee application. (LF 2643-2646). In reviewing a court-tried case, the appellate court should sustain the trial courts judgment "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976). The determination of whether or not the phrase, "reasonable attorneys' fees" under article X, section 23 of the Missouri Constitution allows an enhancement of

the attorneys' fees and whether or not a refund is authorized is a question of law subject to *de novo* review because there are no material facts in dispute. Farmer v. Kinder, 89 S.W.3d 447, 449 (Mo. banc 2002). Conclusions of law by the trial court are reviewed by an appellate court independently to determine whether the trial court properly declared or applied the law to the facts presented. Kessler-Heasley Artificial Limb Co., Inc. v. Kenney, 90 S.W.3d 181, 184 (Mo. App. 2002). If the evidence is not controverted and the sufficiency of the evidence is not at issue, no deference is due the trial court's judgment regarding the legal effect of its findings of fact. St. Charles County Convention & Sports Facilities Auth. v. Mydler, 950 S.W.2d 668, 670 (Mo. App. E.D. 1997).

POINT 1

THE TRIAL COURT ERRED IN DETERMINING THAT THE MSD STORMWATER USER CHARGE WAS A TAX BECAUSE THIS HOLDING IS AGAINST THE WEIGHT OF THE EVIDENCE AND THE LAW.

A. UTILITY CHARGES WERE NOT TAXES BEFORE NOVEMBER 4, 1980.

MSD is both a wastewater utility and a stormwater utility created in 1954 under a special provision of the Missouri Constitution (Article VI, Section 30(a)) through the adoption of a Charter Plan by the voters of St. Louis City and County. (J. ¶¶8-9, 15 (LF1544, 1546)). Before discussing the five-part test in Keller v. Marion County, 820 S.W.2d 301 (Mo. banc 1992) it is useful to step back and take a look at the pre-Hancock tax cases with respect to the definition of a tax prior to November of 1980. After all, prior to November of 1980 there was a well-established body of case law that told us what constituted a tax.

Pre-Hancock (prior to November 4, 1980) cases show that charges for utility services were fees not taxes. Craig v. City of Macon, 543 S.W.2d 772 (Mo. 1976) is instructive since in that case the City of Macon imposed a flat charge on all households in the community for trash service. State law authorized the City to levy a tax for this service by a majority of the electorate, thereby requiring a vote. Faced with the question of whether the charge was a fee or a tax, the Court in Craig v. City of Macon, found that it was a fee not a tax and applied the following definition of a tax:

> "The term 'tax' has been defined variously, but the appropriate definition for us is found in Leggett v. Missouri State Life Ins. Co., 342 S.W.2d 833, 875 (Mo. banc 1960) in which we stated: 'Taxes are 'proportional contributions imposed by the state upon individuals for the support of government and for all public needs.' . . . Taxes are not payments for a special privilege or a special service rendered. . . . 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…." Craig v. City of Macon, at 774 citing Leggett v. Missouri State Life Ins. Co., 342 S.W.2d 833, 875 (Mo. banc 1960).

In the Craig case, the charge was used to pay the cost of waste collection and disposal. In addition, the revenues from the charge did not subsidize the operation of the city or go into general revenue. The disposal charge was collected for a specific purpose, to pay the cost of the service; therefore, it was not a tax. It was a fee. Craig v. City of Macon at 774. Certainly how the courts treated charges (fees or taxes) prior to November of 1980 is a critical part of the analysis under the Hancock Amendment and should be the starting point in determining whether a charge is a tax before applying the five-part Keller test.

Using the pre-November 4, 1980 definition of a tax, the Stormwater User Charge imposed by MSD in this case would be a fee not a tax.

B. DEFINITION OF A TAX AFTER NOVEMBER 4, 1980.

After the adoption of the Hancock Amendment in November of 1980 - prior to the adoption of the Keller test in 1991 - both Craig v. City of Macon and Leggett v. Missouri State Life Ins. continued to reign as the preeminent definition of what is a tax and a fee. See Roberts v. McNary, 636 S.W.2d 332, 335-36 (Mo. 1982) where the court considered the tax/fee language in article X, section 22(a) contrasting the definition of a tax and a fee although it concluded that fees were also required to be approved by a majority of the electorate.

When Keller v. Marion County, supra was decided in 1991, the Keller court reaffirmed the pre-1980 definition of a tax and fee established in Craig v. City of Macon, Leggett v. Missouri State Life Ins. Co., and Roberts v. McNary. Keller v. Marion County, 820 S.W.2d 301, 303-04 (Mo. banc 1992). The definitions of "tax" and "fee" have not changed and remain the same to this day.

Without any doubt, the Stormwater User Charge established by Ordinance 12560 meets the classic definition of a fee because the charges are paid by certain individuals to public officers for services rendered in connection with a specific purpose. No revenues are paid into the general fund of the government to defray customary governmental expenditures because the revenues are segregated and can only be used for stormwater purposes. The corollary is that these charges are fees and not taxes because they are not proportional contributions imposed by the state upon individuals for the support of government and for all public needs. Taxes are not payments for a special privilege or a special service rendered by a political subdivision.

C. KELLER FACTORS

INTRODUCTION

The five-part Keller test was intended to provide guidelines to help identify the real nature of the charge or unmask a charge to show that it was a tax disguised as a fee. While the five-part test is useful and required, the courts have remained steadfast in cautioning that the five-part Keller test is nothing more than a useful guideline. However, at times courts have lost their way by applying the five-part Keller test like a mathematical formula, losing track of the real purpose of the test. Arbor Investments Company, et al. v. City of Hermann, 341 S.W.3d 673, 682 (Mo. 2011), instructs that "consideration of the Keller factors is a necessary step, but the purpose of their use is not because an arithmetic score will be determined that decides whether the particular charges in question pass or fail but rather is to assist the courts in determining the ultimate issue of whether the charge is a user fee or a disguised tax."

While the trial court in this case did not have the benefit of the above statement from the Hermann case, it applied the five-part test like a mathematical formula. The trial court in its Judgment and Decree dated July 9, 2010 stated in paragraph 97 that "Since the Keller decision, Missouri courts have adopted a mathematical application of the Keller factors...." The application of the Keller test as a mathematical formula is a fundamental flaw in the court's analysis that permeates throughout the Judgment as shown below.

Before discussing the five-part Keller test some preliminary observations are useful. Another misconception throughout the Judgment and Decree is the idea that

utility rates must be exact and that the decision to use the impervious surface measure is not precise and therefore is unfair. Municipals that own and operate public utilities, in the course of their operation and ownership, establish rates for utility customers and generally follow well-recognized utility industry practices by charging customers based on the cost to serve a class of customers although the cost to serve a class of customers is but one consideration in the determination of the reasonableness of the rate. Shepherd v. City of Wentzville, 645 S.W.2d 130, 133 (Mo. App. E.D. 1982). The function of fixing rates and the determination of whether differences in rates between classes of customers are to be made, and the amount of difference, is a legislative function rather than a judicial function and as such there is a strong presumption that the rates fixed by the municipality are reasonable and the burden of proving that the rates fixed by the municipality are unreasonable is upon the party challenging the rates. Shepherd v. City of Wentzville, Id.

While the courts retain equitable jurisdiction to prevent a municipality from enforcing public utility charges, oversight is limited to charges that are "clearly, palpably and grossly unreasonable." Forest City v. City of Oregon, 569 S.W.2d 330, 333 (Mo. App. 1978). This case is about whether the charge is a tax or a fee and the question of the precision of the rates is not the issue although Keller v. Marion County and Arbor Investments Company, et al. v. City of Hermann provide sufficient support that utility rates do not have to be exact under the fee/tax five-part Keller test.

The use of the amount of impervious surface is a reasonable measure, although like many utility charges, it is not perfect. Of course, land in its natural state will have

runoff, but the decision exclude property left in its natural state is reasonable. A utility charge is not invalid unless the charge is "clearly, palpably and grossly unreasonable." Forest City v. City of Oregon, at 333.

In addition, understanding how capacity charges work is important since a stormwater system primarily provides capacity to carry the stormwater. Unlike other utilities that charge both a capacity charge to recover their fixed costs associated with plants and lines, and an additional charge to cover their costs to make or deliver the commodity to the customers, stormwater systems primarily provide capacity, which is reflected in the charge. Each and every month the customer receives the ability to dispose of the stormwater that may come across his property, with the charge in this case being determined by the amount of impervious surface area under the control of the customer, which has a reasonable relationship to the potential amount of stormwater drained from the property. Whether the capacity is actually used is not in the control of the customer or MSD, but MSD nevertheless provides the same amount of capacity each and every month for the customer. The exclusion of properties left in their natural state is a reasonable determination as well as the decision to charge less by giving properties that drain into major rivers a 50% credit and a credit for properties where other political subdivisions provide some of the stormwater service. Within the framework of the MSD Ordinance, the amount of the impervious surface is reasonably related to the amount of goods or services taken by the fee payer.

Five-Part Keller Test

Factor 1 – When is the fee paid? Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis, while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee.

The Stormwater User Charge was due after the stormwater services were provided, and MSD stormwater services are continuous and ongoing. As one might expect, the testimony in this case showed that rainfall amounts varied from month to month on a magnitude ranging from 2 inches to 10 inches. (Judgment P 42) Nevertheless, the same capacity, including related services (maintenance, administration and education), is provided despite the variance in the rainfall from month to month. A stormwater system cannot be casually modified to fit actual usage and precipitation on a monthly basis, but instead should be built to handle the largest reasonable capacity. That size of system is then delivered to the customer each and every month; much like the capacity of a bathtub - waiting to be used whether or not it rains two inches or ten or not at all.

For the reasons stated above, the trial court erred when it found that MSD did not satisfy the first factor of the five-part test because the undisputed facts showed the payment was made monthly. The trial court erred when it concluded in its Judgment and Decree of July 9, 2010 in paragraphs 102 and 103 that the service could not be accepted or rejected because under Craig v. City of Macon, supra, and Arbor Investments Company, et al. v. City of Hermann, supra, this is not a factor. In Craig v. City of

Macon, supra, the mandatory trash service for everyone was a fee. Arguments made in Arbor Investments Company, et al. v. City of Hermann, that a utility was a monopoly failed. As noted above in Municipals opening comments to the five-part test, the customer is paying for capacity and pays each month based on the amount of impervious surface.

Factor 2 – Who pays the fee? A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged.

Again, there is no dispute concerning the facts. The charge is not blanket-billed to everyone because properties that do not have any impervious surface do not pay a Stormwater User Charge. In addition, properties that drain directly to a major river receive a 50% credit while other properties where stormwater services are in part provided by other public entities receive a partial credit based on the amount of service MSD provides to these properties. The trial court erred when it concluded in its Judgment and Decree dated July 9, 2010 that the charge is blanket-billed to everyone in paragraph 109 after it concluded in paragraph 108 that persons who did not have impervious surface were not billed.

Factor 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.

In this case, the measure of the service is the amount of impervious surface and the capacity of the system to handle the stormwater. As additional impervious surface is added or removed, the user charge varies and rates are adjusted. If all of the land was covered with asphalt or concrete, the capacity of the system would have to be increased. Returning land to a natural state can occur thereby reducing the need for additional stormwater capacity. The amount of the fee is reasonably related to the amount of goods or services taken by the fee payer in this case, because the fee is increased based on the fee payers' amount of impervious surface area that is to be drained into the stormwater system. As noted in our opening comments to the five-part test, there is no requirement of a direct relationship of the fee to the service. In Craig, the plaintiffs complained that there was one charge that fit all. Again, in Arbor Investments Company, et al. v. City of Hermann, supra, and Craig v. City of Macon, supra, there was no direct relationship. The trial court erred when it concluded in paragraph 116 of its Judgment and Decree dated July 9, 2010 that there had to be a direct relationship between the charge and the service.

Factor 4 – Is the government providing a service or good? If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being

provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment.

Providing stormwater capacity for surface water is a service. This can be determined by applying the ordinary dictionary definition of the word "service," which this Court has used as its guideline in determining the meaning of a word. As a special purpose district under the Missouri Constitution, MSD is charged with providing stormwater services. The trial court erred when it concluded in paragraph 120 of the Judgment and Decree dated July 9, 2010 that the failure to give credits to property owners who do not allow the stormwater runoff to increase beyond the amount before development meant that MSD was not delivering a measurable service in connection with the Stormwater User Charge. Clearly the service was there. Again the trial court confuses utility rate making with the issue of whether or not the charge is a tax. Rates do not have to be perfect; they just need to be reasonable and are invalidated only if they are grossly unfair.

Factor 5 – Has the activity historically and exclusively been provided by the government? If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment.

MSD was created by the Missouri Constitution and empowered as a special district to provide stormwater and wastewater services across lines of political

subdivisions. Of course the government provides this service. While this may be of interest in determining if the charge is a tax or a fee, it is clear from Craig v. City of Macon, supra, that the fact that the government is providing this service does not make the charge a tax. In Craig the City mandated the service and was the sole provider.

POINT 2

THE TRIAL COURT ERRED WHEN ATTTORNEYS' FEES WERE ENHANCED BECAUSE:

A. AS A MATTER OF LAW THE WORD "REASONABLE" AS USED IN ARTICLE X, SECTION 23 OF THE MISSOURI CONSTITUTION PRECLUDES AN ENHANCEMENT OF ATTORNEYS' FEES.

The voters adopted article X, section 23 of the Constitution of the State of Missouri in November of 1980 along with sections 16-24 of article X, known as the Hancock Amendment. The focus of the argument by Municipals under its Suggestions for Point No. 2 is the phrase "reasonable attorneys' fees" in article X, section 23 to be awarded to a prevailing party. The question presented is whether or not the fee enhancement that doubled the attorneys' fees is "reasonable."

In examining this language, it is presumed that the words contained in the Amendment are used in their natural sense with no forced or unnatural construction to be put upon the language. State ex inf. Danforth v. Cason, 507 S.W.2d 405, 408-409 (Mo. banc 1974). The meaning of words in the constitution as conveyed to the voters is presumed to be their natural and ordinary meaning. Id. The ordinary and commonly understood meaning is derived from the dictionary. Boone County Court v. State of Missouri, 631 S.W.2d 321, 324 (Mo. banc 1982). This rule (ordinary dictionary meaning) is almost universally applied by Missouri courts in interpreting the meaning of words in our Constitution and was most recently applied by this Court to determine if a tax credit

was a "direct expenditure of funds generated through taxation" under the Missouri Constitution. Manzara v. State, 343 S.W.3d 656, 659-660 (Mo. banc 2011).

Webster's Ninth New Collegiate Dictionary (10th ed. 1983) defines "reasonable" as **1. a:** not conflicting with reason **b:** not extreme or excessive **c:** MODERATE, FAIR **d:** INEXPENSIVE.

The American Heritage Dictionary of the English Language, (4th ed. 2000, updated in 2009) defines the word "reasonable" as: **3.** Having modest or moderate expectations; not making unfair demands; **4.** (Business/Commerce) moderate in price; not expensive; **5.** Fair, average. The word "reasonable" is used eight times in the Missouri Constitution.[1]

[1] Article I, section 18(b) allows for the reimbursement of "reasonable personal and traveling expenses"; Article I, section 32 gives crime victims the right to "reasonable protection" from the defendant; Article III, section 38(d).6(17) uses the words "reasonable costs" in the definition of "valuable consideration" presumably to eliminate the profit motive from the selling of stem cells by allowing for just recovery of costs; Article III, section 39(a)(5) requires any law passed by the General Assembly to limit the payment for the rental of gaming equipment so that it is not in excess of the "reasonable market rental rate"; Article III, section 48 limits the power of the General Assembly to "reasonable regulation or control" with respect to the preservation of memorials; Article V, section 20 limits the payment to judges for travel to "reasonable traveling and other expenses" allowed by law; Article IV, section 30(b) provides that freeholders of the city and the county shall fix the "reasonable compensation and expenses" for the freeholder

The use of the word "reasonable" in these sections of the Missouri Constitution shows that the dictionary meaning of the word "reasonable" was intended. The word "reasonable" in the Missouri Constitution is used in its ordinary sense. Reference to analogous constitutional provisions can help shape a statute to accord with its aim or objective. 2B Sutherland Statutory Construction §56:4 (7th ed.). To ascribe some other meaning to the word "reasonable," other than the dictionary definition, would be contrary to the rules the Missouri Courts have followed in determining the meaning of words, whether they are used in the constitution or in a statute. Boone County Court v. State of Missouri, supra. Rules applicable to constitutional construction are the same as those applied to statutory construction. State at the Information of Martin v. City of Independence, 518 S.W.2d 63, 65 (Mo. 1974). The interpretation given by this court to the phrase "reasonable attorneys' fees" as used in the Missouri Constitution cannot be changed by legislative action making it permanent until the voters amend the constitution or the court changes its interpretation.

The trial court, in its Judgment and Decree, found that the "Class Counsel's time and fees submitted are reasonable" (LF 2637-49-Exhibit No. 1, Paragraph 9 and 11) before they were enhanced. The Judgment and Decree states in Paragraph 9 that the "…Class Counsel's time and fees submitted are reasonable" and then further states in

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appointed by the governor; and Article X, section 23 provides that if a suit is sustained under sections 16 through 22 of article X of the Missouri Constitution the prevailing party shall receive "reasonable attorneys' fees."

Paragraph 11 that the rates charged for performance on this case "…are Class counsel's customary rates and further that the rates are in line within the rates customarily charged by other attorneys in the community for similar services." After determining that the time, fees and rates were reasonable, the trial court doubled these "reasonable fees." Municipals do not quarrel with the number of hours or the hourly rate used to compute the lodestar. What makes the attorneys' fees unreasonable is the use of a multiplier to enhance fees already found to be reasonable. (LF 2637-49 – Exhibit No. 1, Paragraph 25).

As noted above, applying the word "reasonable" as used in its ordinary context conveys the meaning that the fee is "fair", "average" or "modest." There is no logic to the trial court's Judgment in this case when in one sentence the trial court declares the lodestar "reasonable" only to apply a multiplier to the lodestar thereby doubling the attorney fees. After applying the multiplier, the attorneys' fees in this case reach $870 per hour which does not meet the ordinary definition of "reasonable" in article X, section 23 of the Constitution of the State of Missouri.

The voters, when they approved the Hancock Amendment, did not have in mind that attorney fees that are first determined to be "reasonable" could then be enhanced. The term "reasonable attorneys' fees" is also used a significant number of times in the Missouri statutes that require state and political subdivision to pay "reasonable attorneys' fees" and to be awarded "reasonable attorneys fees." The use of the term "reasonable attorneys' fees" allowing for the recovery of these fees abounds in the Missouri statutes, significantly increasing the importance of this issue as an issue of first impression since

the language in these statutes is virtually identical and indistinguishable from the language in article x, section 23.[2]

Based on the above analysis, using straightforward constitutional rules of construction followed in Missouri, the trial court's decision with respect to the fee enhancement should be reversed as a matter of law because the enhancement of a fee does not meet the ordinary dictionary definition of the word "reasonable" as used in article X, section 23 of the Missouri Constitution and in other sections of the Missouri Constitution. Based on the above analysis, there is no reason why the court needs to reach other fatal defects relating to the use of the multiplier discussed by the Municipals in Points 1B and 1C. There is no reason to invent or apply a theory when the language in the

[2] A partial list of Missouri statutes that use the term "reasonable attorney fees": 428.125.1 and .3; 523.259.1(1) and .1(2)(b); 347.175(1) and (2); 416.635; 407.755; 570.123; 454.1584(b) and (c); 610.027.3 and .4; 514.205.1; 454.910(b) and (c); 570.087.2 and .4; 523.283.4; 213.111.2; 233.240; 436.103; 274.270; 393.1150; 488.474.1; 488.472; 79.383.1; 622.530; 287.720; 632.415.2; 452.354; 359.601; 448.3-116.7; 431.180.2; 375.420; 392.350; 416.121.1(1) and .1(2); 407.581.5, .6, .7, and .8; 400.9-623(b)(2); 350.1081.3(1), .3(1)(a) and .4; 130.033; 263.262; 306.900.3(1); 537.410; 204.628; 60.355.3; 428.135; 441.643; 233.370.3, .6 and .7; 409.5-509(b)(1), (b)(3), (c)(1), (c)(3), (e) and (f)(1); 430.082.7; 290.300; 233.255.2, .5 and .6; 429.625; 389.310.3; 407.898; 407.848; 537.353.4. (This list contains results 1-51 of 270 results in Westlaw using the query (*pr(statutes) & reasonable/3 "attorney fee"*)

constitution does not even give a hint that a multiplier of attorney fees is possible even in extraordinary circumstances, thereby embedding this principle into the Missouri Constitution.

B. AS A MATTER OF LAW THE FEE ENHANCEMENT OF THE LODESTAR BY TWO TIMES DUPLICATES FACTORS ALREADY INCLUDED IN THE COMPUTATION OF REASONABLE ATTORNEYS' FEES MAKING THE ENHANCEMENT UNREASONABLE UNDER ARTICLE X, SECTION 23 OF THE MISSOURI CONSTITUTION.

An analysis of the lodestar methodology supports reversing the trial courts Judgment and Decree with respect to the enhancement of the attorney's fees. This analysis is derived from a long history of fee enhancement cases under federal law, using the lodestar methodology, culminating in a recent 2010 decision by the United States Supreme Court, which examines in detail the history of fee enhancements and the underlying assumptions in using the lodestar methodology to compute attorney fees. Purdue v. Kenney A. ex rel. Winn, 130 S.Ct. 1662, 1672-1673 (U.S. 2010).

A "reasonable" fee is a fee that is sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L.Ed.2d. 439 (U.S. 1986). The fee should be adequate to attract competent counsel, but should not produce windfalls to the attorneys. Blum v. Stenson, 465 U.S. 886, 897, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). This allows the plaintiff to attract a lawyer of sufficient skill to pursue a difficult matter. Under the lodestar methodology, the plaintiff's lawyers are paid for the hours they work, at an hourly rate in line with rates customarily charged in the community for similar services, which allows for compensation based on the complexity

of the case since more complex and difficult cases require more hours and a more skilled and experienced lawyer.

> "We have thus held that the novelty and complexity of a case generally may not be used as a ground for an enhancement because these factors "presumably [are] fully reflected in the number of billable hours recorded by counsel." *Ibid.* We have also held that the quality of an attorney's performance generally should not be used to adjust the lodestar "[b]ecause considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate." Citing Delaware Valley I, supra, at 556, 106 S.Ct. 3088. Perdue v. Kenny A. ex rel. Winn, 130 S.Ct. 1662, 1673 (U.S. 2010).

The lodestar methodology avoids double billing, is readily administrable, is objective, cabins the discretion of the trial judge permitting meaningful review, provides for reasonably predictable results, and produces an award that roughly approximates the fee that the prevailing attorney would have received if the attorney was representing a paying client who was billed by the hour in a comparable case. Perdue v. Kenny A. ex rel. Winn, at 1672.

The attorneys' fees when doubled show a range of fees for the work from $480 to $870 per hour for officers; from $350 to $420 per hour for associates; and from $270 to $320 for paralegals. These hourly rates are not consistent with the finding in the Judgment and Decree that the hourly rates used to determine the lodestar were reasonable as discussed in Point 2A. In Ladd v. Pickering, 783 F.Supp.2d 1079, 1091-93 (E.D. Mo. 2011) the court discusses appropriate attorney fees in the St. Louis area, adjusting the

rates to reflect the St. Louis market which had a high of $480 to a low of $200 per hour depending on experience.

Besides rejecting the enhancement of attorneys' fees based on constitutional construction as applied by the Missouri Courts, this Court should also reject any enhancement of attorneys' fees because the lodestar methodology adequately compensates the attorneys for risk, contingency, hours worked, difficulty, skill, expertise, results, and a vigorous defense - all factors cited by the trial court in its enhancement of the attorneys' fees. (LF 2646). The trial court in this case applied the lodestar methodology determining that the attorneys' fees in the lodestar were reasonable but then went on to enhance the attorneys' fees by two times. A fee enhancement duplicates the lodestar factors, which are designed to calculate a reasonable fee, thereby requiring that the Judgment with respect to the attorneys' fees be reversed because the enhanced attorneys' fees were not reasonable.

C. AS A MATTER OF LAW THERE WERE NO EXCEPTIONAL CIRCUMSTANCES SHOWN TO JUSTIFY THE ENHANCEMENT OF THE ATTORNEYS' FEES, THEREFORE THE ENHANCED FEES WERE NOT REASONABLE UNDER ARTICLE X, SECTION 23 OF THE MISSOURI CONSTITUTION.

The United States Supreme Court has stated that there is a strong presumption the lodestar is sufficient to fairly and adequately compensate the attorneys based on factors in the lodestar calculation and that these factors cannot be used as grounds to enhance attorneys' fees above the lodestar. Perdue v. Kenny A. ex rel. Winn, at 1669. The party seeking an enhanced fee above the lodestar has the burden of identifying factors that the lodestar does not adequately take into account and must prove with specificity that the enhanced fee is justified by showing extraordinary circumstances. Id.

The Judgment and Decree entered by the trial court in this case identifies a number of factors used to justify the fee enhancement in paragraph 25 of Exhibit No 1. (LF 2646). However, as noted earlier in this Brief under Point 1B, these factors were clearly part of the original lodestar calculation, thus the enhancement acts to duplicate the factors already taken into consideration in arriving at the lodestar.

The Supreme Court was particularly concerned when the enhanced fees are to be paid by state and local taxpayers of a political subdivision that have limited budgets because diversion of funds simply directs public funds away from important government services. Perdue v. Kenny A. ex rel. Winn, at 1677. This is especially important in this

case because MSD is a limited purpose political subdivision providing wastewater and stormwater services, meaning that the enhanced fees come directly from stormwater programs funded by MSD charges.

The Plaintiffs have not shown exceptional circumstances in this case to justify an enhanced fee under the guidelines in Perdue v. Kenny A. ex rel. Winn, at 1674-1676. One myth that needs to be dispelled is that this case was unduly complicated. Since 1990, every municipal lawyer, judge and constitutional scholar has known that you use the five-part test to determine if a charge is a fee or tax. City of Hannibal v. County of Marion, 800 S.W.2d 471 (Mo. Ct. App. 1990). There are numerous cases that provide a framework for applying the test to the facts. This is not a complicated or novel case. Under Perdue, exceptional circumstances must be properly justified to show why the court granted a multiplier of two and not some other number. The Judgment and Decree entered in this case does not show why the lodestar was multiplied by two instead of some other number. It is also necessary for the court to link any factor in the record to show the reason for the enhancement, which did not occur in this case. The Judgment and Decree in this case fails to provide sufficient documentation to meet the Supreme Court's exacting requirements to provide review of the Judgment and Decree.

For the reasons stated above, the Judgment and Decree of the trial court did not show exceptional circumstances, which meet the requirements for a fee enhancement, nor did it provide sufficient documentation of the reasons why the lodestar fee was inadequate, therefore, the justification for awarding an enhancement that doubles the attorneys' fees in this case is unreasonable.

For the reasons stated above the trial court erred when it enhanced the lodestar by two times.

INTRODUCTION TO POINT 3 – REFUND CLAIM.

The Municipals will now address the trial court's ruling denying the request by the Plaintiffs for a $90,000,000 refund because Rule 83.05 requires that the Suggestions of the *Amici Curiae* are due at the time MSD files its brief, thereby necessitating that the Municipals provide the Court at this time with all of their Suggestions including Suggestions on the refund issue. Municipals are impacted by the potential harm to budgets and bonding capacity for reasons set forth in more detail below if refunds are required when there has not been strict compliance with state law.

Section 23 of the Hancock Amendment provides that taxpayers may bring suit "to enforce the provisions of [the Hancock Amendment] and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys' fees incurred in maintaining such suit." Mo. Const. art. X, §23. As discussed in more detail below, section 23 of article X does not expressly provide for a refund of excess revenue collected

The trial court entered its judgment on November 23, 2010, denying Plaintiffs' request for a refund of approximately $90,000,000 on the grounds that the Plaintiffs did not file a protest as required by section 139.031 RSMo. (Refund J. Paragraph 64:LF1803). The Trial Court properly declared and applied the law when it held that the statutory requirements for tax refunds set forth in RSMo. §§ 137.073 (if applicable) or 139.031 apply to Hancock cases and must be followed in order to obtain a refund of taxes. (Refund J. ¶¶64,67; LF 1803-04).

POINT 3

THE TRIAL COURT DID NOT ERR IN REFUSING TO REFUND CHARGES TO PERSONS WHO DID NOT FILE A PROTEST UNDER SECTION 139.031 RSMO BECAUSE:

A. NO REFUND IS AUTHORIZED UNDER ARTICLE X, SECTIONS 16 - 24 OF THE MISSOURI CONSTITUTION.

Sections 16 through 24 of article X, of the Constitution of the State of Missouri, commonly known as the Hancock Amendment (at times also referred to as "Amendment"), were adopted by the voters on November 4, 1980 to establish limits on taxation and spending. Section 16 of the Amendment provides that property taxes and other local taxes and state taxation and spending may not be increased beyond the limits set forth in the Amendment without voter approval. The Hancock Amendment attempts to create a comprehensive, constitutionally-rooted shield to protect taxpayers from the ability of government to increase the tax burden above that borne by the taxpayers on November 4, 1980, unless the voters approve such increase. Fort Zumwalt School Dist. v. State, 896 S.W.2d 918, 921 (Mo. banc 1995). The overriding purpose of the Hancock Amendment is to limit expenditures by state and local government. Boone County Court v. State, 631 S.W.2d 321, 325 (Mo. banc 1982).

While the issues in this case are focused on sections 22 and 23 of article X, it is important to review the Amendment in its entirety (sections 16 through 24 of article X) to determine the intent of the drafters with respect to refunds (including those that occur as a reduction in taxes), when a political subdivision has violated the Amendment. Specific

provisions for refunds or reductions in taxes are provided in three separate sections of the Hancock Amendment.

First, article X, subsection 18(b) specifically authorizes a pro rata refund to all taxpayers if total state revenues exceed the revenue limit established in subsection 18(a) by one percent or more. If the excess is less than one percent, no refund is authorized and the excess revenue is transferred to the general revenue fund. In the case of the revenue lid set forth in section 18(a), the drafters clearly spelled out when a refund was authorized and the framework for making the refund.

Second, subsection 18(e).5 of article X provides that new taxes not approved by the voters, which generate new revenues in excess of $50,000,000, may be challenged by a taxpayer or statewide elected official under section 23 of the Amendment to enforce compliance with subsection 18(e).5. If the court determines that subsection 18(e).5 has been violated, the court shall order - in accordance with subsection 18(e).5 - refunds of the excess revenues or a reduction in taxes to offset the excess monies collected. Again, the drafters specifically spelled out a refund or a reduction in taxes as an offset to an illegal tax as the specific remedy for a violation of subsection 18(e).5.

Third, subsection 22(a) of article X provides that if the definition of the base of an existing tax is broadened, the maximum authorized levy of taxation on the new base shall be reduced to yield the same estimated gross revenue as the prior base. For the third time, the drafters of the Amendment spelled out a specific remedy to return funds collected in violation of the Amendment to the taxpayers by providing for a corresponding reduction in the base to offset taxes collected in violation of the principle in subsection 22(a) that

you cannot generate excess revenues by expanding the base of an existing tax without an affirmative vote of the electorate. The trial court in this case found that MSD enacted Ordinance No. 12560 on December 13, 2007, effective March 1, 2008 repealing the $0.24 flat charge and replacing it with a monthly Stormwater User Charge on every property that had an impervious surface area at a rate of $0.12 per every 100 square feet of impervious surface area. (Paragraph 28 Judgment and Decree dated July 9, 2010). In addition, the trial court found that at the same time MSD decreased the ad volorem tax portion of the old storm funding program to zero. (Paragraph 29 Judgment and Decree dated July 9, 2010). Again, the drafters of the Amendment specified the remedy by explicitly providing for a reduction in the base of the tax to offset excess revenues for a violation of section 22(a), which does not apply to this case because MSD adopted a new and totally different charge based upon the amount of impervious surface and reduced the old ad volorem tax to zero.

Section 23 of article X provides that a taxpayer may bring a suit to enforce provisions of sections 16 through 22 and if the suit is sustained, the taxpayer shall receive his costs, including reasonable attorneys' fees. There is no mention in section 23 of a remedy for a refund of taxes or a reduction in a tax when there is a violation of the Hancock Amendment. The specificity of section 23 that limits the remedy to attorneys' fees and costs supports the interpretation that section 23 is not consent to suit for a money judgment nor is it necessary to infer or imply a money damage remedy when the remedy is not essential to enforce the right. Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918, 923 (Mo. 1995). The constitutional right established by article X, section 22(a) may be

accomplished by an injunction to enjoin the collection until the constitutionality of the tax is determined. See concurring opinion in Green v. Lebanon R-III Sch. Dist., 13 S.W.3d 278, 287 (Mo. 2000).

Having provided in three sections of the Amendment when refunds or a reduction in taxes are authorized for a violation of the Amendment, it is clear from examining the Amendment in its entirety that the drafters did not intend to include by inference or by implication a refund of taxes in section 23 of the Amendment. Language describing specifically when a refund may be made in the three preceding sections of the Hancock Amendment does not support the view that section 23 of the Amendment implies that there is a refund but instead limits the powers in section 23 to the very words used, the recovery of attorneys' fees and costs. Farmer v. Kinder, 89 S.W.3d 447, 452-53 (Mo. 2002). A constitutional provision must be construed as a whole so as to not destroy the intent of the drafters. State, at the Information of Martin v. City of Independence, 518 S.W.2d 63, 65-66 (Mo. 1974). Due regard should be given to the primary objectives of the drafters of the Amendment by construing all related provisions as a whole. Boone County Court v. State, 631 S.W.2d 321, 324 (Mo. 1982).

Simply put, section 23 means just what it says; you get your costs and attorneys' fees if your action is sustained. While constitutional provisions are generally given a broad meaning, a court should not ascribe meaning to a provision that is clearly contrary to the intent of the drafters. Farmer v. Kinder, 89 S.W.3d 447, 452-53 (Mo. 2002). The contrast in section 23, which does not provide for a refund of taxes or a reduction in taxes to offset an increase in taxes that violate the Amendment, to the other three sections of

the Amendment that specifically authorize refunds or reductions in taxes could not be more palpable, making it clear that limiting the remedy to costs including attorneys' fees was no oversight. Farmer v. Kinder, Id. at 453.

Courts should also avoid an interpretation of the constititution that limits or restricts legislative enactments any further than the absolute requirements of the law. Carmack v. Dir. Missouri Dept. of Agric., 945 S.W.2d 956, 959 (Mo. banc 1997). One compelling reason for not implying a refund in section 23 of the Hancock Amendment is that the drafters of the Hancock Amendment were mindful that there could be a need to implement the Amendment; therefore, they provided in section 24 authorization for the General Assembly to enact laws to implement the Amendment consistent with the purpose of the Amendment. If this court concludes that there is not an implied refund provision in section 23, the General Assembly retains the power under section 24 of article X to legislate a different result to apply to taxpayers who pay taxes.

It would be a very strained interpretation to imply that a refund of taxes is an implied remedy under section 23 when the drafters of the Amendment took great care to specifically spell out when a refund or a reduction in taxes is required in three other sections of the Amendment, none of which apply to the MSD Ordinance. Based on the language of the Hancock Amendment, this Court should affirm the trial court's decision denying a refund.

B. REFUND PROCEDURES IN SECTION 139.031 RSMO ARE MANDATORY

The facts with respect to the request for a refund by Plaintiffs of approximately $90,000,000 are not in dispute. Persons who paid the charge for which the refund is requested did not file a refund claim under section 139.031.1 RSMo., although MSD escrowed a very small number of accounts who arguably met the requirements of section 139.031.RSMo. (Tr. 1338:22-1340:15) The Trial Court properly declared and applied the law when it held that the statutory requirements for tax refund set forth in RSMo. sections 137.073 or 139.031 apply to Hancock cases and must be followed to obtain a refund of taxes. (Refund J. ¶¶64,67; LF 1803-04.).

Section 139.031.1 RSMo. provides that a taxpayer desiring to pay any current tax based upon a disputed assessment shall make full payment of the tax and at the time of paying the tax file a written protest setting forth the grounds on which the protest is based including the true value in money claimed by the taxpayer in dispute. Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005). Section 139.031.1 applies to taxes collected by a city and municipal tax collectors. Armco Steel v. City of Kansas City, Mo., 883 S.W.2d 3, 8 (Mo. 1994). Failure to file a timely protest precludes a refund of taxes. Gen. Motors Corp. v. City of Kansas City, 895 S.W.2d 59, 62 (Mo. Ct. App. 1995). Section 139.031.1 RSMo. must be strictly construed and enforced. State ex rel. Nat. Inv. Corp. v. Leachman, 613 S.W.2d 634, 635 (Mo. banc 1981).

In Ring v. Metro. St. Louis Sewer Dist., 969 S.W.2d 716, 717 (Mo. banc 1998), the Supreme Court held that "[t]he enforcement of the right to be free of increases in

taxes that the voters do not approve in advance may be accomplished in two ways" – (1) seeking an injunction or (2) bringing a "timely action" for a refund of the tax increase. Ring v. Metro. St. Louis Sewer Dist., was subsequently clarified by Judge Wolff in a concurring opinion in Green v. Lebanon R-III School Dist., 13 S.W.3d 278, 287 (Mo. banc 2000) and later in Koehr v. Emmons, 55 S.W.3d 859, 863 (Mo. App. E.D. 2001) and in Green v. Lebanon R-III School Dist., 87 S.W.3d 365, 367 (Mo. App. S. D. 2002). In Metts v. City of Pine Lawn, 84 S.W.3d 106, 109 (Mo. App. E.D. 2002), the court found taxes and charges challenged under the Hancock Amendment could not be refunded except by following procedures in section 139.031 RSMo.

The adoption of the Hancock Amendment did not take place in a vacuum making it important to look at the law with respect to the refund of taxes at the time of its adoption in November of 1980. Whether a statute affirms the rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the legislation (or as in this case a constitutional amendment) should be construed with reference to the common law and statutes at the time of enactment. Perry v. Strawbridge, 209 Mo. 621, 108 S.W. 641, 645 (1908).

At common law "Assumpsit for money had and received is an appropriate remedy to recover back moneys illegally exacted by a collector as taxes, in all jurisdictions *where no other remedy is given,* unless the tax was voluntarily paid or some statutory conditions are annexed to the exercise of the right to sue, which were unknown, at common law." (Emphasis added). B & D Inv. Co., Inc. v. Schneider, 646 S.W.2d 759, 763- 764 (Mo. banc 1983) citing Cox v. Lott, 79 U.S. (12 Wall.) 204, 20 L. Ed. 370, 372 (1871).

Section 139.031 provides a remedy for refunds thus avoiding the issue at common law of whether or not the payment was voluntary or involuntary while at the same time providing notice to the government that it might have to refund taxes. It also provides certainty to the taxpayer by establishing a specific procedure for a refund. B & D Inv. Co., Inc. v. Schneider, at 764. Plaintiffs' had a statutory remedy for a refund and could have also made their claim that the charge was unconstitutional under section 139.031.1 RSMo.

The law discourages suits for refunds of taxes erroneously paid for a number of important public policy reasons. Political subdivisions are required by law to adopt a budget showing expenditures and revenue sources. Section 67.010 RSMo. The budget of a political subdivision must be balanced, that is expenditures must not exceed revenues. Section 67.010.2 RSMo. Once the revenue has been collected, the political subdivision has the right to assume that taxes paid voluntarily – absent a valid protest – can be spent for the purpose for which they were appropriated. Com. Fed. Sav. & Loan v. Director of Rev., 752 S.W.2d 794, 797 (Mo. banc 1988). Section 139.031 RSMo. also protects the government from unexpected refunds, protects the taxpayer from any claim that the payment was voluntary, and provides a source of funds for the repayment in the event the suit is successful. B & D Inv. Co., Inc. v. Schneider, at 764.

Requiring the repayment of taxes reduces revenues generated from the very customers who are getting the refund creating a vicious cycle since revenues for the refund would seemingly have to come from the customers who get the refund. This is particularly true for special purpose districts like MSD who are limited by law to

providing a few services like stormwater or wastewater. Consequently, the refund comes from persons who have received the benefit of the funds and from the very revenues collected and used for the public good. In addition, attorneys' fees and costs must be paid. In effect, persons who paid the stormwater bill are required to pay the refund, interest, attorneys' fees and costs to themselves. In this case, the proposed MSD refund is estimated to be $90,000,000 with another $9,000,000 in interest plus an additional amount for costs and attorney fees.

A judgment requiring MSD to spend more money making refunds under section 23 would thwart the purpose of the Amendment because entry of a judgment for money damages is not essential to protect the rights granted taxpayers under Sections 22 and 23 and is contrary to the Hancock Amendment's general purpose. Fort Zumwalt Sch. Dist. v. State, 896 S.W.2d 918, 923 (Mo. 1995). For the above reasons the decision of the trial court denying the claim for refund should be affirmed.

CONCLUSION

Municipals urge the Court to reverse the trial court's decision that the MSD Stormwater User Charge is a tax because under the definition of a tax before and after the adoption of the Hancock Amendment, utility use charges that are services, billed monthly, and based upon the amount of impervious surface on the property are fees not taxes.

Municipals further urge the Court to reverse the decision of the trial court that the attorneys for the Plaintiffs were entitled to have their fees multiplied because: (a) Article X section 23 of the Missouri Constitutions only allows for reasonable attorneys' fees; (b) the trial court concluded that the lodestar was reasonable before multiplying the lodestar thereby making the attorneys' fees unreasonable; (c) the lodestar incorporates into its calculation the complexity of the case by allowing for adequate hours and an hourly rate sufficient to employ a skilled attorney to vindicate the plaintiffs rights under the Hancock Amendment, therefor there is no reason to multiply the lodestar; and (d) the Plaintiffs did not prove there were exceptional circumstances to justify a multiplier under the law.

Municipals urge the Court to affirm the trial court's decision with respect to its determination that the Plaintiffs were not entitled to a refund of the MSD Stormwater User Charge because there is no implied right to a refund under article X, section 23 of the Constitution of Missouri; and further for the reason that the Plaintiffs failed to file a protest as required by law under section 139.031 RSMo.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the requirements of Rule 55.03; the limitations set forth in Rule 84.06 in that it contains 10,897 words and was produced using Microsoft Word Software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was provided to all attorneys of record via email and the Missouri Supreme Court Electronic filing system this 18th day of December, 2012, to:

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