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IN THE SUPREME COURT OF MISSOURI

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MACON COUNTY EMERGENCY SERVICES BOARD, James Wilson, in his official capacity as an MCEB member; Jeff Roberts, in his official capacity as an MCEB member; Jeff Bixenman, in his official capacity as an MCEB member; Margie Voss, in her official capacity as an MCEB member; Stan East, Jr., in his official capacity as an MCEB member; Gene Wood, in his official capacity as an MCEB member; and Chuck Spencer in his official capacity as an MCEB member,

Appellants,

v.

MACON COUNTY COMMISSION, Alan Wyatt, in his official capacity as a Macon County Commissioner; Drew Belt, in his official capacity as a Macon County Commissioner; and Jon Dwiggin, in his official capacity as a Macon County Commissioner

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Appeal from the 41<sup>st</sup> Circuit Court of Missouri  
The Honorable Frederick Tucker

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	i
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF FACTS.....	2
POINT RELIED ON .....	6
ARGUMENT.....	7
CONCLUSION .....	13
CERTIFICATE OF SERVICE AND COMPLIANCE .....	14
APPENDIX	

## TABLE OF AUTHORITIES

### CASES

<i>Akins v. Director of Revenue</i> , 303 S.W.3d 563, 564 (Mo. banc 2010) .....	7
<i>Associated Industries of Missouri v. Lohman</i> , 511 U.S. 641, 647 (1994).....	12
<i>Drey v. McNary</i> , 529 S.W.2d 403, 411 (Mo. banc 1975) .....	12
<i>Junior College Dist. Of St. Louis v. City of St. Louis</i> , 149 S.W.3d 442, 446 (Mo. banc 2004) .....	7
<i>Kirkwood Glass Co., Inc. v. Director of Revenue</i> , 166 S.W.3d 583, 585 (Mo. 2005).....	11
<i>Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County</i> , 946 S.W.2d 234, 238 (Mo. App. E.D. 2012).....	12
<i>South Metro. v. City of Lee's Summit</i> , 278 S.W.3d 659, 666 (Mo. 2009).....	11
<i>State v. McLaughlin</i> , 265 S.W.3d 257, 267 (Mo. banc 2008).....	11

### STATUTES

Mo. Rev. Stat. § 48.020.1 .....	2
Mo. Rev. Stat. § 115.557 .....	10
Mo. Rev. Stat. § 144.757 (Cum. Supp. 2012) .....	1, 2, 3, 7, 8, 9, 10, 11, 12
Mo. Rev. Stat. § 144.757.2 .....	11
Mo. Rev. Stat. § 190.305 (Cum. Supp. 1990) .....	2
Mo. Rev. Stat. § 190.310 (Cum. Supp. 1990) .....	2
Mo. Rev. Stat. § 190.300 (1981) .....	2
Mo. Rev. Stat. § 190.335 (Cum. Supp. 1993) .....	1, 2, 3, 7

Mo. Rev. Stat. § 190.339 (Cum. Supp. 1993) .....	1, 7
Mo. Rev. Stat. § 190.339.1(3) (Cum. Supp. 1996) .....	3
Mo. Rev. Stat. § 190.355.1 .....	11

**OTHER**

Robert H. Freilich, <i>Missouri Law of Land Use Control: with National Perspectives</i> , 42 UMKC L. REV. 1, 27 (1973).....	12
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## JURISDICTIONAL STATEMENT

This case involves a petition filed by the Macon County Emergency Services Board and its Board Members in their official capacities: James Wilson, Jeff Roberts, Jeff Bixenman, Margie Voss, Stan East, Jr., Gene Wood, and Chuck Spencer (“the Board”). The Board sought its share of section 144.757 RSMo Cum. Sup. 2012<sup>1</sup> use tax funds approved on November 6, 2012 as it was receiving sales tax revenues at a rate of .375% (3/8 of 1%) when the use tax was approved. The Macon County Commission, through its Commissioners (“Commission”), refused to provide the Board with any proceeds from the use tax on the basis that it specifically excluded the Board from the use tax in the November 6, 2012, ballot measure and that the disbursement of the use tax is solely within its discretion. The question presented by this appeal is whether the Board is entitled to receive a portion of the section 144.757 use tax. Answering this question requires the construction of revenue law section 144.757, and how this statute correlates with sections 190.335 RSMo Cum. Sup. 1993 and 190.339 Cum. Sup. 1993.<sup>2</sup> Therefore, this Court has exclusive jurisdiction. Mo.Const.Art. V., § 3.

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<sup>1</sup> This statute (144.757) is now set out, unchanged, in the 2013 Cumulative Supplement and all references to this statute shall be to that supplement unless otherwise indicated.

<sup>2</sup> References to sections 190.335 and 190.339 will be to the 1993 Cumulative Supplement unless otherwise indicated.

## STATEMENT OF FACTS

Appellants are the Macon County Emergency Services Board and its Board Members in their official capacities. Legal File (LF) 39–40, 62. The Board filed a petition with the 41st Judicial Circuit Court requesting a declaratory judgment that it was entitled to a proportional share of the section 144.757 use tax beginning on November 6, 2012—the date the use tax was authorized—and continuing throughout the life of the Macon County Use Tax. LF 2–22, 39–61. The Board argued that it should receive a share of the use tax because it was receiving a duly authorized Macon County sales tax of  $\frac{3}{8}$ s of 1% (“ $.375\%$ ”) at the time the Macon County Use Tax was approved. LF 39–61, 82.

Respondents are the Macon County Commission and its Commissioners in their official capacities. LF40, 63. Macon County is a third class county. LF 82, §48.020.1. The Commission refused to disperse any of the use tax to the Board. LF 44–45, 64–65, 84.

The Board was created by the Commission when the Commission submitted a proposal in 1992 to the Macon County voters to create emergency telephone services and to allow a sales tax at the rate of  $.375\%$  for a period of two years to fund said services. §§ 190.305, 190.310, RSMo Cum. Supp. 1990, and § 190.300, RSMo 1981. LF 40, 63.

The Missouri General Assembly enacted section 190.335 in 1993. LF 55–57. This statute provided that the Board became independent of the Commission in that a sales tax passed pursuant to this statute would be overseen by the Board. LF 43. This statute further provided that the Board would also oversee the provisions of the central

dispatching of emergency services for Macon County. § 190.335. The Board was not given any taxing authority in this statute and relied upon the Commission to place any tax on the ballot for its benefit. § 190.335, LF 43.

Prior to the expiration of the 1992 sales tax, the Commission caused a proposal to be placed on the November 8, 1994, ballot for the sales tax to continue pursuant to section 190.335, RSMo Cum. Sup. 1993. LF 41–42, 63. This ballot proposal passed. LF 62, 63. The .375% sales tax is still in effect as the Board, pursuant to section 190.335, has set that as the sales tax rate every year since the 1994 sales tax was passed. LF 42–43, 63–64.

In 1996, the Missouri General Assembly enacted section 190.339.1(3) RSMo Sup. 1996, which changed the Board's name and also provided that the Board was a "body corporate and political subdivision of the state." §190.339.1(3), LF 43, 64. Section 190.339 stated that the Board could receive money from any sales tax authorized by section 190.335 and authorized the Board to make disbursements from such money collected, but it did not give the Board the right to levy taxes. § 193.339. That power rests with the Commission under section 190.335.1.

The Commission determined that it would present a use tax proposal as provided for in section 144.757 on the November 6, 2012, ballot. LF 43, 64. One of the Commissioners asked the Board if it wanted to be included in the use tax election ballot. LF 43, 45, 46, 64. The Department of Revenue website specifically states that "Local use taxes are distributed in the same manner as sales taxes." LF 83, 85. The Board checked with the Department of Revenue and was told by Revenue staff that the Board did not

have to do anything as it was currently receiving a local sales tax and would automatically be included. LF 45, 83, Tr. 911 Call Tr. 1-3, 1-6. The Board took no further action regarding this issue.

On November 6, 2012, the local sales tax in Macon County was 1.375% of 1%. LF 43, 64. The Board's local sales tax at the time the ballot was presented to the Macon County voters was .375%. LF 43, 63-64. The ballot presented to the Macon County voters set the use tax to be approved at 1%, and the ballot did not name the Board as being excluded from the use tax. LF 60. The Macon County voters approved the 1% use tax on November 6, 2012. LF 46, 65.

After the November 12, 2012, election, the Director of the Department of Revenue began collecting the Macon County Use Tax and periodically sent those revenues to the Commission. LF 47, 65. The Board did not receive any use tax from the Commission, and when it asked for its share of the tax, the Commission refused to give the Board any part of the Use Tax proceeds. LF 46, 65. The Board was told that this was because the Commission had specifically excluded the Board from the use tax election. LF 28, 46-47.

From the date the Macon County Use Tax was approved through September 2014, the Director of the Department of Revenue collected \$121,548.70. LF 47. The Board requested in its Declaratory Judgment Petition that the Court declare that it should receive either .375% of the amount that had been collected by Revenue (\$46,188.51) and then its share thereafter or, alternatively, that it receive its proportional share based on the Commission having set the use tax at 1%. The percentage for the Board would then be



.2727%, which would reduce the requested amount to \$33,146.33. The Board further requested the Court declare it receive its proportional share thereafter. LF 47–49.

On March 23, 2015, the Circuit Court denied the Board’s request that it declare that the Board should receive its proportional share of the use tax. LF 82–87. The Board filed a Notice of Appeal on April 15, 2015, requesting an appeal to this Court. LF 88. The Macon County Circuit Clerk sent the appeal to the Missouri Court of Appeals, Western District, and a letter acknowledging receipt of the Notice of Appeal was sent on April 28, 2015. The Missouri Court of Appeals, Western District, then transferred the appeal to this Court on May 11, 2015, on its own motion. LF 98–99.

**POINT RELIED ON**

**THE CIRCUIT COURT ERRED IN DETERMINING THAT THE BOARD IS NOT ENTITLED TO A PROPORTIONAL SHARE OF THE USE TAX BECAUSE THAT RULING DEFEATS THE LEGISLATIVE PURPOSE OF SECTION 144.757 IN THAT THERE IS NO AMELIORATION OF THE LOSS OF SALES TAX TO THE ENTITY THAT WOULD HAVE OTHERWISE RECEIVED A HIGHER SALES TAX BUT FOR A TAXPAYER PURCHASING FROM AN OUT-OF-STATE VENDOR WHO CHARGES NO OR A LOWER SALES TAX.**

Mo. Rev. Stat. § 144.757 (Cum. Supp. 2012)

Mo. Rev. Stat. § 190.335 (Cum. Supp. 1993)

Mo. Rev. Stat. § 190.335.4

Mo. Rev. Stat. § 190.339 (Cum. Supp. 1993)

Mo. Rev. Stat. § 32.085

Mo. Rev. Stat. § 32.087

*Kirkwood Glass Co. v. Dir. Of Rev.*, 166 S.W.3d 583, 585 (Mo. 2005).

*Premium Standard Farms, Inc. v. Lincoln Tp. of Putnam County*, 946 S.W.2d 234, 238 (Mo. App. E.D. 2012)

*Drey v. McNary*, 529 S.W.2d 403, 411 (Mo. banc 1975)  
*South Metro. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. 2009).

*State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008).

Robert H. Freilich, *Missouri Law of Land Use Control: with National Perspectives*, 42 UMKC L. REV 1, 27 (1973).

## ARGUMENT

### *Standard of Review*

Resolution of this case depends on the interpretation of section 144.757 and how that statute correlates with sections 190.335 and 190.339. Legal questions of statutory interpretation are reviewed *de novo*. *Junior College Dist. Of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 446 (Mo. banc 2004); *Akins v. Director of Revenue*, 303 S.W.3d 563, 564 (Mo. banc 2010).

### POINT RELIED ON

**THE CIRCUIT COURT ERRED IN DETERMINING THAT THE BOARD IS NOT ENTITLED TO A PROPORTIONAL SHARE OF THE USE TAX BECAUSE THAT RULING DEFEATS THE LEGISLATIVE PURPOSE OF SECTION 144.757 IN THAT THERE IS NO AMELIORATION OF THE LOSS OF SALES TAX TO THE ENTITY THAT WOULD HAVE OTHERWISE RECEIVED A HIGHER SALES TAX BUT FOR A TAXPAYER PURCHASING FROM AN OUT OF STATE VENDOR WHO CHARGES NO OR A LOWER SALES TAX.**

A use tax cannot be implemented in a county unless there is a local sales tax and then the use tax is to be set at the same amount as the local sales tax. § 144.757. In order to be constitutional, the use tax must be at or below the local sales tax or it would be an impermissible burden on commerce. *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 647 (1994). Further, the use tax is required to be decreased to keep it the same as the local sales tax should the local sales tax decrease in order to prevent the use tax

from being a discriminatory burden on interstate commerce. *Id.* It likewise is to increase should the local sales tax increase in order to continue to compensate, supplement and protect the local sales taxes. § 144.757. The Board was receiving that requisite sales tax at the time the use tax was approved in Macon County. LF 42–43, 63–64.

The ballot the Commission submitted on November 8, 1994, to pass a sales tax on behalf of the Board stated:

May the county of Macon continue a county sales tax of 3/8 of a cent for the purpose of continuing to provide central dispatching of fire protection, emergency ambulance service, law enforcement, including emergency telephone services and other emergency services through the existing enhanced 911 telephone service?

LF 41–42, 60, 63. This language basically tracked the provisions of section 190.335, which states, “in lieu of the tax levy authorized under section 190.305 for emergency telephone services, the county commission of any county may impose a county sales tax...” for 911 central dispatching services.

When the Commission determined to submit a use tax ballot to the Macon County voters, its authority to do so was provided by section 144.757. Section 144.757 states, in pertinent part, that:

1. Any county or municipality ... may, by a majority vote of its governing body, impose a local use tax if a local sales tax is imposed as defined in section 32.085 at a rate equal to the rate of the local sales tax in effect in such county or municipality; provided, however, that no ordinance or order enacted pursuant to sections 144.757 to 144.761 shall be effective unless the governing body of the

county or municipality submits to the voters thereof at a municipal, county or state general, primary or special election a proposal to authorize the governing body of the county or municipality to impose a local use tax pursuant to sections 144.757 to 144.761.

2. (1) The ballot of submission ... shall contain substantially the following language:

Shall the \_\_\_\_\_ (county or municipality's name) impose a local use tax at the same rate as the total local sales tax rate, currently \_\_\_\_\_ (insert percent), provided that if the local sales tax rate is reduced or raised by voter approval, the local use tax rate shall also be reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases from out-of-state vendors do not in total exceed two thousand dollars in any calendar year.

The ballot language the Commission used for the use tax on November 6, 2012, election was as follows:

Shall the County of Macon impose a local use tax on out of state purchases at the same rate as the local sales tax rate, currently 1.000%, provided that if the local sales tax rate is reduced or raised by voter approval, the local use tax rate shall also be reduced or raised by the same action? A use tax return shall not be required to be filed by persons whose purchases from out of state enders do not in total exceed two thousand dollars in any calendar year. The purpose of the proposal is to reflect the new interpretation of sale tax on motor vehicles by the

Missouri Supreme Court. This proposal will also eliminate the current sales tax advantage that Non-Missouri vendors have over Missouri vendors.

LF 60. This language did not substantially track section 144.757.2 in that the sales tax at the time of the election was 1.375%, not 1%. LF 43. But, as the statute of limitations for challenging the tax has run, however, the 1% tax is the valid use tax in Macon County. § 115.557.

The Director of Revenue thereafter began collecting the Macon County Use Tax and periodically sending it to the Commission with no directions as to how to disperse the tax revenue. LF 45, 46, 65; Tr. 4–7. The Board requested the Commission provide it with its proportional share of the use tax as it was an entity receiving a sales tax at the time the use tax was passed. LF 46–47, 65. The Commission refused to provide it with any use tax because it stated it had excluded the Board from the use tax election when it carved out the .375% of the combined local sales tax. LF 46, 65.

The Circuit Court supported the Commission's position of not providing any of the use tax to the Board based on its statutory interpretation of section 144.757. *See also*, LF 82–87. The Circuit Court compared section 144.757's absence of language giving direction to third class counties as to how use tax revenue is to be spent to the spending direction given in this same statute to municipalities within a county having a charter form of government within a population in excess of nine hundred, especially as the spending/disbursement direction was required to be set out in the ballot to authorize a use tax. *Id.* The Circuit Court found this lack of direction by the Missouri General Assembly to be intentional and to mean that the Missouri General Assembly did not intend that the

disbursement of the use tax funds for third class counties to be the same as the disbursement of local sales taxes. LF 85–87. The Circuit Court found the lack of statutory direction, particularly in the ballot language, meant that the legislature intended for the disbursement and spending of the use tax revenues in a third class county to be committed to the sound discretion of the Commission.

“The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.” *State v. McLaughlin*, 265 S.W.3d 257, 267 (Mo. banc 2008). The determination of legislative intent is made by reading and considering the language set out in a particular statute in whole and then also by section. *Id.* Rules of statutory construction are not rigidly applied. *South Metro. v. City of Lee’s Summit*, 278 S.W.3d 659, 666 (Mo. 2009).

This Court held that the purpose of the use tax is to “compensate, supplement, and protect” the local sale taxes by “eliminating the incentive to purchase from out-of-state sellers in order to avoid local sales taxes.” *Kirkwood Glass Co., Inc. v. Director of Revenue*, 166 S.W.3d 583, 585 (Mo. 2005). Based upon this purpose of the use tax, and the fact that local sales tax is passed for a specific purpose, such as providing “central dispatching of fire protection, emergency ambulance service, law enforcement, including emergency telephone services and other emergency services through the existing enhanced 911 telephone service,” the lack of specific direction as to how third class counties are to manage use tax revenues in section 144.757 is not troubling in that the legislative intent of the statute provides that direction. § 190.355.1. It was, however,

necessary for the Legislature to provide specific directions as to the disbursement of use tax funds for municipalities within a county having a charter form of government within a population in excess of nine hundred in section 144.757 in order to allow a disbursement other than the same disbursement of the local sales tax based upon the legislative purpose of the statute in that using 50% of the use tax revenue for capital improvements.

Not spending or dispersing the use tax in a third class county for the purpose of compensating, supplementing, and protecting the local sales taxes by giving the use tax to the recipients of the local sales taxes who are suffering loss of sales tax revenue due to out-of-state sellers being able to sell items at no or a lower sales tax, defeats the purpose of the use tax. See, e.g. *Drey v. McNary*, 529 S.W.2d 403, 411 (Mo. banc 1975) (revenues from a tax passed by voters must be spent consistent with purpose passed by the voters). Further, as the Commission is a statutory creation it can only spend tax money as provided by statute or ballot. *Premium Standard Farms, Inc. v. Lincoln Tp. Putnam County*, 946 S.W.2d 234, 238 (Mo. App. E.D. 2012)(local governments “have no inherent power but are confined to those expressly delegated by the sovereign and to these powers necessarily implied in the authority to carry out he delegated powers.” Robert H. Freilich, *Missouri Law of Land Use Control with National Perspectives*, 42 UMKC L. Rev. 1, 27 (1973)). Additionally, there is no statutory provision expressly allowing the Commission to exclude the Board from receiving either the local sales tax that the voters passed to support it or the use tax that the voters passed to supplement the loss of sales tax revenues due to out-of-state sales made with either no or less sales tax.



The 2012 Use Tax passed for the purpose of making up for lost sales tax revenues suffered by the Board and the other entities that have a Macon County Sales Tax. Unless the Commission gives the Board its proportional share of the use tax, it is defeating the intent of the Use Tax, because without the Use Tax Proceeds, the Use Tax is not supplementing or protecting the Sales Tax the voter's approved for the Board. Therefore, in order for the Commission to uphold the legislative intent of a local use tax, it should provide the Board with its proportional share of the use tax proceeds.

### CONCLUSION

For the foregoing reasons, the Circuit Court's decision should be reversed and remanded with direction that the Board should receive its proportional share of the Macon County Use Tax and awarded a proportional share of the Use Tax Revenues since the tax was approved.

Respectfully submitted,

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**CERTIFICATE OF SERVICE AND COMPLIANCE**

I hereby certify that a true and correct copy of the foregoing was served electronically via the Missouri electronic filing system:

Ivan L. Schraeder  
Attorney for Respondent Macon County Commission  
and Commissioners in their official capacities

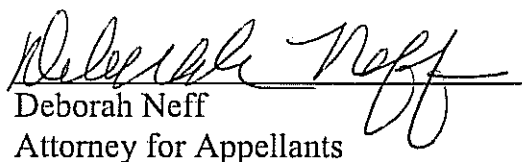
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Deborah Neff

And a true and correct copy of the foregoing was mailed, first class mail, postage pre-paid, via the United States Post Office to:

Judge Rick Tucker  
101 E. Washington Street  
Macon, Missouri 63552

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3,320 words.

  
Deborah Neff  
Attorney for Appellants

