

IN THE
SUPREME COURT OF MISSOURI

NO. SC92581

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.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
Cause No. 08SL-CC03051
HONORABLE DAN DILDINE (By Order of this Court)
CIRCUIT COURT JUDGE

**SUBSTITUTE BRIEF OF PLAINTIFFS/RESPONDENTS/CROSS-APPELLANTS
THE RATEPAYERS**

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**INTRODUCTION TO
RESPONSE TO MSD'S APPEAL**

MSD's proposition is that persons owning property with impervious area cause the need for there to be a stormwater system to manage the runoff from those properties. Therefore, according to MSD, it is only fair to divvy up MSD's costs of maintaining the stormwater infrastructure and its regulatory compliance based on impervious area, even if there is no relationship between a ratepayer's impervious area and the services actually provided to that ratepayer. Indeed, MSD concedes that it has no way of determining what services it provides in exchange for its "Stormwater User Charge" (the "Charge") to any given rate payer. So, in this sense, what we have here is a "causer fee," not a "user fee." The Hancock Amendment does not recognize an exception to the voter requirement for "causer fees."

There are some rate structures that simply cannot be wedged into the "user fee" exception that Courts have found in the Hancock Amendment, and this is one of them. The reason for this is the nature of the "service" MSD provides. It is not a "service" in any conventional sense where (1) you can choose to purchase the service or not, (2) MSD can refuse to provide the service if you don't pay, and (3) the more you use of the service, the more you pay. Rather, MSD's activities include maintaining a vast stormwater infrastructure, regulatory compliance, public education, water quality monitoring – all activities that benefit the public in general and do not lend themselves to being billed to individuals based upon the individual's use. The ratepayer does not get any more "service" from MSD when he adds a patio, but he is charged as though he does. The

stormwater system is usually more important to the person at the bottom of the hill than the person at the top of the hill, but the Charge is not based on that benefit. And anyone who drives would seem to benefit by having roads remain clear, and anyone who uses water would benefit from better water quality, regardless of whether they own property or their property has impervious area. But it is undisputed that MSD's impervious area Charge bears no relationship to benefits received by the ratepayers.

As proven at trial, the "causer fee" assumption that there is a direct correlation between impervious area on property and stormwater runoff such that if you increase the former you will necessarily increase the latter, is simply false. MSD attempts to relitigate this issue by directing the Court's attention to new exhibits prepared specially for this appeal – exhibits which were offered by MSD at trial, but not admitted due to a lack of foundation. From these erroneous exhibits, MSD argues that Plaintiffs' experts compared the wrong numbers in reaching their conclusions. But the trial court found that the field studies conducted and the engineering equations presented by Plaintiffs' experts established that there was no direct relationship between impervious area and runoff, and these findings were not challenged by MSD at trial.

The notion that MSD is really only interested in the "additional" runoff caused by impervious area was also debunked at trial. Stormwater systems are designed to accommodate total runoff from property, not runoff from one type of surface, but not another. Moreover, MSD's permitting regulations require that runoff from property be no greater after development than it was prior to development. So there is no "additional" runoff once property is developed.

The argument that MSD is targeting only additional runoff might make some sense if MSD actually billed on the basis of the “additional” runoff generated by impervious area, but it does not. MSD does not measure runoff of any kind. And it might make some sense if the amount of impervious area actually bore a relationship to the amount of services provided – the amount of services “used” for the fee – but it does not. Property that is unconnected to MSD’s stormwater system because runoff goes into a river, for example, is still billed 50% of the Charge based upon the amount of impervious area, even though runoff from that impervious area obviously places no burden on the system. The amount of regulatory services that a property disconnected to the stormwater system receives does not vary based on the amount of impervious area on the property, and is no greater or less than the benefits enjoyed by an owner of undeveloped property that is not charged at all.

In reality, the Charge is merely an expedient way to apportion costs. MSD’s corporate representative testified, and the trial court found as fact, that MSD’s allocation of its costs based on impervious area was “simply an accounting function” and may not have anything to do with the services each fee payer receives in exchange for the Charge. MSD simply takes all of its stormwater costs, divides them by the total square footage of impervious area in the District (excepting roads, runways and train tracks), and bills the ratepayer based upon the amount of impervious area on his property. Divorced from the equation is any relation between the amount of the Charge and the service provided or the amount of the Charge and the amount of stormwater discharged from a property.

If this rate scheme passes the Hancock test, it is difficult to imagine one that would not.

The driving factor behind MSD's adoption of the Charge was to increase revenue, which it did: from \$20 million to \$80 million by 2014. MSD argues that the Charge based on impervious area is "fair," "common," and "easily understood," and that it needs the money to provide additional services in its District. Plaintiffs submit that this is a pitch that MSD should make to the voters, not to this Court. But MSD is dismissive of the right to vote guaranteed by the Hancock Amendment labeling the idea of "let the voters decide" as mere "rhetoric." Plaintiffs submit that the Hancock Amendment will be gutted if a "user fee" includes a fee that (1) is not related to use, (2) is not related to benefit, (3) cannot be declined by the person being charged, (4) cannot be shut off to a person who does not pay; and (5) essentially benefits everyone similarly, although the Charge varies widely.

It must also be remembered that there was no way for District taxpayers to avoid paying MSD's Charge absent filing this lawsuit to enforce Hancock. MSD is not governed by any publicly elected officials, so taxpayers who object to the increased tax burden MSD has unilaterally imposed on them cannot vote MSD's leaders out of office. Its self-appointed Rate Commission has no power to limit rates like the Public Service Commission. Simply put, MSD has no meaningful political accountability and no "check" on its taxing and spending power. If MSD is allowed to circumvent Hancock's voter-approval requirement, there will be no limit to the tax burden MSD could impose on District taxpayers. MSD would have the unbridled power to increase its stormwater

Charge at any time, in any amount, without accountability to the ratepayers who cannot choose to opt out from the service. This is exactly the type of abuse the Hancock Amendment was enacted to prevent.

The trial court correctly held that MSD's Charge violates Hancock's voter-approval requirement. MSD's arguments to the contrary (in a brief that reads much like a trial brief) largely ignores the applicable standard of review, casting away the trial court's findings as "faulty," "erroneous" and "deficient," and asking this Court to substitute its judgment for the trial court's. Under the *Murphy v. Carron* test, this Court must accept the trial court's findings unless they have no substantial evidence to support them or are against the weight of the evidence, which MSD has not properly argued, much less proven. Thus, all of the trial court's findings must be accepted, and when they are accepted, MSD has no valid argument on appeal. This Court should affirm the trial court's decision striking down the Charge under Hancock.

Jurisdictional Statement

Respondents/Cross-Appellants Zweig, Milberg and Kurz, on behalf of themselves and the Class ("Plaintiffs" or the "Ratepayers"), agree with MSD that this appeal falls within the general jurisdiction of this Court under Mo. Const. art. V, §3.

Standard of Review

MSD correctly states that the standard of review is controlled by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976):

The judgment of the trial court will be sustained by the appellate court 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. Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is ‘against the weight of the evidence’ with caution and with a firm belief that the decree or judgment is wrong. The use of the words *de novo* and *clearly erroneous* is no longer appropriate in appellate review of cases under Rule 73.01.

This Court views the evidence and reasonable inferences that may be drawn therefrom in the light most favorable to the judgment, disregarding evidence and inferences to the contrary. *Moore v. Rhodes*, 263 S.W.3d 782, 784 (Mo. App. E.D. 2008).

MSD misstates the applicable standard of review in arguing that the trial court’s judgment is entitled to “no deference” because there were “no real factual disputes.” (MSD Br. 23.) As this Court has recently held, “[i]t is only when the evidence is uncontested that no deference is given to the trial court’s findings.” *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010) (citing *Guhr v. Dir. of Revenue*, 228 S.W.3d 581, 585 n.3 (Mo. banc 2007)). Evidence is considered uncontested in a court-tried civil case when the issue before the trial court involves only stipulated facts and does not involve resolution by the court of contested testimony. *Id.* (citing *Schroeder v. Horack*, 592 S.W.2d 742, 744 (Mo. banc 1979)). As this case was not based only on stipulated facts, and there was contested evidence on every material issue before the trial court (as is evident if one simply compares the respective parties’ proposed findings of fact and the trial court’s judgment), this standard does not apply.

Where evidence *is* contested, “a trial court is free to disbelieve any, all, or none of that evidence.” *Id.* (citing *York v. Dir. of Revenue*, 186 S.W.3d 267, 272 (Mo. banc 2006)). On appeal of a court-tried case, this Court defers to the trial court on factual issues “because it is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record.” *Id.* (citing *Essex Contracting, Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 652 (Mo. banc 2009)); *Twin Bridges Electric, Inc. v. Collins*, 823 S.W.2d 14, 16-17 (Mo. App. E.D. 1991)). The deference extended to the trier of fact on such issues is not limited to credibility of witnesses but also to the trial court’s conclusions and all fact issues deemed to have been found in accordance with the result reached by the trial court. *Twin Bridges*, 823 S.W.2d at 17. As this Court has recognized, its role is not to re-evaluate testimony through its own perspective. *White*, 321 S.W.3d at 309. Rather, the appellate court confines itself to determining whether substantial evidence exists to support the trial court’s judgment; whether the judgment is against the weight of the evidence – “weight” denoting probative value and not the quantity of evidence; or whether the trial court erroneously declared or misapplied the law. *Id.* (internal citations omitted). In considering whether the trial court’s judgment is against the weight of the evidence, the reviewing court may exercise its power to set aside the judgment only with caution and only if it possesses a firm belief that the judgment is wrong. *MC Dev. Co., LLC v. Cent. R-3 Sch. Dist.*, 299 S.W.3d 600 (Mo. banc 2009).

MSD also argues that all Hancock Amendment challenges are *de novo*. (MSD Br. 23.) But the case MSD relies on states the opposite, citing *Murphy*:

The trial court is free to believe or disbelieve all, part or none of the testimony of any witness. When determining the sufficiency of the evidence, an appellate court will accept as true the evidence and inferences from the evidence that are favorable to the trial court's decree and disregard all contrary evidence.

Sch. Dist. of Kansas City v. State, 317 S.W.3d 599, 604 (Mo. banc 2010) (citations omitted). MSD's other two cases state that constitutional challenges to a statute are *de novo*, but do not imply that Hancock Amendment cases involve less deference to trial court findings, as established by *School District of Kansas City*. See *Franklin County v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008); *Akers v. City of Oak Grove*, 246 S.W.3d 916, 919 (Mo. banc 2008) (non-Hancock case).

Thus, the *Murphy* standard applies to all points herein except Points II – IV of Plaintiffs' appeal.

Statement Of Facts

I. Introduction

MSD's "Statement of Facts" presents the evidence that MSD considers most favorable to its case, rather than the evidence in the light most favorable to the judgment. For instance, after the "Procedural Background," only ten of MSD's approximately 80 record citations include a reference to the judgment. Much of the Factual Background portion of MSD's "Statement of Facts" includes statements that were presented by MSD

in its Proposed Findings of Fact and Conclusions of Law, but were not adopted by the trial court, and which run counter to the trial court's actual Findings of Fact.

Chief among MSD's improper assertions of fact is its "causer fee" argument: "A charge based on impervious area was chosen because impervious area drove the demand for MSD's services and thus affected the costs of providing those services." (MSD Br. 12). This is what MSD argued at trial, what it proposed the trial court to find, and what certainly is a central theme to its argument on appeal. (LF1528, ¶11.) But the trial court rejected this proposition. Instead, the trial court found that MSD selected impervious area to be the basis for its charge as an "accounting function to distribute MSD's costs" even though impervious area "may not have anything to do with the services each fee payer actually receives from MSD." (LF1558, ¶65).

MSD's Statement of Facts violates Rule 84.04(c) because it omits facts relied on by the trial court in rendering its judgment. "A brief does not substantially comply with Rule 84.04(c) when it highlights facts that favor the appellant and omits facts supporting the judgment." *Prather v. City of Carl Junction*, 345 S.W.3d 261, 263 (Mo. App. S.D. 2011) (citations omitted) (dismissing appeal and noting, "[b]ecause the City's statement of facts omits facts necessarily relied upon in the trial court's ruling, this Court had to scour the record and rely on Respondent's brief to compile the facts favorable to the judgment.") As appellate courts have recognized:

An appellant may not simply recount his or her version of the events, but is required to provide a statement of the evidence in the light most favorable to the judgment. An appellant's task on appeal is to explain why, even

when the evidence is viewed in the light most favorable to the respondent, the law requires that the judgment of the trial court be reversed.

In re Marriage of Smith, 283 S.W.3d 271, 273-74 (Mo. App. E.D. 2009) (citations omitted) (dismissing appeal); *accord*, *In re Marriage of Weinshenker*, 177 S.W.3d 859, 862-63 (Mo. App. E.D. 2005) (appeal dismissed).

Missouri courts have explained the purpose of this rule: “Aside from violating Rule 84.04(c), failure to acknowledge adverse evidence is simply not good appellate advocacy. Indeed, it is often viewed as an admission that if the Court was familiar with all of the facts, the appellant would surely lose.” *Prather*, 345 S.W.3d at 263 (quoting *Evans v. Groves Iron Works*, 982 S.W.2d 760, 762 (Mo. App. E.D. 1998) (dismissing appeal, and noting that the rule “applies to all types of appeals”). This rule is particularly important where, as here, the standard of review requires deference to the trial court’s findings. *Evans*, 982 S.W.2d at 762 (in light of the standard of review, “the only facts ‘relevant to the questions presented for determination’ are the facts that support the Commission’s award”). As MSD has failed to comply with Rule 84.04(c), Plaintiffs’ Statement of Facts presents the contested facts in the light most favorable to the trial court’s judgment.¹

¹ As the Court of Appeals’ decision is vacated by virtue of this Court’s acceptance of transfer, Plaintiffs do not discuss the decision in this Brief.

II. Factual Background

A. MSD's Replacement of its Prior Stormwater Program with its New Charge

Without going to the District voters for approval, in December 2007, MSD's Board of Trustees approved Ordinance No. 12560, effective March 1, 2008, which repealed the old stormwater funding program and replaced it with a monthly Charge imposed on every District property with impervious area at a rate of \$0.12 per every 100 square feet of impervious surface area of the property.² (LF1549, Fact.-Find. ¶28.) In December 2008, MSD increased the rate to \$0.14 per 100 square feet of impervious area. (LF1550, Fact.-Find. ¶30.) MSD intended to continue to periodically raise the rate until it reached \$0.29 per 100 square feet of impervious area in 2014. (*Id.* ¶32.)

During the first full fiscal year of its assessment, the Charge resulted in revenue of approximately \$41 million to MSD – almost doubling the amount of revenue MSD received under its prior stormwater funding program. (*Id.* ¶31.) When fully implemented (as was planned by MSD) in 2014, the Charge would have resulted in annual stormwater

² Under the Stormwater Ordinances, impervious areas include a property owner's home or buildings, concrete patios, driveways, walkways, parking lots or other similar structures. (LF1549, Fact.-Find. ¶28 n.1.) Impervious area does not include naturally occurring impervious area such as rock or much of the non-porous soil found in the watersheds making up MSD's district which function almost identically to a paved driveway or roof. (LF1556-57, Fact.-Find. ¶60.)

revenue of approximately \$81 million to MSD – almost four times the amount of revenue MSD received under the prior funding program. (*Id.* ¶33.)

MSD never submitted the Charge to a vote of the qualified District voters. (LF1551, Fact.-Find. ¶35.) Rather, MSD determined that it needed greater funding for stormwater services, and unilaterally decided to replace its prior voter-approved tax and fee program with a substantially higher Charge. (LF1548, Fact.-Find. ¶24.)

B. MSD’s Management and Rate Commission

MSD is not regulated or governed by any body of publicly elected officials, so if ratepayers in the District disapprove of MSD’s decision to impose its Charge upon them, there is no mechanism by which the ratepayers can vote to remove MSD’s management. (LF1551, Fact.-Find. ¶36.) Nor is there any way for the ratepayers to avoid paying the charges, absent suing MSD as Plaintiffs did here. (*Id.* ¶¶36, 37.)

MSD’s Rate Commission, an entity that reviews and makes non-binding recommendations to MSD regarding its rate proposals, also has no political accountability. (MSD Charter, Pls’ Tr. Ex. 22, §§7.280(g), 7.220, 7.300(e).) Unlike an independent regulatory body like the Missouri Public Service Commission (“PSC”), which was created by the General Assembly and derives its authority from the State, MSD’s Rate Commission is an entity created by MSD, and derives its authority solely from MSD’s Charter. (Pls’ Tr. Ex. 22, §7.040.) Similarly, while the PSC Commissioners are appointed by the Governor with the advice and consent of the Senate, *see* Mo. Rev. Stat. §386.050, the Rate Commission Representative Organizations (which choose the Rate Commissioners) are not publicly elected but are chosen and appointed by

MSD. (Pls' Tr. Ex. 22, §§7.230, 7.240.) The Rate Commission has no authority to take any action until it receives a notice of a proposed rate change from MSD, and even then, its only purpose is "to review and make recommendations" to MSD – recommendations that are not binding on, and can be ignored by, MSD. (Pls' Tr. Ex. 22, §7.300(e).)

C. Trial Court's Findings Regarding Phase I Trial

In its judgment on Plaintiffs' Hancock claims, the trial court made findings of fact with regard to each of the *Keller* factors:

- ***Keller one:*** The court found that MSD bills its Charge on a periodic (monthly) basis, and that the Charge is not based on the provision of a service that property owners may accept, reject, or use on a limited basis. (LF1552, Fact.-Find. ¶¶39-40.) The trial court further found that the Charge to each ratepayer does not vary from month to month based on a ratepayer's actual use of MSD's stormwater services (i.e., through rainfall and runoff) – even though MSD's costs of providing its stormwater services vary – and further that MSD does not identify on its bills what services (or amount of services) it provided to them in the prior month to support the charge on their bill. (LF1553, Fact.-Find. ¶¶42-44; LF1554, Fact.-Find. ¶49.) The trial court also found, based on the testimony of MSD and its expert, that the Charge is simply an apportionment of MSD's total annual stormwater costs, and is not designed to measure MSD's cost of providing services to an individual property owner. (*Id.* ¶¶46-48, 50.)

- **Keller two:** The court found that MSD bills its Charge to every resident owning property with impervious area, regardless of whether runoff from the property actually drains into MSD's stormwater system. (LF1554-56, Fact.-Find. ¶¶51, 53-55.) It further rejected MSD's contention that impervious area is an appropriate basis for the charge, finding that property owners with no impervious area pay nothing, even though they benefit from MSD's stormwater system. (*Id.* ¶52.)
- **Keller three:** The court found that the primary service MSD offers to a ratepayer is the handling of runoff from the ratepayer's property, and that MSD charges for that service based on the ratepayer's impervious area. (*Id.* ¶¶56-57.) The trial court further found that the assumption underlying MSD's Charge – that there is a direct relationship between the impervious area of a property and the runoff from that property that enters MSD's stormwater system – was proven false by Plaintiffs' experts through their testimony that: (a) numerous other factors in addition to impervious area affect runoff; (b) lot size, not impervious area, is the driving factor in measuring runoff; (c) impervious area on properties in St. Louis has very little impact on runoff because the soil is so dense; (d) runoff calculations demonstrated that when impervious area was increased, runoff did not correspondingly increase; and (e) actual data obtained from a field study of St. Louis properties with approximately the same amount of impervious area showed that runoff from those properties varied significantly, ranging

from 2,802 cubic ft. to 33,992 cubic feet for a 100-year rainfall event. (LF1556-57, Fact.-Find. ¶¶59-63.) The court found that not only is there not a direct relationship between impervious area and runoff, but there is little, if any, relationship between the two. (LF1569, ¶113.) The court noted that if a ratepayer reduces runoff by installing a detention basin on his property, he receives no credit from MSD on his bill. (LF1559, Fact.-Find. ¶68.) It further found that MSD bases its Charge to individual customers on its costs for the entire stormwater system, and that MSD's costs for its "base" services, which comprise 50% of its stormwater services, do not vary from ratepayer to ratepayer based upon the amount of impervious area on a property, yet all ratepayers are charged for these services based on their impervious area. (*Id.* ¶69.)

- **Keller four:** The court found that MSD's Charge funds its maintenance and operation of the stormwater system, as well as its compliance with applicable regulations and provision of education to District residents regarding mandates of the Clean Water Act. (*Id.* ¶70.) Prior to MSD's enactment of the Charge in 2007, it provided the same activities, and those activities were funded by taxes under a fully voter-approved funding program. (LF1541, Fact.-Find. ¶1; LF1560, Fact.-Find. ¶72.) The court also found that ratepayers who develop their lots pursuant to MSD's Design Requirements are billed Charges for services they do not receive, because those Requirements mandate that they maintain pre-development runoff

conditions and therefore their new developments yield no new runoff into MSD's system. Nevertheless, they are still billed Charges based on the addition of impervious area to the property. (LF1560, Fact.-Find. ¶73.)

- **Keller five:** The court found that MSD has historically been the exclusive provider of stormwater services because it has been mandated to provide all such services within its boundaries since its formation in 1954. (*Id.* ¶74.) Neither Plaintiffs' experts nor any of MSD's witnesses were able to offer evidence of any private entities having historically supplied stormwater services in St. Louis (or anywhere in Missouri). (LF1561, Fact.-Find. ¶¶77-79.) The court also rejected MSD's argument that homeowners and developers who maintain retention ponds and other stormwater structures are private providers of stormwater services. (LF1562, Fact.-Find. ¶80.)
- The court also found that under MSD's Stormwater Ordinances, failure to pay the Charge results in a lien against property by operation of law. (LF1552, Fact.-Find. ¶38.)

D. Trial Court's Findings Regarding Phase II Trial

In its judgment on refund class certification, injunctive relief and Plaintiffs' refund claims, the trial court found that all of the requirements of Rule 52.08(b) were met and, therefore, certification of a refund class was appropriate. (LF1801, ¶¶ 59-60.) The court also found that MSD should be enjoined from collecting its unlawful Charge. (LF1789, ¶22.)

With respect to Plaintiffs' refund request, the court found that Plaintiffs filed suit against MSD only three months after the Charge was first imposed. (LF1782, ¶1; LF1784-85, Fact.-Find. ¶¶7-9.) The court also found that MSD was aware that the Hancock Amendment would apply to its Charge before the Charge was even enacted because (1) it spent 15 years embroiled in Hancock litigation over its wastewater charges and (2) its executives testified that MSD was aware that a Hancock challenge to its stormwater Charge was possible. (LF1787-88, Fact.-Find. ¶¶18-19.)

The court, however, declined to order a refund because it found that any refund would "have to be paid by MSD's customers to themselves" (LF1804, ¶70), since MSD had already spent all or the vast majority of the Charges it unlawfully collected even though MSD knew a refund order was a possibility. (LF1787, Fact.-Find. ¶17.) In so finding, the court acknowledged that its decision "seem[ed] wrong" because it was tantamount to allowing a citizen to rob a bank and keep the money so long as it was used by the robber for a good purpose. (LF1803-04, ¶65.)

E. Trial Court's Findings Regarding Phase III Hearing

Based on the testimony and evidence adduced by Plaintiffs at the hearing, including an affidavit of Plaintiffs' lead counsel, the Court found that the lodestar calculation of attorneys' fees incurred by Plaintiffs was \$2,275,159.50. (LF2637, ¶3.) The court analyzed each of the factors that should be considered under Missouri law in determining whether the lodestar fee calculation is reasonable, finding that:

- The issues presented in the case were sufficiently novel and difficult to warrant the time expended by counsel (LF2638-39, ¶6);

- Class counsel possessed the skill requisite to perform the legal service properly (LF2639, ¶7; LF2642, ¶17);
- Plaintiffs' counsel credibly testified as to the efforts undertaken by counsel to prosecute the case to its conclusion and that MSD failed to prove that any reductions were appropriate (LF2639, ¶8);
- The sheer number of hours spent prosecuting the case demonstrated that acceptance of the matter precluded other employment by Class Counsel (*Id.* ¶10);
- Plaintiffs' counsel and their expert credibly testified that Class Counsel's rates were in line with those charged in the local community for legal services (LF2640, ¶11);
- Plaintiffs obtained excellent results by prevailing on the only legal theory asserted in the petition and by obtaining an injunction that would save District ratepayers \$300 million through 2014 alone, and the fact that Plaintiffs did not prevail on an incidental issue – one of the many issues litigated at trial – is not a sufficient reason for reducing the fee (LF2640-41, ¶¶12-13);
- Class Counsel accepted this matter on a contingency arrangement and received no payment for any fees or expenses incurred in the litigation (LF2642, ¶18); and
- Plaintiffs faced certain challenges in the case, bringing this lawsuit against a political subdivision that was seasoned in Hancock Amendment litigation and

well-prepared to defend (and did vigorously defend) Plaintiffs' Hancock challenge to the Charge (LF2643, ¶20).

In conclusion, based on the credible testimony of Plaintiffs' counsel and expert, the court found that the lodestar was reasonable. (*Id.* ¶21.)

The court also found that a multiplier of 2.0 was reasonable based on persuasive authority from the U.S. District Court for the Eastern District of Missouri, Newberg on Class Actions, cases from other states, and the factors for determining reasonableness of the lodestar noted above. (LF2643-46, ¶¶22-25.) The court stated that in arriving at its fee award, it considered that if attorneys are not willing to take Hancock cases on a contingent fee basis, there would be no enforcement mechanism for violations. (LF2648, ¶30.) It also found that Plaintiffs helped 480,000 ratepayers, and if MSD had the money or resources for money (other than the ratepayers), the court would have ordered a refund of roughly \$90 million and granted counsel a percentage fee. (*Id.*) For this reason, the court found that whether the multiplier is used to exceed the hourly rate or not, its fee award was reasonable considering the facts of the case. (*Id.*)

The court also awarded all out-of-pocket fees incurred, totaling \$471,072.28, based on the plain language of §23 of the Hancock Amendment and this Court's precedent, as well as the Declaratory Judgment Act and Rule 87.09. (LF2646-67, ¶¶26-27.) The court found that Plaintiffs' retention of experts to analyze MSD's Charge under *Keller's* five-factor test was necessary to successfully prosecute the case, noting that even MSD employed an expert to consult and testify on the *Keller* factors. (LF2647, ¶28.)

ARGUMENT

I. The trial court properly applied the *Keller* factors and other law in reaching its findings and ruling that MSD’s stormwater Charge is a tax or fee subject to the voter-approval requirements of the Hancock Amendment [Response to MSD’s Point Relied On I].

The Hancock Amendment represents “the voters’ basic distrust of the ability of representative government to keep its taxing and spending requirements in check. As an additional bulwark against local government abuse of its power to tax, the voters amended the constitution to guarantee themselves the right to approve increases in taxes proposed by political subdivisions.” *Beatty v. MSD*, 867 S.W.2d 217, 221 (Mo. banc 1993). As this Court has recognized, the Hancock Amendment was enacted to prevent political subdivisions like MSD from generating revenue in violation of the express will of the people. *See Fort Zumwalt School Dist. v. State*, 896 S.W.2d 918, 921 (Mo. banc 1995) (“The Hancock Amendment ‘aspires to erect a comprehensive, constitutionally-rooted shield . . . to protect taxpayers from government’s ability to increase the tax burden above that borne by the taxpayers on November 4, 1980’ unless a tax increase is approved by the voters.”).

The applicable test for determining whether a charge is a “tax, license or fee” within the meaning of the Hancock Amendment, or a user charge not subject to the voter approval requirement, was set forth by this Court in *Keller v. Marion County Ambulance District*, 820 S.W.2d 301 (Mo. banc 1991) and recently reaffirmed in *Arbor Investment Company, LLC v. City of Hermann*, 341 S.W.3d 673 (Mo. banc 2011). In *Keller*, this

Court held that a local ambulance district's increased charges for ambulance service were not "taxes, licenses or fees" within the meaning of Article X, Section 22(a). In doing so, *Keller* overruled this Court's prior decision in *Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982) that "all fees -- whether user fees or tax-fees -- are subject to the Hancock Amendment." 820 S.W.2d at 304.

Keller distinguished between tax increases labeled as fees, on the one hand, and "true user fees," on the other; it concluded that "true user fees" are not subject to the Hancock Amendment, finding that "[t]he phrase "license or fees" in §22 indicates an intent to prevent political subdivisions from circumventing the Hancock Amendment by labeling a tax increase as a license or fee." *Id.* at 305. This Court further held that in order to determine if a fee is a tax subject to the Hancock Amendment, a court must "examine the substance of a charge" and disregard the label. *Id.*

To "examine the substance of a charge," *Keller* adopted a five-factor test. *Id.* at 304. Courts review each *Keller* factor individually and determine whether it weighs in favor of the taxpayer's position as a violation of Hancock or the political subdivision's position as a non-violation. *See Arbor*, 341 S.W.3d at 681-86. This Court recently held in *Arbor* that the *Keller* factors are "not intended to be exhaustive," and courts may – as

this Court did in *Beatty* (and again in *Arbor*) – consider “other factors³” in analyzing whether a charge is a tax or a “user fee.” *Id.* at 675, 683.

This Court has held that where “genuine doubt exists as to the nature of the charge imposed by local government, we resolve our uncertainty in favor of the voter’s right to exercise the guarantees they provided for themselves in the constitution.” *Beatty*, 867 S.W.2d at 221; *see also Arbor*, 341 S.W.3d at 681. As this Court recognized in *Arbor*, the practical effect of this statement is that “ties go to the taxpayer.” *Arbor*, 341 S.W.3d at 681.

A. *Keller* One: It was undisputed at trial that MSD’s Charge is billed on a periodic monthly basis, and substantial evidence supports the court’s finding that the Charge is not billed for services provided in the prior month.

The first *Keller* factor asks: “When is the fee paid?” *Keller*, 820 S.W.2d at 304 n.10. “Fees subject to [Hancock] are likely due to be paid on a periodic basis while fees not subject to [Hancock] are likely due to be paid only on or after provision of a good or service to the individual paying the fee.” *Id.* The *Arbor* court held that in analyzing this first factor, courts should consider both whether the fee is paid on a periodic basis and whether it is paid only after provision of a service. *Arbor*, 341 S.W.3d at 684 n.11. The

³ While this Court need not consider any other factors to affirm the trial court’s judgment, other factors identified in *Arbor* further support the trial court’s decision and are thus discussed herein in Argument Section I.F.

Arbor court noted that in *Beatty*, it held that the first factor concerns itself “only with timing” because the fee therein was charged “without regard to when the service was used.” *Id.*

1. The Charge is billed on a periodic monthly basis.

The trial court correctly found that “[u]nder the Stormwater Ordinances, MSD bills its Charge to District property owners on a periodic – monthly – basis.” (LF1552, Fact.-Find. ¶¶39.) MSD has not challenged this finding.

2. Substantial evidence supports the trial court’s factual finding that the Charge is not billed for services provided in the prior month.

Although MSD contended at trial that its Charge was billed for services provided in the prior month, the trial court properly determined that the evidence did not support that contention. MSD adduced no evidence that its monthly bills bore *any* relationship to the services it actually provided to a fee payer in the prior month. In fact, all of the testimony proffered at trial was to the contrary, including the following observations:

- Rainfall varies in St. Louis from month to month on a magnitude of two to ten inches, as do MSD’s costs, but a ratepayer’s Charge remains the same. (LF1553-54, Fact.-Find. ¶¶42-43,48.)
- Plaintiffs’ bills did not vary from month to month based on their actual use of MSD’s stormwater services, and their Charge bore no relationship to the amount of rainfall or runoff from their properties during any monthly period. (LF1553-54, Fact.-Find. ¶¶43, 48.)

- MSD did not identify on Plaintiffs' bills what specific stormwater services (or amount of services) it provided to them in the prior month for the charge on their monthly bill. (LF1553, Fact.-Find. ¶44.)
- The Charge billed to each fee payer was simply an apportionment (based on impervious surface area of an individual's property) of MSD's total annual costs relating to its stormwater system, and was not in any way based on the actual services MSD provided to a fee payer during any given month. (LF1553, Fact.-Find. ¶46.)
- MSD's Director of Engineering and corporate representative testified that MSD did not identify the services it provided to a particular fee payer for the monthly bill it sent them, and that he would not know how to go about making such a determination. (LF1553-54, Fact.-Find. ¶47.)
- When MSD billed a fee payer, it did not attempt to determine the amount of stormwater services the fee payer used during the prior month. (LF1554, Fact.-Find. ¶48.)
- MSD's expert testified that the Charge was not designed to measure MSD's cost of providing stormwater services to any particular individual property. (*Id.*, Fact.-Find. ¶50.) The Charge is simply 1/12th of the fee payer's pro rata share of MSD's budget as determined by MSD annually. (LF1567, ¶103.)

These factual findings demonstrate that, as in *Beatty*, MSD's Charge was billed "without regard to when the service was [actually] used." *Arbor*, 341 S.W.3d at 684

n.11. Thus, under the second prong of *Keller* factor one, MSD's Charge was *not* billed for services provided in the prior month, it was merely labeled as such. If this Court were to reach any other conclusion based on this evidence, political subdivisions like MSD would be incentivized to draft self-serving language in their ordinances in an attempt to create a "user charge" that satisfied *Keller* factor one. In fact, MSD admits that this is **exactly** what it attempted to do here, arguing that it satisfies *Keller* factor one because the billing language in its Stormwater Ordinances is a verbatim recitation of the ordinance approved in *Missouri Growth Association v. MSD*, 941 S.W.2d 615 (Mo. App. E.D. 1997). (MSD Br. 15, 26.) If this Court were to accept MSD's position, the *Keller* factor one inquiry would be meaningless, because every political subdivision could make the same blanket conclusory assertion in its ordinance that its charges are for services provided in the prior month, particularly where – as here – the services provided to the fee payer are so amorphous that they have no true beginning or ending point. The trial court did not find MSD's position credible, and correctly found that the weight of the evidence supports Plaintiffs' position on *Keller* factor one.

3. The Charge is not based on the provision of a service that the fee payer can accept, reject or use on a limited basis.

MSD's contention that its Charge is billed "after" provision of stormwater services likewise fails because of the mandatory nature of its services, for the reasons stated in *Building Owners & Managers Ass'n of Greater Kansas City v. City of Kansas City*, 231 S.W.3d 208 (Mo. App. W.D. 2007). In *Building Owners*, the appellate court analyzed Kansas City's building inspection fee ordinance, which was charged on an annual basis.

Like MSD does here, the City analogized its fees to those found to satisfy *Keller* factor one in *Missouri Growth*, arguing that it should prevail on the first *Keller* inquiry because its fire inspection fees were not charged until **after** the inspections were completed. The *Building Owners* court squarely rejected that argument because the fee was mandatory:

In [*Missouri Growth*], [MSD] imposed a monthly user fee that was based on a customer's water usage. If no water was used or the water was turned off for a period of time, no fees were owed. Thus, the fees in *Missouri Growth* were not necessarily incurred on a regular or periodic basis. By contrast, the City's 2005 ordinance required building owners to pay the annual fire inspection certificate fee in order to operate their businesses and multifamily dwellings. The fee was not based on the provision of a service that building owners could accept, reject, or use on a limited basis.

231 S.W.3d at 212.

Here, the trial court similarly found that MSD's "Charge is not based on the provision of a service that property owners may accept, reject, or use on a limited basis." (LF1552, Fact.-Find. ¶40.) It further found that "unlike other utilities, [Plaintiffs] cannot 'shut off' or otherwise reduce their use of MSD's stormwater services (absent taking impractical measures like tearing out their driveways or removing their roofs), since the Charge is not based on their actual use of MSD's stormwater system during any monthly billing period." (*Id.*) Similarly, it found that "MSD's corporate representative acknowledged that a fee payer cannot opt out of MSD's stormwater services." (*Id.*) Nor can MSD turn off the services if a fee payer fails to pay his bill. (*Id.*) Based on these

findings, the trial court found that, for the reasons recognized in *Building Owners*, MSD's Charge is not billed "after" provision of its service. (LF1567, ¶102.)

MSD contends that the trial court should not have relied on *Building Owners*, because it claims the *Building Owners* court "mistakenly focused only on the regularity of the bill and failed to consider whether the bill was sent after the provision of the service." (MSD Br. 46.) To the contrary, it was the mandatory nature of the charge and the customer's inability to turn the service on or off that swayed the *Building Owners* court. Indeed, this case is even stronger for Plaintiffs than *Building Owners* because at least the *Building Owners* plaintiffs were the primary beneficiaries of the building inspection. In the case of stormwater runoff, the benefit of MSD's stormwater services accrues to the property that the stormwater runs to, not from. Thus, the trial court correctly applied the *Building Owners* court's reasoning to the facts of this case.

Moreover, contrary to MSD's contention, the trial court's judgment indicates that it **did** consider MSD's evidence that its Charge was billed after the provision of service and simply found it not credible. For instance, the trial court made the factual findings that "Plaintiffs . . . testified that MSD does not identify on their bills what specific stormwater services (or amount of services) it provided to them in the prior month for the charge on their . . . bill," and that while "[i]t would be impractical, if not impossible for MSD to determine the amount of runoff from given properties, . . . MSD can tell a landowner in January of a given year, the amount of his December bill, if the amount of impervious area does not change." (LF1553, Fact.-Find. ¶¶45-46.) Indeed, it is difficult for MSD to make the case that it bills its ratepayers only after providing a service when

MSD cannot identify the specific service provided. (LF1553-54, Fact.-Find. ¶47.) MSD protests these findings but does not do so under the *Murphy* standards – and these findings should be affirmed.

4. This Court has never held or even suggested that whether the political subdivision provides an “ongoing service” is relevant to the *Keller* factor one determination.

While arguing on the one hand that the fact that its service is of “general benefit” to ratepayers matters not in the *Keller* analysis (*see, e.g.*, MSD Br. 57-58), MSD argues on the other hand – as it did in the trial court – that its charges are akin to the levee district’s **benefits assessment** that was found not to be a tax by the Court of Appeals in *In re Tri-County Levee District*, 42 S.W.3d 779 (Mo. App. E.D. 2001) because its stormwater services are ongoing and continuous in nature. (MSD Br. 41-43.) But this Court has never held or even remotely suggested that whether the political subdivision provides an “ongoing service” is relevant to the *Keller* factor one determination. In fact, it recently had the opportunity in *Arbor* to expand *Keller* factor one to include this consideration – as the utility services at issue arguably were ongoing – but did not do so.

The Charge in this case is inapposite to the assessment at issue in *Tri-County* in any event. The fee in *Tri-County* was based on a benefits assessment tied to the value of the actual benefits conferred on the plaintiff’s property by the levee district. The *Tri-County* court’s decision that the benefits assessment was not a tax under Hancock was premised on evidence that the specific annual **benefits** the district provided to the plaintiff’s property were valued at \$2,101,716. *Id.* at 782. By contrast, here, MSD’s

witnesses confirmed that the Charge is an apportionment of MSD's **costs** and does not purport to measure any benefit to an individual's property. (LF1553-54, Fact.-Find., ¶¶43-50.) A benefits assessment like that done in Tri-County would evaluate the benefit of a stormwater system to the property owner. Such an assessment most likely would have tied benefits to whether the property was near the top or the bottom of the hill and the amount of runoff (not impervious area) from uphill properties. Of course, MSD did not perform any such assessment. The trial court's determination on *Keller* factor one should be affirmed.

B. *Keller* two: Substantial evidence supports the trial court's finding that MSD's Charge was blanket-billed to nearly all residents, including non-users.

The second *Keller* inquiry is: "Who pays the fee?" *Keller*, 820 S.W.2d at 304 n.10. "Fees subject to [Hancock] are likely to be blanket-billed to all or almost all of the residents of the political subdivision while fees not subject to [Hancock] are likely to be charged only to those who actually use the good or service for which the fee is charged." *Id.* This Court and the Court of Appeals have found that fees are **not** blanket-billed where "only those persons who actually use [the political subdivision's] services pay the charge." *Beatty*, 867 S.W.2d at 220; *see also Arbor*, 341 S.W.3d at 684; *Mo. Growth*, 941 S.W.2d at 623. On the other hand, in *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo. banc 1995), this Court found that a charge **was** blanket-billed where the monthly sewer charge at issue was assessed against property that was not connected to the sewer

system. This Court recently reaffirmed this application of *Keller* factor two. *Arbor*, 341 S.W.3d at 681, 684.

Here, the trial court found that MSD's Charge was blanket-billed because it was billed to all residents owning property in the District with impervious area, regardless of whether runoff from the property actually drained into (i.e., that property actually "used") MSD's stormwater system. (LF1568, ¶¶105-109.) MSD contends that the trial court's factual findings in this regard were "remarkable and speculative" and unsupported by the evidence. (MSD. Br. 58-59.) To the contrary, substantial evidence supports this finding:

- Under the Stormwater Ordinances, MSD bills its Charge to every resident owning property in the District with impervious surface area, without regard to whether runoff from that property actually drains into the stormwater system. (LF1554-55, Fact.-Find. ¶51.)
- Under the Stormwater Ordinances, MSD imposes its Charge on property that does not drain into (i.e., use) MSD's stormwater system because it (i) drains internally resulting in no runoff to MSD's stormwater system; (ii) drains directly to the Mississippi, Missouri, or Meramec Rivers without the use of MSD's stormwater system; and/or (iii) drains into a stormwater system which is maintained by another entity (i.e., a levee district) under an agreement with MSD. (*Id.*) These non-users can apply for a credit of up to 50%, but they cannot escape MSD's Charge entirely. (*Id.*) In fact, the only way to escape MSD's Charge would be to take the dramatic (and impractical) step of removing all impervious area (including one's home,

driveway, etc.) from one's property. (Tr. 80:4-82:11; LF1555, Fact.-Find. ¶52; LF1568, ¶108.)

Documents produced by MSD also showed that properties falling into category (ii) alone (all of their runoff drains to one of the three major rivers) comprise approximately 7% of MSD's Charge revenue base, although it is unclear how many ratepayers are aware of and have taken advantage of the credit. (Pls' Ex. 63, Table 4-1 (Revenue Reduction for Non-District Drainage Facilities, Policy No. 1) and p. 4-4 (projected first year revenue figure).) Thus, substantial evidence supported the trial court's factual finding that MSD blanket-bills its Charge to properties that did not drain into its stormwater system. (LF1555-56, Fact.-Find. ¶55; LF1568, ¶109.) As the trial court found, these properties are – in much the same manner as in *Feese* – not “connected to” MSD's stormwater system, yet MSD still charges them for stormwater service. (LF1568, ¶107.)

MSD takes issue with this factual finding, claiming that the trial court ignored its evidence that it did not bill its Charge to 38,000 properties without impervious area. (MSD Br. 49-52.) However, from the judgment, it is clear that the trial court **did** take into account the fact that MSD does not charge owners of undeveloped property. But the trial court found that MSD's rationale for its decision not to bill them – that they supposedly did not “create the need” for MSD – was a subterfuge to attempt to comply with *Keller* factor two, likely in part because the testimony of MSD's own witnesses did not support MSD's rationale. (LF1568, ¶108 (“[P]roperties with no impervious area are not billed even when they drain into MSD's stormwater system. This exception seems only related to an attempt to comply with the Keller factors, by not billing everyone.”)).

For example, MSD's Executive Director testified that undeveloped properties (properties with only pervious area) "absolutely" do have runoff that enters MSD's stormwater system. (Tr. 669:7-9; *see also* 709:10-12, 774:19-775:2.) He further testified that MSD's stormwater system is designed to accommodate runoff from both **pervious** and impervious areas. (Tr. 766:7-12.)

Plaintiffs likewise adduced testimony from their experts that pervious areas discharge runoff into MSD's stormwater system. (Tr. 324:12-17.) In fact, Plaintiffs' expert testified that the results of his District-wide field study showed that in some circumstances, undeveloped property may even discharge *more* runoff than developed properties. (Pls' Tr. Ex. 72-69; Tr. 534:11-19, 535:20-24.) Thus, the overwhelming evidence contradicts MSD's contention that only properties with impervious area cause the need for its services.

MSD also claims that the trial court mistakenly relied on *Feese* in finding in Plaintiffs' favor on *Keller* factor two, on the fallacy that property owners whose runoff does not drain into MSD's system should pay a 50% charge because they still somehow "use" or "receive" MSD's regulatory and planning services. (MSD Br. 54.) MSD's contention is not credible, particularly because all property owners in the District arguably benefit from MSD's regulatory and planning services, yet, according to MSD, only those with impervious area must pay for that benefit. In fact, the properties that benefit the most are downhill properties or those close to bodies of water that could flood without the diversion of stormwater. The trial court found MSD's arbitrary "impervious area" classification to be without merit, making the factual finding that "[l]andowner[']s

with no impervious area pay nothing, though presumably they would benefit by Defendant's services, at least equivalent to 50% benefit, as do the properties that [receive a credit because they] drain internally, directly into rivers, etc." (LF1555, Fact.-Find. ¶52.) The trial court properly found that the evidence demonstrated that MSD's stormwater system was created to handle runoff, and the only "users" of MSD's system are those properties that have runoff that drains into the system. Like in *Feese*, MSD's Charge is blanket-billed because it is billed even to property owners who do not "use" (i.e., have runoff that drains into) MSD's stormwater system. Thus, *Keller* factor two was correctly resolved in favor of Plaintiffs.

C. *Keller* three: The trial court correctly resolved *Keller* factor three in favor of Plaintiffs because there is not a direct relationship between impervious area and stormwater runoff or between MSD's Charge and the level of services provided to the ratepayer.

The third *Keller* inquiry is: "Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?" *Keller*, 820 S.W.2d at 304 n.10. "Fees subject to [Hancock] are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to [Hancock] are likely to be dependent on the level of goods or services provided to the fee payer." *Id.*

"*Keller*'s third test focuses on the individual paying the fee." *Beatty*, 867 S.W.2d at 221. As the Supreme Court held in *Beatty* and reaffirmed in *Arbor*, "[i]n 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.” *Id.* (emphasis in original); *Arbor*, 341 S.W.3d at 681.

MSD spends much of its brief doing its best to water-down *Keller* three’s “direct relationship” test and attempting to sell this Court on the same “incremental” or “additional” runoff theory that the trial court rejected.⁴ Yet not once does MSD even attempt to show – as is required under this Court’s precedent – that its Charge bears a “direct” relationship to the level of stormwater services its fee payers actually receive. The reason is simple: no direct relationship exists.

As the evidence demonstrated, MSD initially adopted its impervious area-based Charge under the assumption that there was a “direct relationship” between the impervious area (development) of a property and the stormwater runoff from that property that enters into MSD’s stormwater system and is managed by MSD. (LF1383-87.) Until this lawsuit was filed, however, MSD had never tested its assumption to see if it had any scientific foundation. (*Id.*) Through the course of discovery relating to *Keller* factor three, Plaintiffs’ experts tested MSD’s assumption and proved it to be wrong. For

⁴ Several of the Amici Curiae briefs submitted to this Court attempt to do the same, relying largely on evidence that was either excluded or discounted by the trial court – and not appealed by MSD. Similarly, MSD has improperly attached in its Appendix several charts it created that are substantively identical to charts that MSD offered at trial, but were not admitted and are not part of the record. (MSD’s Appendix A115-117.) MSD has not appealed this evidentiary ruling.

this reason, in its Brief, MSD advances a myriad of other untenable theories and arguments in an attempt to somehow fit its Charge within the *Keller* three framework. Each of these was rejected by the trial court, and each is addressed in turn below. As the “direct relationship” inquiry is the only relevant *Keller* three inquiry under Missouri law, and there is **not** a direct relationship between impervious area and runoff or between MSD’s Charge and the level of services actually provided to the taxpayer, the trial court properly applied the evidence to the case law in reaching its conclusion that *Keller* factor three weighs in favor of the Plaintiffs’ position.

1. There is not a direct relationship between impervious area and runoff.

The trial court made the factual findings that “[t]he primary service that MSD offers to a fee payer is the handling of stormwater runoff from that fee payer’s property” and “MSD’s . . . Charge [bills] for MSD’s stormwater service based upon the amount of impervious area on each property.” (LF1556, Fact.-Find., ¶¶56-57.) The trial court further found that “[t]he assumption underlying MSD’s . . . Charge is that there is a direct relationship between the impervious area (development) of a property and the stormwater runoff from that property that enters into MSD’s stormwater system and is managed by MSD. (*Id.*, Fact.-Find. ¶58.) Thus, based on this Court’s precedent, the trial court correctly concluded that there must be a “direct relationship” between impervious area and runoff in order for MSD’s Charge to pass muster under *Keller* factor three. *Arbor*, 341 S.W.3d at 681; *Beatty*, 867 S.W.2d at 221.

The trial court found that no such relationship existed based on substantial evidence adduced by Plaintiffs. The testimony of Plaintiffs' experts, which went unchallenged by MSD at trial (LF1558, Fact.-Find. ¶¶64), conclusively demonstrated that there is not a direct relationship between impervious area and stormwater runoff; in fact, there is little, if any, relationship at all. (LF1569, ¶¶113.) Specifically, Plaintiffs' experts evaluated the relationship between impervious area and stormwater runoff both by performing hypothetical runoff calculations using estimated figures, and by performing a field study of properties within MSD's service area and calculating actual runoff using physical measurements taken from those properties. (LF1557-58, Fact.-Find. ¶¶61,63.) Based on their testimony, the trial court made the following factual findings:

- Impervious area is just one of numerous factors that influence stormwater runoff from a given parcel of property. (LF1556-57, Fact.-Find., ¶¶60.)
- Impervious area is not the driving factor in measuring stormwater runoff, and, in fact, the most important factor considered by urban hydrologists in measuring runoff is the total lot size of a property. (*Id.*)
- Since the type of soil found on most properties in St. Louis allows for very little water penetration, increasing impervious area on properties in St. Louis has very little impact on stormwater runoff. (*Id.*)
- Impervious area does not cause or bear a direct relationship to pollutants on a given property. (LF1557, Fact.-Find. ¶¶62.)
- There are a number of factors other than impervious area that have a substantial effect on runoff for properties in the St. Louis area, such as lot

size, slope and the extent to which impervious area is connected (to other impervious area) vs. disconnected. (LF1557-58, Fact.-Find. ¶63.)

- The results of Plaintiffs’ experts’ field study demonstrated that properties having the same amount of impervious area did not generate anywhere near the same amount of stormwater runoff in most circumstances, and that runoff from an undeveloped (pervious) property actually exceeded the runoff of some of the properties with impervious area. (*Id.*)

From these findings, the trial court concluded that there is “little, if any” relationship between impervious area and runoff. (*Id.*; LF1557, Fact.-Find. ¶62; LF1557-58, Fact.-Find. ¶63; LF1569, ¶113.) It aptly found that “[t]he relationship here is between impervious area and [MSD’s] fee, not service and fee.” (LF1569, ¶113.) Thus, substantial probative evidence supported the trial court’s determination that there is not a direct relationship between impervious area and runoff.

2. Substantial evidence demonstrated that MSD’s Charge bears no relation to the level of services it actually provides to a property owner.

In addition to finding that there is not a direct relationship between impervious area and runoff, the trial court also found that there is not a direct relationship between the Charge and the level of services MSD actually provides to a property owner. The evidence supporting the trial court’s factual findings on this point included the following testimony of MSD’s own witnesses:

- MSD's corporate representative testified that MSD's use of impervious area to allocate its costs among fee payers may not have anything to do with the services each fee payer actually receives from MSD; it is simply an accounting function that provides a means to distribute MSD's costs. (LF1558, Fact.-Find., ¶65.)
- MSD's Executive Director and corporate representative testified that MSD's costs for its "base" services, which comprise 50% of the stormwater services it provides, do not vary from ratepayer to ratepayer based upon the amount of impervious area. (*Id.*, Fact.-Find., ¶69.)

(*See also* LF1558-59, Fact.-Find., ¶¶66-68.)

Based on these factual findings, the trial court concluded that "[t]he testimony of MSD's witnesses demonstrates that its Charge bears no relation to the level of services it actually provides to an individual property owner, but rather is simply a way of apportioning its total stormwater costs amongst its fee payers." (LF1569, ¶114.)

This evidence demonstrates that the trial court properly found in favor of Plaintiffs on *Keller* factor three, because *Keller* factor three focuses on the "individual paying the fee," *Beatty*, 867 S.W.2d at 221, and there was no evidence at trial that there is any relationship, much less a direct relationship, between MSD's Charge and the services actually provided by MSD to an individual fee payer.

3. **Contrary to MSD’s assertion, a “variable individualized charge” does not alone meet the “direct relationship requirement,” and MSD’s Charge is not akin to the charges in *Missouri Growth* and *Arbor*.**

Because MSD was unable to demonstrate that its Charge bears a direct relationship to the level of services it provides to the taxpayer, it now seeks to water down the “direct relationship requirement,” arguing that its charge is “variable and individualized” and therefore satisfies the *Keller* factor three requirement as set forth in *Beatty*, *Missouri Growth* and *Arbor*, because – MSD claims – the courts in those cases simply rejected a uniform flat rate, average charge. (MSD Br. 61-63.) Not only is MSD’s contention wrong, but its Charge more closely resembles the “flat fee” found not to satisfy *Keller* factor three in *Beatty* than the variable charge that survived *Keller* scrutiny in *Missouri Growth* and *Arbor*.

In *Beatty*, this Court invalidated MSD’s sewer charge under the Hancock Amendment. Analyzing *Keller* factor three, this Court stated that this inquiry “focuses on the individual paying the fee” and further that in order to be a true “user fee,” “the charge imposed must bear a **direct** relationship to the level of services a ‘fee payer’ actually receives from the political subdivision.” *Beatty*, at 221 (emphasis in original). Finding that MSD’s sewer charge was a “flat fee” because “[t]he amount of the fee remain[ed] the same no matter how much waste a residential customer sends into the system,” the Court resolved *Keller* factor three in favor of the ratepayers. *Beatty*, 867 S.W.2d at 218.

In contrast, in *Missouri Growth*, MSD had revised its sewer charge so that it was based upon a customer's actual use of water as measured by that customer's water meter or by water consumption figures – both of which were “specifically approved by the voters.” *Id.* at 624. This revised wastewater charge assumed that the water a customer received must be discharged as wastewater unless the customer could show otherwise. *Id.* at 623-24. If a customer could prove that a portion of the water measured by the meter did not enter the wastewater system (e.g., a separate meter for water to fill a pool or sprinkle a lawn), the customer was entitled to a credit. *Id.* at 624. Finding that these characteristics made the charge directly related to the service provided, the *Missouri Growth* court held that it satisfied *Keller* three. *Id.*

Recently, in *Arbor*, this Court analyzed utility charges for electricity, gas and water, reaffirming that there must be a “direct relationship” between the charge and the services received by the taxpayer. *Arbor*, 341 S.W.3d at 681. Finding that the evidence showed “that the amount of a customer's bill depends on the amount of electricity, gas and water used,” this Court held that *Keller* factor three was properly resolved in favor of the political subdivision. *Id.* at 685.

As is illustrated by a discussion of these three cases, MSD's Charge here is like the “flat fee” in *Beatty* – not the so-called “variable rate” in *Missouri Growth* or the charge in *Arbor*. This Court termed the *Beatty* wastewater charge a “flat fee” because “[t]he amount of the fee remain[ed] the same no matter how much waste a residential customer sends into the system.” *Beatty*, 867 S.W.2d at 218. As MSD admitted at trial (and admits in its Brief), its \$0.12 per 100 square feet Charge is a flat fee that varies only

by the amount of impervious area, not on how much stormwater a customer sends to MSD's system. (MSD Br. 67-68.) The rate itself, \$0.12 to start, is flat. Thus, MSD's Charge is like the fee found not to meet *Keller* three in *Beatty*.

In addition, unlike the charge at issue in *Missouri Growth*, (i) MSD's impervious area methodology was not specifically approved by the voters; (ii) there is no meter or other voter-approved tool to measure an individual's stormwater runoff – only MSD's assumption (proven false by Plaintiffs' experts) that the more impervious area a fee payer has, the more runoff his property generates; (iii) a ratepayer has no means available (short of removal of a roof or driveway) to decline MSD's stormwater service or reduce his "use" of the service; (iv) if a rate payer reduces his stormwater runoff (i.e. by installing a detention basin on his property), he receives no credit from MSD; and (v) the ratepayer is charged the same monthly rate whether it rains for days on end or there is a drought.

Finally, as the amount on a ratepayer's bill does not depend at all on the amount of runoff that emanates from a ratepayer's property, MSD's Charge also is not akin to the charge at issue in *Arbor*.

MSD's contention that its Charge is among the types of charges accepted by the courts in *Missouri Growth* and *Arbor* is without merit.

4. The trial court properly applied the "direct relationship" requirement set forth in *Beatty* and reaffirmed in *Arbor*, and in doing so, correctly rejected MSD's "demand services" argument.

Because MSD was unable to overcome the wealth of evidence demonstrating that there is not a "direct relationship" between impervious area and stormwater runoff, MSD

argues on appeal that Plaintiffs (through their experts' testimony) created a "new, academic, overly complicated standard" to meet *Keller* factor three, and that the trial court erroneously accepted this standard. (MSD Br. 71.) MSD claims that the trial court found that no "direct relationship" existed because MSD could not show that there was a "perfect," "one-to-one linear relationship" between impervious area and stormwater runoff. (MSD Br. 72.)

Contrary to MSD's assertion, however, the trial court did not require – and its judgment nowhere even mentions – a perfect, one-to-one relationship between impervious area and runoff in order to meet *Keller* three. In fact, the trial court found that the testimony of Plaintiffs' experts showed that there was **little, if any relationship** between the two. (LF1569, ¶113.)

In truth, it is MSD that has attempted to create an overly academic standard for *Keller* factor three, arguing throughout its Brief that its impervious area-based charge makes sense because stormwater services are "demand services" – that it is the creation of impervious area in general that has "created the need" for its services.⁵ (See, e.g., MSD. Br. 6-7, 12, 15, 20, 27.) Stated another way, MSD contends that if none of the District had ever been developed, MSD would not exist – and therefore divvying up all of its stormwater costs based upon impervious area (i.e., creating a "causer fee") makes

⁵ As discussed above in Statement of Facts Section I, the trial court rejected this proposed finding by MSD.

sense. (*Id.*) MSD argues that this methodology is the “industry standard” because it is used by many other stormwater utilities.⁶ (MSD Br. 24.)

First of all, the fact that stormwater utilities in some other jurisdictions not subject to the Hancock Amendment might use impervious area, in some fashion, as part of their rate structures, is wholly irrelevant to the *Keller* factor analysis.

Second, the basis of MSD’s “demand services” argument – that the creation of impervious area in general has “created the need” for its services – ignores reality. Since 1954 when MSD was first established, the St. Louis area was far from a grassy meadow – people had long since settled in St. Louis, and roads, homes, and other impervious structures had already been built throughout the MSD service area. As MSD’s Executive Director testified, the stormwater system that was built at that time was designed not to simply manage the runoff from developed areas, but to handle the runoff from both developed **and** undeveloped areas. (Tr. 766:7-12.)

Third, MSD’s “demand services” theory does nothing to satisfy the requirements of *Keller* factor three. *Keller* factor three focuses on the fee payer, not the political subdivision; it asks whether there is a “direct relationship” between the charge imposed and the “level of . . . services provided to the fee payer” – not between the charge and the reason the political subdivision exists. *Keller*, 820 S.W.2d at 304 n.10. The fact remains that, regardless of the reason why MSD first came into existence, once it became

⁶ This “industry standard” argument was contested at trial and MSD’s proposed finding to this effect was rejected by the trial court. (LF1529, ¶14.)

necessary for MSD to provide stormwater services, unless the charge for those services is put to the voters, this Court requires that the charge must be **directly related** to the services actually received by each individual fee payer. *Beatty*, 867 S.W.2d at 221. MSD's "demand services" theory does not explain how charging fee payers based on the impervious area of their properties relates at all to the level of stormwater services those fee payers receive – because, as MSD's own witnesses admit – no such relationship exists.

Finally, MSD's "demand services" theory must fail because allowing such a theory to pass muster under *Keller* factor three would essentially render the Hancock Amendment meaningless, as a "user charge" could be invented for every type of governmental service imaginable; not to mention that given the current economic climate, it would be extraordinarily tempting for a political subdivision to do so. For instance, the Saint Louis County Department of Highways and Traffic could begin billing County residents a monthly "road user charge," allocating its costs based on the number of cars an individual owns – on the theory that if no cars existed, there would be no need for roads, and hence, the Highways and Traffic Department would not exist. Police departments could follow suit, foregoing taxes in favor of a heightened "police user fee" imposed on a per-person basis – on the theory that if individuals who need police protection (and individuals causing the need for police protection) didn't exist, neither would the police department. As these examples illustrate, there is no logical limit to such a rationale, and this cannot be what this Court envisioned when it fashioned *Keller* three's "direct relationship" test.

Thus, the trial court correctly rejected MSD's "demand services" theory and found that the Charge is not a "user charge" under *Keller* factor three because it does not satisfy the "direct relationship" requirement.

5. The trial court properly rejected MSD's argument that its Charge satisfies *Keller* three because there is a direct relationship between impervious area and "additional" runoff.

As somewhat of a subset of its "demand services" theory argument, MSD contends that its Charge satisfies *Keller* factor three's "direct relationship" test based on the (untested and unsupported) notion that there is a direct relationship between impervious area and "additional" runoff (as distinguished from total runoff) from a property, which MSD contended for the first time at trial was the basis for its impervious area methodology. (MSD Br. 64-66, 75-76.) In its Brief, MSD suggests that if the trial court had simply compared the right runoff numbers (as opposed to Plaintiffs' experts, who MSD claims compared the "wrong" ones), it should have found in MSD's favor on *Keller* factor three. (MSD Br. 66.) MSD presented this same "additional runoff" argument to the trial court as a proposed finding, and the trial court rejected it. (LF1535, ¶34.) That finding is not properly challenged by MSD under *Murphy*.

Stated another way, MSD claims that Plaintiffs and the trial court improperly considered whether there is a direct relationship between impervious area and "total" runoff (runoff from both pervious and impervious areas on a property) in analyzing *Keller* factor three, when all that should have been considered is the relationship between impervious area and the runoff that solely emanated from the impervious areas on a

property. (MSD. Br. 63-67.) In an effort to relitigate the issue, MSD even goes so far as to submit to this Court calculations – outside the record on appeal – for its consideration. (See MSD’s Appendix A115-A117.) These calculations are substantively identical to calculations that were offered into evidence by MSD at trial, but were not admitted because of a lack of foundation. MSD has not appealed this evidentiary ruling. This Court should not countenance MSD’s backdoor attempt to slip exhibits before this Court that were rejected by the trial court. This Court also should not consider the arguments at pp. 75-76 of MSD’s Brief that rely on these exhibits – arguments that were also made to the trial court and rejected. (Compare MSD’s Appendix A115-A117 to Plaintiffs’ Appendix A49-A55 (MSD’s Trial Exhibits B5 and D5 and Tr. 1084-86).)

MSD’s “additional runoff” theory is nothing more than “smoke and mirrors” adopted by MSD during trial in a last-ditch attempt to somehow fit its impervious area methodology within the framework of *Keller* factor three. As the evidence made clear, this theory only surfaced after MSD was unable to rebut Plaintiffs’ expert testimony that there is not a direct relationship between impervious area and stormwater runoff. (Tr. 752:3-12, 756:7-13, 761:8-16.)

MSD’s “additional” runoff theory fails for several reasons. First, the premise for the theory – that if you add impervious area to property, you increase the amount of runoff from the property (“additional runoff”) – is demonstrably untrue. Runoff may or may not increase depending on where the impervious area is situated and the other characteristics of the property. Furthermore, the runoff from the additional impervious area placed on parcel A will almost certainly be different than the amount of “additional”

runoff from parcel B with the same amount of added impervious area. Plaintiffs' experts proved this both theoretically and with actual field measurements, thereby dismantling MSD's "additional runoff" theory.

As Plaintiffs' expert testified, none of the commonly used and accepted hydrologic formulas (including those used by MSD to measure runoff) measure only "additional runoff" from a property because it makes no sense to do so. No hydrologist measuring stormwater runoff from an individual property would measure only "additional runoff" because almost all properties have both pervious and impervious areas. (Tr. 402:9-404:19.) Thus, the only scenario in which it may make theoretical sense for MSD to base its stormwater charge on "additional runoff" alone would be if the **entire** district were paved, and there was no grass or vegetation (pervious area) anywhere. (*Id.*) Obviously, this does not comport with reality.

MSD's witnesses admitted at trial that MSD's stormwater system is not designed to simply handle this additional (or "incremental") runoff; rather, it is designed to manage the total runoff from both pervious **and** impervious areas – because runoff from both pervious and impervious property puts a load on MSD's stormwater system. (Tr. 766:7-12.) In fact, Plaintiffs' expert Mr. Jones testified that the results of his field study showed that in some circumstances, undeveloped property may even discharge **more** runoff to MSD's stormwater system than developed properties. (Pls' Tr. Ex. 72-69; Tr. 5 34:11-19, 535:20-24.) In the same vein, MSD's stormwater system does not monitor pollutants resulting from only this "additional" runoff; rather, it monitors all pollutants discharged

from all property, both pervious and impervious. (LF919, p. 127:1-14.) Thus, MSD's "additional runoff" theory does not comport with the activities MSD actually performs.

Finally, even if one (for the sake of argument) accepted MSD's "additional runoff" concept in theory, it fails in practice because MSD does not charge its customers based on the "additional runoff" into its stormwater system. As MSD's Executive Director testified, if an individual decides to develop property, to obtain a permit from MSD, the individual must submit a design that shows that the amount of runoff after development is no greater than before development. (Tr. 663:9-13, 778:9-19, 778:22-779:7.) This can be accomplished by the use of detention basins or other best management practices. (Tr. 780:11-17.) Accordingly, there is no "additional" runoff after development than before, and the amount of impervious area added to the property is irrelevant; in fact, the amount of runoff could be substantially **less** after development than before. (Tr. 780:11-23.)

In sum, MSD's "additional runoff" theory is a contrivance that would only make sense in a world where MSD's entire service area was a giant block of concrete. There is good reason that the trial court rejected this theory: it does not make sense in science or in practice, and was disproven at trial.

6. **The trial court properly rejected MSD's argument that its Charge satisfies *Keller* factor three because it apportions to ratepayers a portion of its "base services" – services that generally benefit all ratepayers.**

MSD argues that Plaintiffs' and the trial court's analysis on *Keller* factor three "misunderstands how utility rates work." (MSD Br. 77-78.) MSD claims that all utilities distribute their costs of service through "common measurement[s]" to fairly and equitably allocate those costs to the customers. (*Id.* at 77.) It argues, for example, that electric or gas utilities do not vary their rates based on the location or characteristics of a property. (*Id.* at 78.) Based on these contentions, MSD argues that the trial court should not have resolved *Keller* factor three in Plaintiffs' favor.

But MSD's argument misses the mark and the purpose of the *Keller* three inquiry. In order for a charge to be a true "user fee" not subject to the Hancock Amendment, the charge must be tied to the fee payer's "use" of the service. *Beatty*, 867 S.W.2d at 221. While it may be true that electric, gas, or even sewer utilities may not be able to precisely quantify the services they provide to a ratepayer, these utility charges are all measured by a meter or other voter-approved tool, and they are measured in a way that allows the fee payer to have some degree of control over his or her bill (i.e., "use" of the service) each month. In stark contrast, under MSD's chosen impervious area methodology, a stormwater ratepayer has no way to reject MSD's service (absent taking drastic measures to remove his house, driveway or patio) and likewise cannot reduce his or her use of it (unlike, for example, how a ratepayer desiring to use less electricity could simply turn off

more lights to reduce his bill). (LF1552, Fact.-Find. ¶¶40.) It is for these reasons that the Court found a lack of a direct relationship between the Charge and the services provided to the ratepayer. (LF1569-70, ¶¶114-116.)

Similarly, MSD claims that its Charge satisfies *Keller* factor three in part because it provides a system of credits whereby those properties that do not drain into MSD's system can reduce their charge by 50% but still pay for MSD's purported general benefit services that are "uniform" throughout the district – including MSD's regulatory compliance, water quality monitoring, and provision of education to District property owners concerning the mandates of the Clean Water Act. (Tr. 771:9-19, 772:13-17; *see also* LF917-18, p. 115:3-25.) According to MSD's witnesses, these general benefit "base services" make up 50% of the stormwater services MSD provides throughout the District. (Tr. 781:18-782:8, 867:10-24.)

But MSD's use of impervious area to assign to each customer a portion of the "general benefits" that customer receives from MSD's provision of "base" services to the entire District fails the third *Keller* inquiry. As this Court has made clear, where a fee is not based on a fee payer's "actual use," but instead is based on an average or estimated use of governmental services by a fee payer, the fee is a "tax" subject to the Hancock Amendment because it does **not** bear a direct relationship to the level of services a fee payer actually receives from the political subdivision. *Beatty*, 867 S.W.2d at 221 (holding that charges that "reflect the estimated, average use a residential customer makes of MSD's services" do not satisfy *Keller* factor three's direct relationship test because "[a]n economist could easily construct a model to show that any fee government

collects is based on the ‘estimated, annual’ use of governmental services by a taxpayer”); *see also Feese*, 893 S.W.2d at 812.

As this Court recognized in *Feese*, the more the service at issue tends to benefit the citizenry as a whole as opposed to the individual, the more the charge for the service is likely to be viewed as a tax. *Feese*, 893 S.W.2d at 813. In *Feese*, the City of Lake Ozark imposed a sewerage service charge on all system users as well as those businesses within 300 feet of the sewer that were physically able to hook up to the system, although not actually connected. *Id.* Lake Ozark defended a Hancock challenge by arguing that the sewerage system was a “benefit” to all property owners, whether connected or not. *Id.* This Court rejected that notion, noting that a public entity may **tax** lands receiving no direct benefit from the construction of a sewerage system because such a system conferred a benefit on everyone in the district by making the district a more desirable place to reside, but for such a charge to be put in place under Hancock, it must be put to the voters. *Id.*

MSD’s allocation of its costs for these “base” services by impervious area is illogical and certainly does not satisfy *Keller* factor three. MSD admits that an owner of property that drains entirely to a major river receives a 50% credit because MSD does not handle his runoff, but contends that he still enjoys the benefits of these “base” stormwater

services and therefore must pay a 50% charge.⁷ As recognized by the *Feese* court, these are just the sort of “general benefits” that render the fee a tax which must be put to the voters. In fact, the rationale behind MSD’s decision to grant a 50% credit to these property owners not only fails the *Keller* three test, but actually presents the clearest case of a lack of a “direct relationship” between the charge and the services provided by MSD. Thus, the trial court properly resolved *Keller* factor three in favor of Plaintiffs.

D. *Keller* four: The trial court correctly resolved *Keller* factor four in favor of Plaintiffs because MSD is not providing a true “service” to the ratepayers.

The fourth *Keller* inquiry is: “Is the government providing a service or good?” *Keller*, 820 S.W.2d at 304 n.10. “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 [Hancock]. 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 [Hancock].” *Id.* This question is not answered by simply looking at whether there is government involvement in the service, because

⁷ But his enjoyment of these general services does not fluctuate based on the amount of impervious area he has. If he adds a patio, he does not start receiving more general services than before, yet he is charged as though he does. And he enjoys the base services no more or no less than his neighbor who owns an undeveloped parcel, but pays nothing to MSD.

there is always government involvement. Rather, courts scrutinize whether a “service,” as such, is actually being provided.

MSD contends that the trial court erred in finding in Plaintiffs’ favor on this factor because there was “no dispute that MSD provides stormwater services to its customers,” services that include operation and maintenance of infrastructure, regulatory compliance, public education, water quality monitoring, coordination with local governments on the Phase II permit, and design standards and review. (MSD Br. 6-7, 82.) But MSD’s argument misses the point. The trial court did not find that MSD is providing *no* service whatsoever to District properties; rather, it found that in 2007 when MSD wanted to shift from tax-based revenue to a greatly increased “user fee,” MSD simply recast the activities it already was performing as “services” for the purpose of creating a “user fee” not subject to Hancock. Moreover, the “stormwater services” that MSD provides are not the type of services that lend themselves to payment by a “user fee,” because they are not quantifiable or measurable by reference to an individual user; MSD’s so-called “stormwater services” are more akin to those provided by the fire department, highway department, and police department – all services that are funded by taxes, not “user fees.”

MSD contends that “a political subdivision is allowed the flexibility to use different ways to fund services it provides,” citing *Keller* for the proposition that the Hancock Amendment does not prohibit these organizations from shifting the burden to the private users of its services. (MSD Br. 85.) But MSD has taken this quote out of context; *Keller* did not hold that political subdivisions can suddenly recast the activities they already were performing – which were funded by a voter-approved tax – as

“services” for the purpose of creating a “user fee” as an end run around Hancock. *Keller* contemplated that an organization **with accountability to the people** could shift the burden of taxes to private users, because those private users could vote that organization’s directors out of office if their decisions were unpopular:

The Hancock Amendment, in order to keep the public burden of taxation under control, does not prohibit these organizations from shifting the burden to the private users of these services. How much to charge users is for those elected to run the organizations. If the decisions are unpopular, the directors may be voted out of office. The only requirement placed on the directors by the Hancock Amendment is that any increase in taxes must be approved by the voters.

Keller, 820 S.W.2d at 304. Here, however, much unlike the situation envisioned by this Court in *Keller*, MSD is **not** regulated or governed by any body of publicly elected officials, so if ratepayers in the District disapprove of MSD’s decision to impose its Charge upon them, there is no mechanism by which the ratepayers can vote to remove MSD’s management. (LF1551, Fact.-Find..¶36.) Thus, MSD’s argument is unsound and should be rejected.

1. The trial court properly considered *Building Owners* in finding in Plaintiffs’ favor on *Keller* factor four.

In analyzing *Keller* factor four, the trial court properly considered the decision in *Building Owners & Managers Association of Greater Kansas City v. City of Kansas City*, 231 S.W.3d 208 (Mo. App. W.D. 2007), where the plaintiffs challenged three Kansas

City ordinances that required businesses and multifamily dwellings to pay fees for annual fire inspection certificates. Prior to the enactment of those ordinances, annual inspections were not mandatory, and the City had enforced the fire code by performing inspections only when complaints were received. These inspections were funded by general revenues. If the inspection revealed fire code violations, the property owner had an opportunity to cure the deficiency, and if uncured, the City Fire Department could issue a municipal citation. In analyzing *Keller* factor four, the Court of Appeals held that the “history of the fire inspection program indicates the City was not delivering a good or service when it took steps to enforce the fire code. With the passage of the three ordinances, the City sought to convert this enforcement activity into a service by requiring annual inspections and charging a fee for an inspection certificate.” *Id.* at 214. The court further stated that “[t]hese revenue-driven policy changes did not alter the fundamental purpose of the inspection program and the nature of the City’s duty to ensure compliance with the fire code.” *Id.* The court, therefore, held that “[b]ecause the inspection program does not constitute a service to property owners, the fees related thereto are likely a violation of the Hancock Amendment.” *Id.*

Here, the evidence demonstrated that MSD’s Charge funds MSD’s maintenance and operation of its stormwater system, and also funds MSD’s compliance with applicable regulations, planning and provision of education to District property owners regarding the mandates of the Clean Water Act. (LF1559, Fact.-Find. ¶70.) Yet the evidence also demonstrated that prior to its enactment of the Stormwater Ordinances in 2007, MSD performed these same activities, and these activities were funded by taxes

under a stormwater funding program that had been fully approved by the voters. (LF1560, Fact.-Find. ¶71.) In 2007, when MSD desired to raise significant additional revenue for stormwater purposes without voter approval, it simply recast these exact same activities as “services” for which it contends it can now charge “user fees” not subject to the Hancock Amendment. MSD offered no testimony at trial that the nature of its stormwater services have changed at all since it operated under its prior funding program. As the *Building Owners* court recognized, the simple fact that MSD has made these “revenue-driven policy changes” does not suddenly convert MSD’s stormwater activities into “services” for purposes of the fourth *Keller* inquiry.

In addition, the “stormwater services” that MSD provides – operation and maintenance of infrastructure, regulatory compliance, public education, water quality monitoring, coordination with local governments on the Phase II permit, and design standards and review – are not the type of individualized services that lend themselves to payment by a “user fee,” much like the “general benefit” services provided by the fire department, police department or highway department. In fact, MSD’s witnesses admitted at trial that at least 50% of its stormwater services are of “general benefit” to ratepayers; MSD claimed that this is the reason that ratepayers whose properties do not drain into the system are still billed a 50% charge. (Tr. 781:18-782:8, 867:10-24.) And, in reality, the other 50% – which consist of maintenance and operation of infrastructure – are just as much “general benefit” services. This is precisely why these “services” should be payable through a tax, not a “user fee,” and precisely why they are not true “services” within the meaning of *Keller* factor four.

The trial court also correctly determined based on the evidence that certain ratepayers are being billed by MSD for stormwater services they do not receive. For example, MSD does not bill its Charge to owners of property containing no impervious area. If, however, that property owner later decides to develop the lot (e.g., construct an office building and parking lot), MSD's Design Requirements mandate that the new development must maintain pre-development stormwater runoff conditions. (LF1560, Fact.-Find. ¶73.) Although the property owner must incur the cost of constructing and maintaining a retention pond or some other type of stormwater management practice structure in order to comply with this mandate, the mere fact that the property contains impervious surface area after development will make the property owner subject to MSD's stormwater Charge. (*Id.*) MSD's Stormwater Ordinances do **not** provide any credit on the Charge to such property owner for maintaining pre-development runoff conditions. (*Id.*) Thus, the property owner, after construction, is now charged a stormwater Charge, despite the fact that such owner has not increased the runoff into MSD's stormwater system and therefore receives no new stormwater services from MSD. (*Id.*)

MSD contends that the trial court erred in making this determination, because the mandates of MSD's Design Requirements do not lower the costs of providing MSD's services. (MSD Br. 89.) But, as mentioned above, the *Keller* inquiry focuses on the taxpayer and asks what service is provided to the taxpayer, not the costs to the government for the services. *Beatty*, 867 S.W.2d at 221. Because MSD is not delivering

a service in connection with its Charge now billed to such property owners, the court properly found in favor of Plaintiffs on *Keller* factor four.

E. *Keller* five: The trial court correctly resolved *Keller* factor five in favor of Plaintiffs because there was no evidence that any private entities have provided stormwater services in St. Louis.

The fifth *Keller* inquiry is: “Has the activity historically and exclusively been provided by the government?” *Keller*, 820 S.W.2d at 304 n.10. “If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to [Hancock]. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to [Hancock].” *Id.*

In its analysis of *Keller* factor five, this Court in *Arbor* considered (i) whether the service is one provided by private versus public entities generally, (ii) whether the service has been provided by private versus public entities in the location at issue, and (iii) whether the current provider is the exclusive entity providing service in such location. *Arbor*, 341 S.W.3d at 686. The trial court’s finding that *Keller* factor five weighs in Plaintiffs’ favor is correct under all three prongs.

First, as this Court has held (and the trial court recognized), “[p]roviding for drainage . . . is a governmental function. . . .” (LF1573, ¶123 (citing *State ex rel. Dalton v. MSD*, 365 Mo. 1, 9 (Mo. banc 1955).)

Under the second and third prongs, MSD adduced no evidence at trial that any private corporations or entities have provided stormwater services in the St. Louis area –

because MSD has historically been the exclusive provider of such services. (LF1572, ¶122.)

The evidence demonstrated that:

- Since MSD was formed in 1954, pursuant to its Charter, MSD has been mandated to exercise complete “title, jurisdiction, control, possession and supervision” of the stormwater systems within its boundaries. (LF1560-61, Fact.-Find ¶ 74.)
- As set forth in the recitals of the Stormwater Ordinances, under a Resolution adopted by MSD in 1956, MSD “accepted the maintenance and operation of the portion of the [s]tormwater [s]ystem theretofore operated and maintained by the municipalities, sewer districts, and other public agencies within the [Original] [B]oundaries of the District.” (LF1561, Fact.-Find ¶75.) The recitals further acknowledge that additional areas were annexed to the District in 1977, and in 1989, MSD accepted responsibility for construction, operation and maintenance of stormwater and drainage facilities over the **entire** District. (*Id.*, Fact.-Find ¶76.)
- Neither MSD’s corporate representative designated to testify on the subject nor MSD’s expert witness offered any evidence of any private entities having historically supplied stormwater services in the St. Louis area (or anywhere in Missouri, for that matter). (*Id.*, Fact.-Find ¶77.)
- When asked by MSD’s counsel to offer an opinion on whether any private entities have ever provided stormwater services to property owners in St.

Louis for a fee, MSD's expert concluded that he could find none. (*Id.*, Fact.-Find ¶78.)

Plaintiffs' expert testified that he is not aware of any private companies in St. Louis that provide stormwater services or other activities similar to the services provided by MSD to paying customers. (*Id.*, ¶ 79.)

Despite the overwhelming evidence that MSD has historically and exclusively provided stormwater services in the St. Louis area, MSD argues in its Brief that this Court should reverse the trial court's finding on *Keller* factor five because: (i) developers (rather than MSD) often initially construct the stormwater systems put in place in a typical development, and (ii) subdivisions or individuals like Plaintiffs have paid out of their own pockets to handle problems relating to stormwater (i.e., erosion problems) on their properties. (MSD Br. 91-92.) MSD unsuccessfully took the same position in the trial court, and requested factual findings to this effect that the trial court rejected, and for good reason. (LF1562, Fact.-Find. ¶80.)

First, although builders may install portions of a stormwater system in a development, per MSD's permitting process, those systems must be designed in accordance with MSD's Rules and Regulations, and MSD's Charter provides (and its corporate representative testified) that after those facilities are constructed, they are dedicated to MSD for all operation, maintenance and construction. (LF801; Tr. 716:4-14.)

Second, the fact that subdivisions or individuals may hire contractors to deal with erosion problems on their own properties does not make these subdivisions or individuals

“private stormwater service providers,” because they are not providing stormwater services to the general public for a fee. MSD contended at trial that any individual doing home maintenance relating in any way to stormwater services should be considered a private provider of services. (LF1510, Tr. 90:7-93:19; 94:1-16; 109:13-110:21; 142:16-143:14; 157:1-23; 158:24-159:4.) Under MSD’s rationale, the homeowner who has electrical wiring in his house to convey electricity from the fuse box to a lamp would be providing the services of an electric utility.

Put simply, the activities cited by MSD do not rise to the level of providing the range of stormwater activities performed by MSD. Certainly this is not what this Court had in mind when it fashioned *Keller* factor five. In fact, where courts have found in favor of the political subdivision on *Keller* factor five, they have done so because the political subdivision adduced evidence that **private companies** had historically provided the services at issue. *See, e.g., Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d 550, 562 (Mo. App. E.D. 1998) (finding in defendant’s favor on the grounds that “[a]t trial, [the] City[’s] expert on utility rate making, testified on direct examination: ‘Both water and sewer has been provided by investor-owned companies and municipalities since the eighteen hundreds’”) And in *Beatty* and *Missouri Growth*, the appellate courts found *Keller* factor five inconclusive because MSD submitted evidence that in St. Louis County, sewer companies were owned by both government and private entities. *See Beatty v. MSD*, 1993 Mo. App. LEXIS 889 (Mo. App. June 15, 1993). MSD adduced no such evidence here.

As this Court found in *Arbor*, “[t]he exclusivity of service at the current time tilts this factor in favor of [the taxpayer].” *Arbor*, 341 S.W.3d at 686. MSD is currently – and has historically been – the exclusive provider of stormwater services in St. Louis, and, therefore, the trial court properly resolved *Keller* factor five in Plaintiffs’ favor.

F. The trial court properly considered other relevant factors in determining that MSD’s Charge is a tax and not a “user fee” under *Keller* and its progeny.

MSD contends that the trial court’s consideration of additional factors beyond the five *Keller* factors is erroneous. (MSD Br. 93-94). But this Court recently held in *Arbor* that while the five *Keller* factors are “useful aids” in analyzing whether a charge is a “user fee” or a tax, they are “not intended to be exhaustive,” and other relevant facts often can and should be taken into consideration in determining whether a charge violates Hancock. *Arbor*, 341 S.W.3d at 675, 682-83. As these factors further support the trial court’s decision, they are discussed briefly below.

1. Certain tax-like characteristics of MSD’s Charge, including the fact that unpaid charges trigger a lien by operation of law, further demonstrate that MSD’s Charge is a tax.

In *Arbor*, this Court noted that in *Beatty*, it had *sub silentio* identified a sixth factor – “whether unpaid . . . charges trigger a lien against real property by operation of law.” *Id.* at 681. This Court applied this sixth factor in rendering its decision, finding that the fact that a fee payer’s failure to pay the charge resulted in “a cutoff of utility service, not a lien” weighed in favor of its conclusion that the charge at issue was a “user

fee.” *Id.* at 686. MSD acknowledges that the trial court properly considered this factor in rendering its judgment. (MSD Br. 96.)

Application of this sixth factor only further bolsters Plaintiffs’ position. In stark contrast to *Arbor*, nonpayment of MSD’s Charge does not result in a “cutoff of [stormwater] service,” *id.*, but instead “results in a lien against real property by operation of law, which lien ‘has the same priority as taxes levied for state and county purposes.’” (LF1552, Fact.-Find. ¶38.) (Indeed, MSD does not have the ability to switch stormwater “services” on or off.) This was precisely the case in *Beatty*, and the *Beatty* court held that the ratepayers’ position on the *Keller* factors was strengthened by its conclusion on this additional factor. Likewise, the trial court here correctly held that this fact only “further support[ed] its conclusion” that MSD’s Charge is a tax. (LF1565, ¶92.)

2. The fact that MSD’s leaders cannot be voted out of office further weighs in favor of Plaintiffs’ position that the Charge is a tax.

This Court also suggested a seventh relevant determination in *Arbor* – whether those running the political subdivision may be voted out of office. *Id.* at 676, 680-81, 687. Specifically, this Court stated three times in *Arbor* that (as recognized in *Keller*), “where a political subdivision provides a service, [h]ow much to charge users is for those elected to run the organizations. If the decisions are unpopular, the directors may be voted out of office.” *Id.* at 687 (citing *Keller*, 820 S.W.2d at 304). While not labeling this as a distinct additional factor, it is apparent from this Court’s decision that this fact was a material consideration in its *Keller* analysis.

Here, unlike in *Keller*, *Arbor* and numerous other cases applying the *Keller* factors, MSD is **not** governed or regulated by any publicly elected officials⁸, so ratepayers who object to the increased tax burden MSD has unilaterally imposed on them **cannot** vote MSD’s leaders out of office. (LF1551, Fact.-Find. ¶36.) In fact, there is no way for District ratepayers to avoid paying the Charge, absent filing this lawsuit to enforce the Hancock Amendment. (*Id.* at 36-37.) As MSD has no “check” whatsoever on its taxing and spending power, if MSD is allowed to circumvent the Hancock Amendment’s voter approval requirement, it could impose an unlimited tax burden on District ratepayers – who cannot opt out of its service. This is exactly the type of abuse that Hancock was enacted to prevent. As this Court found this fact to be material to its *Keller* analysis in *Arbor*, this Court should consider this fact as further support for the trial court’s judgment, because it only further demonstrates that MSD’s Charge is a tax. Thus, the trial court’s judgment should be affirmed.

⁸ MSD states in its brief that it has a “voter-adopted” Rate Commission, in an attempt to make it appear that MSD has some political accountability for its rate-making decisions. (MSD Br. 98) It does not. In fact, all that the voters approved are certain amendments to MSD’s Charter that initially created the Rate Commission. Nor is the Rate Commission analogous to a regulatory body, as MSD argued at trial and implies in its Brief. As the evidence made clear, the Rate Commission is not an independent body, and it has no power to implement any rate. (*See* Statement of Facts Section II.B above.)

G. In the event this Court is inclined to consider case law from other jurisdictions, the only relevant case law is federal case law interpreting the Clean Water Act and the Michigan Supreme Court's decision analyzing a stormwater charge under its Headlee Amendment, after which the Hancock Amendment was modeled.

MSD asks this Court to look at case law from other states that have considered whether stormwater charges are taxes. (MSD Trial Br. 97-98.) But MSD overlooks the two most relevant cases outside of Missouri – *DeKalb County, Georgia v. U.S.*, No. 1:11-cv-00761-LJB (Fed. Cl. Jan. 28, 2013) and *Bolt v. City of Lansing*, 459 Mich. 152 (Mich. 1998). *DeKalb* applies federal law to determine whether a stormwater user charge is a tax or fee, and *Bolt* examines the same question under a constitutional provision nearly identical to the Hancock Amendment.

1. The U.S. Court of Federal Claims has ruled that impervious-area based stormwater charges are taxes, not fees.

MSD cites to the Clean Water Act, implying that the Act specifically approves payment of stormwater user charges based on impervious area. (MSD Br. 7.) What MSD does not tell the Court is that prior to the Clean Water Act amendment that MSD touts, the federal government routinely took the position that stormwater user charges based upon impervious area were taxes and therefore uncollectable under the Supremacy Clause. To remove this defense, Congress amended the Act to waive sovereign immunity for these charges. The recent analysis of the U.S. Court of Federal Claims in

DeKalb County, Georgia v. U.S. supports Plaintiffs’ position: the court agreed with the federal government that impervious-based stormwater charges are taxes, not fees.

Applying a standard similar to that adopted by this Court in *Keller*, the *DeKalb* court noted that the charge’s label is not dispositive; instead, “in seeking to draw a line between an impermissible tax and a permissible fee, the court must ‘consider all the facts and circumstances of record in the case and assess them on the basis of the economic realities to determine the essential nature of the charge.’” *DeKalb*, at A24 (citing *City of Columbia*, 914 F.2d at 154); compare with *Keller*, 820 S.W.2d at 305 (holding that the court must “examine the substance of a charge” and disregard the label).

Among the considerations analyzed in *DeKalb* were: (i) who pays the charge; (ii) for whose benefit revenues are spent; and (iii) the involuntary nature of the charge.

With respect to the first issue – who pays the charge (the precise issue presented in *Keller* factor two) – the court found the charge is more akin to a tax than a fee because it “is not assessed against a narrow group of residents or businesses; instead, the assessment is levied against every single owner of developed property.” *DeKalb*, at A30.

The court next examined “for whose benefit the revenues generated by the charge are spent,” finding that where revenue is spent “to provide a benefit for the general public, then the charge is more likely to be a tax, but if the revenue is spent to provide a particularized benefit for a narrow group . . . , then the charge is more likely to be a fee.” *DeKalb*, at A31. The court found – like the trial court did here – that the stormwater system benefits the public generally and that maintaining stormwater infrastructure is not the provision of an individualized service to customers:

The purposes of the stormwater ordinance, and of the stormwater system – *i.e.*, flood prevention and the abatement of water pollution – are benefits that are enjoyed by the general public. . . . [T]hey are not individualized services provided to particular customers.

The presence of a stormwater management system, and the imposition of charges to fund that system, create reciprocal benefits and burdens for nearly all owners of developed property. . . . While each property owner is burdened by payment of the charge, and enjoys no special benefit by virtue of the connection of its own property to that system, the property owner does derive a benefit from the fact that stormwater runoff from other properties is collected and diverted by the system. That benefit, however, is one that is shared with nearly every other member of the community. In short, flood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes.

The abatement of water pollution is also an important benefit of the system, and it is likewise a public benefit that is shared with the rest of the community. The owners of developed property, who pay the stormwater management charges, receive no special benefit from clean rivers, streams, and lakes that is not also enjoyed by the general public.

The stormwater system is a local infrastructure improvement that provides benefits – *i.e.*, drainage, flood protection, and water pollution abatement – not only to the owners of developed property who pay

stormwater utility charges, but also to the owners of undeveloped property, who do not pay the charge, and to other members of the general public who may not own any property in the county at all.

Id. at A32 (internal citations and quotations omitted).

The court found the fact that the stormwater charge was not based on the quantum of services provided weighed in favor of its determination that the charge is a tax, noting that “[w]hile user fees are generally based on the quantum of services that are provided, the assessments in this case are not necessarily based on the benefits provided to each owner of developed property.” *Id.* at A35. The court distinguished between the benefits derived by the payor and the anticipated burden that a property imposes on the system:

First, the stormwater charges in this case are based not on the *benefits* derived by the payor, but by the anticipated *burden* that its property imposes on the stormwater system. However, the burden imposed on the system by the runoff from the property, and the benefits conferred upon that property by the system are not the same thing. There may be properties, for example, that impose significant burdens on the stormwater system while deriving no substantial benefit from that system (*e.g.*, a property with extensive impervious coverage that is located on the top of a hill). Similarly, there may be properties that have little impact on the stormwater system that receive substantial benefits from that system (*e.g.*, a small home on a large, otherwise undeveloped lot that is located downhill from extensive development).

Id. The fact that the stormwater charge – like MSD’s Charge here – did not depend upon the burden that any given property actually imposed on the system further caused the court to conclude that the charge is a tax:

Second, even if the benefits conferred on specific properties and the burdens those properties impose on the system were treated as if they were the same, the amount of the charge does not depend upon the burden actually imposed on the system by a particular property. Regardless of how much rain falls on a property, and how much of that rain actually leaves the property and flows into the system, the charge remains the same.

Id. The court likewise dismissed the County’s argument – similar to MSD’s argument here – that the charge is a fee because revenue generated by the charge was segregated from other revenue. *Id.* (citing *Valero Terrestrial Corp. v. Caffrey*, 205 F.3d 130, 135 (4th Cir. 2000) (“If the revenue of the special fund is used to benefit the population at large then the segregation of the revenue to a special fund is immaterial.”)).

Finally, the court noted that the charge was “an inescapable charge based solely upon the mere fact of property ownership.” *Id.* at A37. It found the fact that those subject to the charge cannot decline to use stormwater services to avoid paying it demonstrated that the charge is a tax:

Fees generally fall into two broad categories: user fees . . . and regulatory fees In both cases, the payment of the fee is voluntary. With a user fee, one can avoid the charge by not accepting the government’s

services or by not using the government's property. With a regulatory fee, one can avoid the charge by not engaging in the regulated activity.

Here, those subject to the stormwater utility charge have no choice but to pay that charge. The government never requested stormwater management services from the County, and it cannot simply decline to use those services. Instead, the government's liability arises solely from its status as the owner of developed property

Id. at A38-39. The court further noted that "[i]f it were possible to deny any particular property owner the benefits of the stormwater management system, one would expect the ordinance to provide for the termination of services due to nonpayment," but, rather, the County's ordinance provided that the County would file suit to collect on any unpaid accounts. *Id.* at A40.

In sum, the *DeKalb* court found that "the nature of a stormwater management system, which benefits the public without providing any individualized, measurable benefit to individual property owners, does not lend itself to a system of funding based on user fees." *Id.* at A36.

2. Michigan has rejected impervious-area based stormwater charges under its nearly identical Headlee Amendment.

In 1978, Michigan voters adopted the Headlee Amendment. Missouri's Hancock Amendment, adopted in 1980, was modeled after Headlee; indeed, a comparison of the two amendments illustrates that they are practically identical. *Gilroy-Sims and Assocs. v. Downtown St. Louis Bus. Dist.*, 729 S.W.2d 504 (Mo. App. E.D. 1987); compare Mo.

Const., art. X, § 22(a) *with* Mich. Const., art. IX, §31. Like Hancock, “the Headlee Amendment grew out of the spirit of tax revolt and was designed to place specific limitations on state and local revenues. [Its] ultimate purpose was to place public spending under direct control.” *Bolt v. City of Lansing*, 459 Mich. 152, 161 (Mich. 1998). As the court recognized in *Gilroy-Sims*, where a state law copies nearly verbatim a law of another state, “there is a presumption that it was enacted with the construction placed upon it by the courts of that state, unless contrary to the clear meaning of the terms of the statute.” 729 S.W.2d at 508. Thus, if this Court is inclined to look at a case from another jurisdiction, the only state case law of any possible persuasive value is that of Michigan, analyzing charges under its nearly identical Headlee Amendment.

In *Bolt v. City of Lansing*, the Michigan Supreme Court analyzed the exact same issue that is before the Court in this case – whether a political subdivision’s stormwater charge was a “user fee” or a “tax” requiring voter approval under Headlee. Similar to MSD’s Charge, the charge at issue in *Bolt* was based on an individual’s purported estimated stormwater runoff, which was calculated based on the impervious and pervious area on the property. 459 Mich. at 155-56. In concluding that the City’s stormwater charge was not a “user fee” but was instead a tax subject to the Headlee Amendment’s voter approval requirement, the *Bolt* court identified a number of “failings” in Lansing’s stormwater charge ordinance, many of which bear striking similarities to the characteristics of MSD’s Charge.

One such characteristic identified by the court was the fact that Lansing’s charge funded certain “general” stormwater benefits provided by the city to all residents. *Id.* at

165. The *Bolt* court noted that “any payment exacted by the state or its municipal subdivisions as a contribution toward the cost of maintaining governmental functions, where the special benefits derived from their performance is merged in the general benefit, is a tax.” *Id.* at 166-67. Thus, the fact that Lansing’s stormwater charge raised revenue to fund maintenance of its stormwater infrastructure and to comply with federal laws concerning water quality led the court to conclude that the charge was a tax:

The extent of any particularized benefit to property owners is considerably outweighed by the general benefit to the citizenry of Lansing as a whole in the form of enhanced environmental quality. . . . When virtually every person in a community is a “user” of a public improvement, a municipal government’s tactic of augmenting its budget by purporting to charge a “fee” for the “service” rendered should be seen for what it is: a subterfuge to evade constitutional limitations on its power to raise taxes.

The court stated that a true user fee “is not designed to confer benefits on the general public, but rather to benefit the particular person to whom it is imposed.” *Id.*

As previously discussed, 50% of MSD’s charge funds its regulatory compliance, water quality monitoring, and provision of education to District property owners concerning the mandates of the Clean Water Act – **general benefits** to all ratepayers. As the *Bolt* court observed, “[i]mproved water quality . . . and the avoidance of federal penalties for discharge violations are goals that benefit everyone in the city, not only property owners.”). The rationale applied by the *Bolt* court in deciding that the Lansing charge was a tax applies equally here.

The *Bolt* court also noted that the Lansing charge was a tax and not a user fee because – just like MSD’s Charge – it was mandatory. The court stated that “[o]ne of the distinguishing factors of a tax is that it is compulsory by law, whereas payments of user fees are only compulsory for those who use the service, have the ability to choose how much of the service to use, and whether to use it at all.” *Id.* at 167. Because “[t]he property owner has no choice whether to use the service and is unable to control the extent to which the service is used,” the *Bolt* court found that Lansing’s charge was not a true user fee. *Id.* at 167-68. The court went on to note that the fact that “property owners can control the amount of the fee they pay by building less on their property” mattered not in its analysis, holding that it did “not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property.” *Id.* at 168.

A third factor found relevant by the *Bolt* court was the fact that – just like MSD’s Stormwater Ordinances – the Lansing stormwater ordinance included a provision whereby nonpayment of the charge triggered a lien. The court stated that, while the fact that a lien may be imposed for nonpayment may not always transform an otherwise proper user fee into a tax, where the charges imposed are disproportionate to “the value of the benefit conferred, and the charge lacks an element of volition,” this fact supports a conclusion that the charge is a tax. *Id.*

Fourth, the court found that Lansing’s ordinance’s “fail[ure] to distinguish between those responsible for greater or lesser levels of runoff and exclu[sion of] street

rights of way from the properties covered by the ordinance” also supported a finding that the stormwater charge was a tax and not a user fee. *Id.* at 167. Both of these characteristics also are present in MSD’s Stormwater Ordinance. (LF1553, Fact-Find. ¶¶43-46; MSD Ordinance No. 12560, Pls’ Tr. Ex. 5, §10(2) (exempting federal, state, county and municipal highways and highway right of-ways used for roadway purposes from payment of Charge)).

And lastly, the *Bolt* court held that the fact that Lansing replaced a stormwater program that was previously funded entirely by taxes with a purported “user fee” – just as MSD has done here – also compelled its conclusion that the stormwater charge was a tax under a different label:

To conclude otherwise would permit municipalities to supplement existing revenues by redefining various government activities as “services” and enacting a myriad of “fees” for those services. To permit such a course of action would effectively abrogate the constitutional limitations on taxation and public spending imposed by the Headlee Amendment, a constitutional provision ratified by the people of this state. In fact, the imposition of mandatory “user fees” by local units of government has been characterized as one of the most frequent abridgments “of the spirit, if not the letter,” of the amendment.

Id. at 169.

In conclusion, all of the same observations articulated by the *Bolt* court apply equally here, and support a finding that MSD's Charge is simply a tax disguised as a user fee. As the *Bolt* court aptly explained,

The danger to the taxpayer of this burgeoning phenomenon [the imposition of mandatory user fees] is as clear as are its attractions to local units of government. The "mandatory user fee" has all the compulsory attributes of a tax, in that it must be paid by law without regard to the usage of a service, and becomes a tax lien of the property. However, it escapes the constitutional protections afforded voters for taxes. It can be increased any time, without limit. This is precisely the sort of abuse from which the Headlee Amendment was intended to protect taxpayers.

Id. Just as the Michigan Supreme Court found Lansing's stormwater charge to violate its Headlee Amendment, this Court should likewise affirm the trial court's holding that MSD's Charge is a tax subject to Hancock's voter-approval requirement.

3. The case law from other states cited by MSD is inapposite, including for the reason that none of those states have a constitutional provision similar to the Hancock Amendment.

MSD cites to cases from seven different states for the proposition that those states have "upheld [] impervious-based charges as fees using criteria very similar to the *Keller* factors." (MSD Br. 97.) Contrary to MSD's assertion, however, in many of these cases, the courts engaged in little or no analysis of any criteria similar to the *Keller* factors. See *City of Littleton v. State*, 855 P.2d 448, 451-52 (Colo. 1993); *Teter v. Clark County*, 704

P.2d 1171, 1174-76, 1180 (Wash. 1985); *Twietmeyer v. City of Hampton*, 497 S.E.2d 858 (Va. 1998). In fact, in *Densmore v. Jefferson County*, 813 So.2d 844 (Ala. 2001), the court upheld a stormwater charge under a state statute – the Storm Water Act – that gave governing bodies the authority to determine their financial needs to fund activities relating to the stormwater system. In reaching its conclusion, the court relied heavily on its prior decision sustaining a City’s imposition of a sewer fee against properties not connected to the sewer system on the ground that such residents received a “substantial indirect benefit” from the sewer service – a holding directly at odds with this Court’s holding in *Feese*. *Densmore*, 813 So.2d at 854. Thus, for obvious reasons, these cases are not in line with this Court’s and other appellate courts’ decisions reached under the *Keller* framework.

Second, a reading of these cases demonstrates that none are on point, particularly because none of those states have a constitutional provision similar to the Hancock Amendment. For instance, much unlike this case, in several of the cases cited by MSD, the issue before the court was whether the charges at issue were “special assessments” within the meaning of state law. *See Littleton*, 855 P.2d at 451-52 (finding that removing excess water from property and preventing flooding are services that do not confer a special benefit on a property and thus are not “special assessments” under state law); *Teter*, 704 P.2d at 1174-76, 1180 (finding that charges imposed to finance a water management department are not “special benefits” under the Washington Constitution and stating in *dicta* that such charges are “fees” because they are “primarily tools of regulation”); *City of Gainesville v. State*, 863 So.2d 138, 142-46 (Fl. 2003) (noting that it

has regularly upheld flat utility rates, and further holding that the stormwater charges are not special assessments in part because only those properties that actually use the system pay the charge, while those that have not developed property or have implemented a system to retain stormwater on site are not required to pay the charge); *cf. Bd. of Ed. of Jordan Sch. Dist. v. Sandy City Corp.*, 94 P.3d 234 (Utah 2004) (analyzing whether stormwater charge arose under state land use regulations and whether the charge was an improper “impact fee” – a payment of money imposed upon developmental activity as a condition of development approval).

Finally, contrary to MSD’s contention, several of the charges at issue in these cases were not impervious area-based at all, or at least were not based exclusively on impervious area as MSD’s Charge is here. *Littleton*, 855 P.2d at 450 (“The amount of the fee is based upon such factors as the zoning, use and state of development of the property subject to the fee.”); *Densmore*, 813 So.2d at 847 (Jefferson County imposed a \$15 flat fee on parcels with one land use classification and a \$5 flat fee on other parcels); *Twietmeyer*, 497 S.E.2d at 859 (City charged a \$2.50 flat rate to each residential property and a \$12.50 flat rate to non-residential properties).

As the cases cited by MSD are both factually and legally distinct from this case, they are wholly irrelevant to this Court’s *Keller* analysis and should not be considered.

II. The trial court did not abuse its discretion in applying a multiplier of 2.0 to the “lodestar” [Response To MSD’s Point Relied On II.A].

A. Standard of Review.

“The trial court is considered an expert at awarding attorney’s fees, and may do so at its discretion.” *Howard v. City of Kan. City*, 332 S.W.3d 772, 792 (Mo. banc 2011) (citing *Weissenbach v. Deeken*, 291 S.W.3d 361, 362 (Mo. App. E.D. 2009)). Missouri appellate courts have long applied a deferential standard to an award of fees, holding that “the court that tries a case and is acquainted with all the issues involved may fix the amount of attorneys’ fees without the aid of evidence.” *Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656-57 (Mo. banc 2009). The setting of such a fee is in the sound discretion of the trial court and should not be reversed unless the amount awarded is “arbitrarily arrived at” or is “so unreasonable as to indicate indifference and a lack of proper judicial consideration.” *Id.*

As this Court has recently held, MSD’s burden to demonstrate an abuse of discretion is high: “the complaining party must show the trial court’s decision was against the logic of the circumstances and so arbitrary and unreasonable as to shock one’s sense of justice.” *Howard*, 332 S.W.3d at 792. This standard of review applies to Points II - IV herein.

B. The trial court did not abuse its discretion in awarding a multiplier.

MSD argues in its brief that because Missouri law is silent on the availability of a lodestar multiplier, awarding a multiplier is “unprecedented” and therefore, the trial court

erred in doing so in this case.⁹ (MSD Br. 100.) But case law from the Eighth Circuit and U.S. District Court for the Eastern District of Missouri, as well as precedent from a number of other states, recognizes that a multiplier may be awarded in statutory fee-shifting and contingency fee cases. *See, e.g., Johnston v. Comerica Mortg. Corp.*, 83 F.3d 241, 244 (8th Cir. 1996) (finding that the “lodestar” may be adjusted “to reflect the individualized characteristics of a given action,” and further that this approach is appropriate in statutory fee-shifting cases because it “assures counsel undertaking socially beneficial litigation (as legislatively identified by the statutory fee shifting provision) an adequate fee irrespective of the monetary value of the final relief achieved for the class”); *see also In re Charter Communs., Inc.*, 2005 U.S. Dist. LEXIS 14772 (E.D.Mo. June 30, 2005), *12, *56 (recognizing that under the “lodestar” approach, the court awards a premium or “multiplier” to the sum of the total hours invested by attorneys multiplied by their hourly rate, which is “intended to account for, among other things, the results achieved, the quality of representation, the complexity and magnitude of the litigation, the consequent risk of nonpayment viewed as of the time of filing the suit, and the contingent nature of the expected compensation for services rendered”); *see also* trial court briefing at LF1823-26, (SLF32-37) (responding to authorities cited by

⁹ Plaintiffs are aware that this Court has accepted transfer in *Volkswagen Group of America, Inc. v. Berry* (SC92770), a case raising similar issues regarding the application of a multiplier to a lodestar, and this Court may address the issue raised in this Section in such case.

MSD). *Newberg on Class Actions* likewise has noted that applying a multiplier in a class action case should be part and parcel of the lodestar fee determination. *Newberg on Class Actions* §13:81, at 498-99 (4th ed. 2002) (“When using the lodestar method, the court has to make a number of findings in determining the attorney’s fee, including the reasonable hourly rate, the number of hours expended **and the multiplier to be used.**”) (emphasis added).

MSD’s assertion that the multiplier awarded to Plaintiffs’ counsel resulted in a “windfall” (MSD Br. 100) misunderstands the purpose of adding a multiplier to the “lodestar.” As courts have recognized, the “unadorned lodestar” simply reflects the general hourly rate for a fee-bearing case and does not properly compensate for the risk that the attorney will not receive any payment if he does not prevail; thus, the award of a multiplier compensates for the risk taken in accepting the matter on a contingent basis:

The economic rationale for fee enhancement in contingency cases has been explained as follows: “A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans.” (Posner, *Economic Analysis of Law* (4th ed. 1992) pp. 534, 567.) “A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the

second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases.” (Leubsdorf, *The Contingency Factor in Attorney Fee Awards* (1981) 90 Yale L.J. 473, 480; see also Rules Prof. Conduct, rule 4-200(B)(9) [recognizing the contingent nature of attorney representation as an appropriate component in considering whether a fee is reasonable]; ABA Model Code Prof. Responsibility, DR 2-106(b)(8) [same]; ABA Model Rules Prof. Conduct, rule 1.5(a)(8).)

Such fee enhancements are intended to compensate for the risk of loss generally in contingency cases **as a class**. (*Beasley v. Wells Fargo Bank* (1991), 235 Cal. App. 3d 1407, 1419 [1 Cal. Rptr. 2d 459].) In cases involving enforcement of constitutional rights, but little or no damages, such fee enhancements may make such cases economically feasible to competent private attorneys. (*Weeks v. Baker & McKenzie* (1998), 63 Cal. App. 4th 1128, 1172 [74 Cal. Rptr. 2d 510].) “[M]ost lawyers of this quality do seem to consider the prospects of success and the fee recoverable before adding to their crowded calendars a case in which payment is contingent.” (Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, *supra*, 90 Yale L.J., at p. 501.)

* * *

Under our precedents, the unadorned lodestar reflects the general local hourly rate for a **fee-bearing** case; it does **not** include any compensation for

contingent risk, extraordinary skill, or any other factors a trial court may consider The adjustment to the lodestar figure . . . is intended to approximate market-level compensation for such services, which typically includes a premium for the risk of nonpayment or delay in payment of attorney fees. In this case, for example, the lodestar was expressly based on the general local rate for legal services in a **noncontingent** matter, where a payment is certain regardless of outcome.

Ketchum v. Moses, 17 P.3d 735 (Cal. 2001). This same rationale articulated in *Ketchum* was articulated by the trial court in its judgment, in which it found that “if attorneys are not willing to take Hancock cases on a contingent fee basis, the effect would be that there would be no enforcement mechanism for violations.” (LF2648, ¶30.)

In the event that this Court affirms the trial court’s Hancock judgment and also finds that Plaintiffs are not entitled to a refund because MSD spent all of the money it unlawfully collected, a 2.0 multiplier on Plaintiffs’ lodestar attorneys’ fees is particularly appropriate, because Plaintiffs’ counsel has been deprived of a contingent fee from what otherwise should have been a \$90.8 million award. (*Id.*; Tr. 1161:14-1162:1.) Missouri courts and the Eighth Circuit have held that a contingent fee of 25% is appropriate in common fund class action cases. *See In re U.S. Bancorp Litig.*, 276 F.3d 1008 (8th Cir. 2002); *In re Charter Communications, Inc. Security Litigation*, No. MDL 1506, 4:02-CV-1186CAS, 2005 WL 4045741 (E.D. Mo. June 30, 2005). Thus, had Plaintiffs been awarded a refund of the \$90.8 million in Charges unlawfully collected by MSD, under Missouri law, a 25% contingent fee, or \$22.7 million, would have been an appropriate fee

award. (Tr. 1161:14-1162:1.) The trial court recognized as much in its judgment, noting that “[h]ad Defendant had the money, or resources for money (other than Plaintiffs) a refund of roughly \$90,000,000.00 would have been ordered to Plaintiffs, and a percentage fee granted to counsel.” (LF2648, ¶30.) Here, the amount awarded to Plaintiffs’ counsel is less than one quarter of what the contingency fee would have been had a refund been awarded.

Second, a multiplier is appropriate for the same reasons articulated in *Ketchum*, as the rates on which the trial court based the lodestar are Plaintiffs’ counsel’s general local hourly rates for **fee-bearing** cases. (LF2640, Fact.-Find. ¶ 11 (“[T]he rates charged by Class Counsel in this case are the rates customarily charged to clients of the firm. . . . [T]he[se] rates . . . are in line with, if not generally lower than, the rates charged by comparable firms in the St. Louis market.”) Put simply, Plaintiffs’ counsel did not alter their rates in any way to account for the risk of nonpayment or delay in payment of attorneys’ fees.

In its judgment, the trial court likewise noted that “Plaintiffs have helped approximately 480,000 rate payers” by enjoining MSD’s unlawful scheme to collect a tax that would have cost the ratepayers approximately \$300,000,000.00 by the end of MSD FY 2014. (LF2641, ¶13; LF2648, ¶30.) The fee awarded to Plaintiffs’ counsel represents a mere 1.1% of that amount. (LF1826.) Thus, as the trial court aptly found, “[w]hether the multiplier is used as the means of exceeding the hourly rate or not, the fee request herein is reasonable.” (LF2648, ¶30.) The trial court’s fee judgment should be affirmed.

III. The trial court did not abuse its discretion in declining to reduce Plaintiffs’ fee award for time devoted to recovering past damages on their successful Hancock claim [Response to MSD’s Point Relied on II.B].

MSD argues – as it did unsuccessfully in the trial court and the Court of Appeals – that Plaintiffs’ fee award should be reduced for fees associated with Plaintiffs’ prosecution of Phase II of the case because Plaintiffs’ refund claim was “unsuccessful.”¹⁰ (MSD Br. 107.) Yet the trial court rejected MSD’s argument, finding that “MSD failed to prove that any . . . reductions were appropriate.” (LF2639, ¶8.) Cases cited by MSD likewise do not support its requested fee reduction, but rather involve reductions of fee awards where, much unlike this case, plaintiffs filed numerous different claims based on different legal theories and succeeded on fewer than all claims presented at trial. (*Id.*) By contrast, Plaintiffs filed only one count in this case based on one legal theory – that MSD’s enactment of the Charge violated the Hancock Amendment – and Plaintiffs prevailed on that legal theory at trial. (LF2640-41, ¶12.) A review of several of the cases cited by MSD demonstrates that they are easily distinguishable.

For example, in *Gilroy-Sims and Associates v. Downtown St. Louis Business District*, 729 S.W.2d 504 (Mo. App. E.D. 1987), the court found that the trial court did not abuse its discretion in awarding only one quarter of the requested fees to plaintiffs because plaintiffs did not actually litigate to conclusion or prevail on **either** of the two counts in their petition. Thus, while plaintiffs’ requested fees may have been reduced by

¹⁰ This Section is moot if Plaintiffs prevail on their request for a refund.

the *Gilroy-Sims* court, plaintiffs actually were allowed to recover attorneys' fees where there was no trial and no finding in their favor by the court on either of the claims raised in their lawsuit.

In *McClain v. Papka*, 108 S.W.3d 48 (Mo. App. E.D. 2003), the trial court found in plaintiffs' favor on their breach of contract claim, but entered judgment in favor of defendants on plaintiffs' claims for fraud and negligent misrepresentation. Although plaintiffs had incurred \$18,900.00 in attorneys' fees, the court awarded plaintiffs only \$1,000.00. On appeal, the Court of Appeals affirmed the award, finding that plaintiffs were entitled to a reduced fee award because they did not succeed on two of the three claims presented at trial, which were based on different facts and legal theories from the successful breach of contract claim.

Here, unlike in *Gilroy-Sims* and *McClain*, Plaintiffs' request for a refund – past damages attributable to Plaintiffs' successful claim for MSD's Hancock Amendment violation – can hardly be said to arise from different facts or to be unrelated to Plaintiffs' counsel's work on the only legal theory advanced in this case. Put simply, Plaintiffs filed a one-count Complaint in this case for violation of the Hancock Amendment, and requested four different forms of relief on such claim: (i) declaratory judgment, (ii) past damages in the form of a refund, (iii) prospective relief in the form of an injunction, and (iv) attorneys' fees and expenses. All of the legal work performed in this case arose out of the same facts and was related to the same legal theory. *See, e.g.*, LF1794, ¶37 ("Plaintiffs' refund claim is typical of the claims of the Refund Class, in that all claims arise from the same practice or course of illegal conduct of MSD: MSD's uniform levy of

an unconstitutional tax upon ratepayers within the District. MSD . . . stipulated that the claims of Plaintiffs were typical of those of the Hancock Class – and the claims of the Refund Class arise out of the same course of conduct.”)

In fact, the parties agreed to bifurcate this case and try the damages issue in a separate phase because the issues were so intertwined that if Plaintiffs had not secured a declaratory judgment that MSD violated the Hancock Amendment, Plaintiffs’ damages claims would have been rendered moot. The fact that Plaintiffs agreed to a two-phase trial in this case in the interest of judicial economy and efficiency should not be a basis for reducing the requested fee award when all of the work performed in the case related to MSD’s Hancock Amendment violation, a legal theory on which Plaintiffs succeeded and obtained excellent results. (LF2640-41, ¶12.) In fact, both Missouri courts and the U.S. Supreme Court have held that under such circumstances, all attorneys’ fees incurred in prosecution of the case are recoverable.

In *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175, 185-87 (Mo. App. W.D. 2002), the court found:

[W]here a plaintiff’s claims are related and she has obtained excellent results overall, her counsel should recover a fully compensatory fee that should not be reduced simply because she has not prevailed on every litigated claim.

Id. (emphasis added). The court distinguished *O’Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64 (Mo. banc 1989) – one of the same cases cited by MSD in its Brief – on the basis that the *O’Brien* plaintiff brought two “distinct” claims; by contrast, the petition in *Williams*

involved several counts with a common core of facts and related legal theories, all of which arose from the same conduct. The court held that “[b]ecause all of [plaintiff’s] claims were related and intertwined, the trial court was not required to segregate attorney’s fees for each claim.” *Id.* at 186; *accord Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

The U.S. Supreme Court’s decision in *Hensley*, cited with approval in *Williams*, further elaborated on this notion, finding that instances where it is proper for a court to reduce attorneys’ fees due to a plaintiff’s lack of success on “unrelated claims” are few and far between, and that the prevailing view is to award a plaintiff all fees requested (and even an enhanced fee award where justified) where the plaintiff has “obtained excellent results” overall:

In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. . . . The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff’s claims for relief will involve a common core of facts or will be based on related legal theories. Much of

counsel's time will be devoted generally to the litigation as a whole

Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983) (emphasis added and internal citations omitted).

Here, there is no doubt that Plaintiffs obtained "excellent results." (LF2640-41, ¶12.) As the trial court found, Plaintiffs prevailed on the only legal theory asserted in

their petition, with the trial court certifying the case as a class action¹¹ and finding in Plaintiffs' favor and against MSD on all five *Keller* factors. (*Id.*) In Phase II, although the trial court did not grant Plaintiffs and the certified class past damages for amounts already collected by MSD, Plaintiffs successfully obtained prospective relief in the form of an injunction preventing MSD from billing its unlawful Charge to ratepayers in the future – relief which saved the ratepayers well over \$300,000,000.00 through 2014 alone. (*Id.*) As the U.S. Supreme Court found in *Hensley*, “it is the result that matters.” *Hensley*, 461 U.S. at 435. The result obtained in this case was a clear victory for the ratepayers. As the trial court recognized in its Phase II and Phase III Judgments, “Plaintiffs’ request for a refund is incidental to their Hancock Amendment claims,” and “[t]he primary focus of this lawsuit always has been the adjudication of whether MSD enacted the Charge in violation of the Hancock Amendment – and not the claim for monetary relief.” (LF1799-1800, ¶¶54, 55; LF2640-41, ¶12.) The fact that Plaintiffs did not prevail on just one form of relief requested at trial “is not a sufficient reason for

¹¹ MSD contends that this Court should not consider Plaintiffs’ success in certifying a refund class because such certification “was to MSD’s, not Plaintiffs’, benefit because it foreclosed any customer from seeking a refund of the Stormwater User Charge.” (MSD Br. 110.) Had MSD shared this sentiment in the trial court, one would have expected MSD to stipulate to certification of a refund class. But, quite to the contrary, MSD hotly contested this issue, which only served to further increase Plaintiffs’ fees for prosecuting this case. (*See, e.g.*, LF1742-52.)

reducing [the] fee” requested by Plaintiffs.¹² *Hensley*, 461 U.S. 435; *see also* LF2640-41, ¶12. The trial court, therefore, did not abuse its discretion in awarding Plaintiffs’ counsel a fully compensatory fee encompassing all hours spent on the litigation.

IV. The trial court did not abuse its discretion in holding that Plaintiffs are entitled to recover all out of pocket expenses incurred in prosecuting this case [Response to MSD’s Point Relied On II.C].

MSD contends that the trial court should not have allowed Plaintiffs to recover all out-of-pocket expenses incurred in this case, because it contends that (1) “costs” are not explicitly defined as including all out of pocket expenses in Article X, §23, and (2) Missouri courts have defined the term “costs” narrowly, and therefore expert fees and other litigation expenses are not encompassed in the term “costs” as it appears in the Hancock Amendment. (MSD Br. 111-12.) MSD is wrong.

Unlike other statutory fee-shifting provisions enacted by the Missouri legislature which provide only that the prevailing party may receive its “court costs and reasonable attorneys’ fees,” *see, e.g.*, the Missouri Human Rights Act, RSMo. §213.111.2, the

¹² Even if this Court were to find that Plaintiffs’ fees incurred for prosecuting the refund claim should not be allowed, the fees attributable to prosecuting such claim are not \$165,498.80 as MSD claims. (MSD Br. 109.) As the evidence demonstrated, MSD’s \$165,498.80 calculation represents all fees incurred to prosecute Phase II of this case, which includes time spent on Plaintiffs’ successful motion for certification of a refund class and prosecution of their injunction claim. (Tr. 1135:18-1137:23.)

Hancock Amendment provides that a taxpayer whose suit is sustained is entitled to receive its “costs, including reasonable attorneys’ fees.” As the legislature could have limited a taxpayer’s recovery to “court costs and attorneys’ fees” alone – like it has in other fee-shifting provisions – but instead chose to use the broader term “costs” and expressly stated that such “costs” include (but are not limited to) “reasonable attorneys’ fees,” it is obvious that the legislature intended in §23 to compensate a taxpayer fully for all of his out-of-pocket “costs” incurred in maintaining a successful suit to enforce the Hancock Amendment, including such “costs” as litigation expenses and expert fees. This Court has agreed, holding that “the language in §23 referring to costs makes clear that a successful taxpayer-plaintiff shall be reimbursed for all out-of-pocket expenses in pursuing the litigation.” *Roberts v. McNary*, 636 S.W.2d 332, 338 (Mo. banc 1982). The Court of Appeals similarly has held that litigation expenses, including expert witness fees, “stand on the same ground as attorneys’ services”; thus, where fees for one service are expressly recoverable, the same is true of the other. *Knopke v. Knopke*, 837 S.W.2d 907, 923 (Mo. App. W.D. 1992) (citing *Jesser v. Mayfair Hotel, Inc.*, 360 S.W.2d 652, 663 (Mo. banc 1962)).

Plaintiffs’ litigation expenses routinely have been held to be recoverable as “out-of-pocket expenses” incurred in prosecution of a class action. *In re Charter Communications, Inc. Security Litigation*, No. MDL 1506, 4:02-CV-1186CAS, 2005 WL 4045741 (E.D. Mo. June 30, 2005) (allowing recovery by class counsel of all out-of-pocket expenses incurred in prosecuting the case, including expenses for “experts, investigators, document reproduction, and travel related to court hearings, witness

interviews and mediation”); *In re Bank America Corp. Secs. Litig.*, 228 F. Supp. 2d 1061, 1067 (E.D. Mo. 2002) (allowing recovery of out-of-pocket costs for “expert witnesses, computerized research, court reporting services, travel expenses, copy, telephone and facsimile expenses, mediation and class notification”).

The trial court also correctly found that Plaintiffs are entitled to an award of their litigation expenses and expert fees pursuant to the Missouri Declaratory Judgment Act, §527.100, and Rule 87.09, which permit the court to “make such award of costs as may seem equitable and just.” Missouri courts have recognized that although the American Rule generally applies, where equity demands it, a defendant in a declaratory judgment action may be taxed with costs, including expert fees. *Nichols v. Bossert*, 727 S.W.2d 211 (Mo. App. E.D. 1987) (“It is . . . within the trial court’s discretion to determine whether the balance of equities requires that defendant pay plaintiff’s costs.”); *Travelers Indemnity Co. v. Bruns*, 701 S.W.2d 195 (Mo. App. E.D. 1985). This is particularly true where employment of an expert witness is necessary to prove the movant’s claim or defense. *See Travelers*, 701 S.W.2d at 196.

For instance, in *Travelers*, the plaintiff appealed from a judgment in a declaratory judgment action in which the court found that Traveler’s policy afforded coverage to the defendant, DeRoy, in a personal injury suit brought by co-defendant Bruns for injuries sustained in a car accident, and awarded Bruns her attorney’s fees and expenses. *Id.* at 196. Travelers’ petition sought a declaration of non-coverage based upon DeRoy not being a permitted user under the policy. *Id.* At trial, DeRoy and his employer both testified (in support of Travelers’ position) that DeRoy was given instructions that he was

to use the vehicle at issue only for business purposes and thus was not a permitted user under the policy. *Id.* The testimony was supported by a letter purportedly given to DeRoy prior to the accident. *Id.* As part of his defense, Defendant Bruns hired an expert witness to challenge the validity of the letter (the date purportedly had been altered), and, based on that expert witness testimony at trial and the cross-examination of DeRoy, the trial court found in favor of Bruns. *Id.* On appeal, Travelers challenged the trial court's award of expert expenses to Bruns, but the court rejected the challenge, finding that because Bruns' employment of the expert witness was necessary to her defense of Traveler's claim, the trial court's award of such expenses was permissible. *Id.*

Here, as in *Travelers*, the court found that Plaintiffs' engagement of its expert witnesses was both reasonable and necessary to the prosecution of their claims against MSD. (LF2647, ¶28.) Under *Keller*, Plaintiffs were required to analyze MSD's Charge under a 5-factor test, which necessitated expert testimony. *Id.*, ¶28; *see, e.g., Mullenix - St. Charles Props., L.P. v. City of St. Charles*, 983 S.W.2d 550, 562 (Mo. App. E.D. 1998) (expert testimony on *Keller* factors 3 and 5). Specifically, expert testimony was required to prove, among other things, that there was not a direct relationship between the quantity of impervious area on a property and the amount and rate of stormwater runoff from the property. The analyses and testimony of Plaintiffs' experts were integral in debunking the opinions of MSD's expert and the underlying assumption to the Charge. It would be manifestly unfair to Plaintiffs to not allow recovery of these expenses from MSD as costs under Section 23. The trial court recognized this (LF2647, ¶28), and

properly awarded to Plaintiffs all out-of-pocket expenses, including expert witness fees, spent on the prosecution of this case. The trial court's judgment should be affirmed.

PLAINTIFFS' APPEAL

Points Relied On

- I. The trial court erred in ruling that Plaintiffs' Hancock Amendment refund claims are barred by Mo. Rev. Stat. §139.031, because it erroneously applied and declared the law, in that, per this Court's decision in *Hazelwood v. Peterson*, §139.031 does not apply to Hancock refund actions.**

Mo. Const., art. X, §§22-23.

City of Hazelwood v. Peterson, 48 S.W.3d 36, 41 (Mo. banc 2001).

State v. Wilkinson, 861 S.W.2d 746, 749 (Mo. App. S.D. 1993).

Beatty v. MSD, 867 S.W.2d 217 (Mo. banc 1993).

- II. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's unlawful Charges, because it erroneously applied the law, in that *Ring* does not support a wholesale denial of a refund under the facts of this case, especially considering the trial court's finding that MSD continued to collect and spend the Charge pending the outcome of this litigation.**

Beatty v. MSD, 867 S.W.2d 217 (Mo. banc 1993).

Ring v. MSD, 969 S.W.2d 716, 719 (Mo. banc 1998).

- III. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's unlawful charges, because it erroneously applied the law, in that it**

recognized that all of the purposes behind §139.031 were served but still failed to grant a refund.

B & D Inv. Co. v. Schneider, 646 S.W.2d 759, 762 (Mo. banc 1983).

Adams v. Friganza, 344 S.W.3d 240, 248 (Mo. App. E.D. 2011).

- IV. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's Charges because it erroneously applied the law, in that, as this Court recognized in *Beatty*, MSD's Stormwater Ordinance expressly authorizes refunds of unlawfully collected charges.

MSD Stormwater Ordinance No. 13022.

Beatty v. MSD, 914 S.W.2d 791 (Mo. banc 1995).

Hackman v. Director of Rev., 771 S.W.2d 77, 81 (Mo. banc 1989).

- V. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's Charges because it erroneously applied the law, in that the plain language of §139.031 demonstrates it was not intended to apply to class actions.

Mo. Rev. Stat. §139.031.

I. The trial court erred in ruling that Plaintiffs’ Hancock Amendment refund claims are barred by Mo. Rev. Stat. §139.031, because it erroneously applied and declared the law in that, per this Court’s decision in *Hazelwood v. Peterson*, §139.031 does not apply to Hancock refund actions.

A. The plain language of the Hancock Amendment grants taxpayers standing to bring suit outside the protest procedure set forth in §139.031.

The trial court’s holding that a taxpayer must follow Mo. Rev. Stat. §139.031 to recover unlawfully collected taxes ignores the plain language of the Hancock Amendment, which makes clear that any taxpayer has standing to initiate a lawsuit for a violation of the Hancock Amendment, “[n]otwithstanding other provisions of this constitution or other law.” *Id.* Therefore, on the face of Hancock itself, a taxpayer need not follow the tax protest procedure set forth in §139.031 to recover on a claim for violation of the Hancock Amendment. As the trial court determined that MSD enacted its Charge in violation of the Hancock Amendment, it erroneously held that Plaintiffs are not entitled to a refund.

B. The trial court erroneously failed to apply this Court’s binding decision in *Hazelwood* to the facts of this case.

In its judgment holding that the taxpayers’ claim for a Hancock Amendment refund is barred by §139.031, the trial court erroneously failed to apply this Court’s binding decision in *City of Hazelwood v. Peterson*, 48 S.W.3d 36, 41 (Mo. banc 2001), in which this Court held that the Hancock Amendment operates as “a wholly independent

mechanism for the refund of unconstitutional taxes.” *Hazelwood* is directly on point and dispositive of this issue.

In *Hazelwood*, taxpayers (as class representatives) and the City of Hazelwood brought Hancock Amendment claims against the Florissant Valley Fire Protection District (“Fire District”), seeking a refund of the Fire District’s ten-cent property tax increase. The proposed tax increase had been submitted to the voters and approved by a margin of thirteen votes. Soon after the election, however, certain voters filed a contest to challenge its validity. **While the election contest was still pending**, the Fire District levied the tax increase. Subsequently, the election contest was sustained, a new election was held, and the voters rejected the proposed tax increase.

The trial court entered a single order certifying a refund class and requiring the Fire District to refund all excess payments made while the election contest was pending. *Id.* at 38. The trial court found that, although the Fire District had the right to treat the tax increase as approved while the election contest was pending, it did so “at its own peril” until the election contest was resolved. *Id.*

On appeal, the Fire District argued that the action was barred because the taxpayers had failed to follow the statutory protest procedure set forth in §139.031. Rejecting the Fire District’s arguments, this Court held that “**Missouri’s statutory procedures [specifically, section 139.031] do not govern the remedies found in article X of this state’s constitution.**” *Id.* at 41 (emphasis added). It further held:

The people of Missouri have reserved to themselves the constitutional right to enforce the Hancock Amendment, **which operates as a wholly independent mechanism for the refund of unconstitutional taxes.**

Id. (emphasis added).

Hazelwood represents the last statement by this Court on the precise issue presented in this case – whether a class of taxpayers may recover refunds of taxes imposed in violation of the Hancock Amendment without following the procedure set forth in §139.031. In *Hazelwood*, this Court answered this question in the affirmative. Thus, the trial court erred in failing to apply this Court’s decision in *Hazelwood*, as *Hazelwood* compels a finding that Plaintiffs are entitled to a refund.

C. The trial court erroneously relied on Judge Wolff’s concurring opinion in *Green v. Lebanon R-III School District* and certain inapposite decisions of the Court of Appeals, in denying Plaintiffs’ refund request.

In ruling that Plaintiffs’ refund claim is barred by §139.031, the trial court erroneously relied on Judge Wolff’s concurring opinion in *Green v. Lebanon R-III School District*, 13 S.W.3d 278 (Mo. banc 2000), and certain inapposite decisions of the Court of Appeals that have distinguished and failed to apply *Hazelwood*’s reasoning on the ground that – much unlike this case – taxpayers failed to file their Hancock challenges until well after the taxes were due and collected. (LF1803-04, ¶¶64, 67.) For the reasons set forth below, those decisions are factually inapposite and not controlling.

The rationale behind the Court of Appeals’ decisions failing to apply *Hazelwood* began with Judge Wolff’s concurring opinion in *Green v. Lebanon R-III School District*,

13 S.W.3d 278 (Mo. banc 2000), a case decided one year **before** *Hazelwood*. In *Green*, owners of real property in certain school districts brought suit to challenge the operating levies of the school districts for the years 1994 through 1998. *Id.* at 280. The taxpayers claimed that the schools erroneously determined the highest rate of tax they could levy without additional voter approval, resulting in a tax rate for each of the years at issue that violated provisions of §137.073 and the Hancock Amendment. *Id.* In their petition, they sought declaratory and injunctive relief, as well as a refund of all amounts unlawfully collected. *Id.* The primary issue on appeal was whether the trial court properly entered judgment in favor of the schools on their motions for summary judgment on their declaratory and injunctive relief claims. *Id.* at 282. This Court reversed the trial court's decision, reinstating the taxpayer's claims, but the majority opinion did not reach the issue of whether refunds of the excess taxes were authorized. *Id.* at 283-84.

Finding that the issue of refund eligibility was a major issue left open by the majority opinion, Judge Wolff wrote a separate concurrence to express his opinion that, on remand, refunds should not be allowed because the taxpayers failed to file their lawsuits until years after the taxes had been collected. *Id.* at 286-87. Noting that "the issue of timeliness is critical" to the taxpayer's eligibility for a refund, Judge Wolff observed:

"The 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." *Ring v. MSD*, 969 S.W.2d 716, 718 (Mo. banc 1998). The two ways are:

First, taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined. Second, if a political subdivision increases a tax in violation of article X, section 22(a), and collects that tax prior to a final, appellate, judicial opinion approving the collection of the increase without voter approval, the constitutional right established by article X, section 22(a), may be enforced only by a *timely* action to seek a refund of the amount of the constitutionally-imposed increase.

*Id.*¹³ (citing *Ring*, 969 S.W.2d at 718) (emphasis in original). Judge Wolff stated that the importance of timeliness of a suit for a refund of taxes unconstitutionally collected could not be overstated, as the taxpayers' failure to provide notice of their challenge to the schools before the taxes were collected otherwise would result in a devastating financial blow to the taxing entity:

When a school district sets its tax rate, and there is no legal action challenging the rate, taxes are collected and the district receives state aid in an amount based upon the tax rate. If, years later, a challenge to the rates is

¹³ Although the focus of his concurrence was on his opinion that timeliness of a Hancock challenge is paramount to refund eligibility, Judge Wolff also stated that, "[t]o be eligible for tax refunds, the taxpayers' lawsuits must be timely filed under the statutory scheme." *Id.* at 286. To the extent Judge Wolff was suggesting that he believed §139.031 should apply to Hancock suits for refunds, this Court *en banc* rejected this notion the following year in *Hazelwood*.

successful and refunds are required, state aid would need to be retrospectively computed. The impact of such after-the-fact adjustments would be devastating to individual school districts.

It is well to interpret and enforce the requirements of the constitution, but it is quite another matter to disrupt settled expectations years after a constitutional violation has purportedly occurred.

* * *

Finality in taxation is essential to local government. . . . A timely challenge to the rate, even though not fully adjudicated before the end of the calendar year, would at least provide notice to the school districts and allow them to prepare for what could be an otherwise crushing financial blow.

Id. at 286-87, 289. In short, the thrust of Judge Wolff’s concern was the notion that a taxpayer cannot sit quietly on his or her rights until years *after* taxes are due and collected, and then, at that late juncture, challenge the constitutionality of such taxes – without any prior notice to the taxing authority – and expect to receive a refund.

After *Green* was handed down, and without mentioning the Supreme Court’s subsequent *en banc* decision in *Hazelwood*, the Eastern District Court of Appeals adopted Judge Wolff’s concurrence as “a correct declaration of the law.” *Koehr v. Emmons* (“*Koehr I*”), 55 S.W.3d 859, 863 (Mo. App. E.D. 2001). Thereafter, the Court of Appeals applied Judge Wolff’s rationale to bar several claims filed by taxpayers who had failed to timely file suits challenging taxes under *Hancock*.

One such case is *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo. App. E.D. 2002), a case relied upon by the trial court in its finding that §139.031 is the exclusive remedy for taxpayers seeking a refund of amounts unconstitutionally imposed. (LF1804, ¶67.) Not only did *Metts* fail to mention *Hazelwood*, but *Metts* is factually inapposite to this case.

In *Metts*, two taxpayers filed a Hancock Amendment lawsuit, seeking declaratory and injunctive relief and a refund of amounts collected for a “garbage and trash” tax imposed by the City of Pine Lawn. The plaintiffs, however, did not commence their suit until after Pine Lawn had threatened to file criminal charges, a civil lawsuit, and liens against their property for failure to pay the tax. The plaintiffs also initiated their lawsuit some four and eight years **after** the allegedly unconstitutional “garbage and trash” ordinances had been enacted, and more than a year after the City enacted a different, then-current “garbage and trash” ordinance, which had been **approved by the voters**. *Id.* at 108. Finding that the plaintiffs “cannot create an alternate method of challenging the charges by merely withholding payment and raising their challenge when enforcement is attempted,” the Court of Appeals held that plaintiffs were, in fact, required to follow the statutory procedures of §139.031. *Id.* at 109.

The holding in *Metts* certainly accomplished what the court set out to do – it punished plaintiffs for sitting on their rights and asserting a constitutional challenge to a taxing scheme that had been on the books for eight years, and only after the city had threatened the taxpayers with collection action. Nevertheless, in taking a results-oriented

approach, the court, without explanation, reached a decision directly contrary to this Court's controlling decision in *Hazelwood*.

Following *Metts*, the Court of Appeals handed down similar decisions rejecting taxpayers' Hancock claims for refunds where those taxpayers failed to file suit until well after the taxes were due and collected¹⁴ – cases also cited by the trial court in support of its judgment. *See, e.g., Koehr v. Emmons*, 98 S.W.3d 580 (Mo. App. E.D. 2002) (“*Koehr II*”); *Vogt v. Emmons*, 158 S.W.3d 243 (Mo. App. E.D. 2005). Each time, the Court of Appeals (following Judge Wolff's concurring opinion in *Green*) found that an action for a refund of taxes collected in violation of Hancock must be timely. *Koehr II*, 98 S.W.3d at 584; *Vogt*, 158 S.W.3d at 249-50. In each of those cases, however, the Court of Appeals **also** went a step further – holding that (as Judge Wolff opined in *Green*) – a taxpayer bringing such an action **must comply with the statutory scheme** (i.e., §139.031 or its equivalent). *Id.* Although the “timeliness” concern articulated by Judge Wolff and followed by this Court arguably can be harmonized with this Court's later *en banc* decision in *Hazelwood*, applying §139.031 to bar the taxpayers' claim cannot. Thus, to the extent that any of these cases stand for the proposition that §139.031 applies

¹⁴ In the event that this Court is inclined to follow this rationale (despite its conflict with *Hazelwood*), at the very least, Plaintiffs and the Class are entitled to a refund of all Charges due and payable from July 18, 2008 (the date Plaintiffs filed their Petition) going forward.

to a **timely-filed** claim for a refund of taxes collected in violation of the Hancock Amendment, those decisions are at odds with *Hazelwood*.

Here, it was undisputed that Plaintiffs timely filed suit challenging MSD's Charge, as the Petition in this case was filed within months after MSD first began imposing the tax. (LF1782, ¶1; LF1784, ¶7.) Likewise, the trial court made the explicit factual finding that MSD was on notice – long before it even enacted the Stormwater Ordinances – that imposition of such charges without a public vote could be challenged by taxpayers as a violation of the Hancock Amendment. (LF1787-88, Fact.-Find. ¶¶18-19.) Therefore, this action is just like *Hazelwood* – it is a timely-filed taxpayer class action to enforce the Hancock Amendment. And just like in *Hazelwood*, here, MSD made the decision to enact its Charge without a public vote “at its own peril,” with full notice of (and ample time to prepare for) the potential consequences of a Hancock Amendment challenge. Thus, the trial court erred in failing to follow *Hazelwood* (and in relying on a concurring opinion from *Green* – particularly when, as the trial court recognized in its judgment, the considerations at issue in *Green* are not even present here). *Hazelwood* compels a finding that §139.031 does not apply to bar Plaintiffs' refund claims, and the trial court's judgment should, therefore, be reversed.

II. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's unlawful Charges, because it erroneously applied the law, in that *Ring* does not support a wholesale denial of a refund under the facts of this case, especially considering the trial court's finding that MSD continued to collect and spend the Charge pending the outcome of this litigation.

In denying Plaintiffs' refund request, the trial court held that pursuant to *Ring v. MSD*, 969 S.W.2d 716, 719 (Mo. banc 1998), it "weighed the interests and equities [sic] of MSD's customers and MSD's obligations under the environmental laws of the nation and state and finds that no refund should be awarded." (LF1804, ¶69.) It further held that Plaintiffs' refund request was denied because "any refund necessarily would have to be paid by MSD's customers to themselves." (LF1804-05, ¶70.) The trial court's judgment denying Plaintiffs' refund request is erroneous for three reasons.

First, the trial court erroneously relied on *Ring* for the proposition that it could "weigh the equities" and award no refund where the political subdivision spent all of the unlawfully collected money during the course of the lawsuit. This Court made no such ruling in *Ring*.

This Court's decision in *Ring* followed its earlier decision in *Beatty*, in which this Court held that MSD's wastewater charges imposed without a public vote violated Hancock. At issue in *Ring* was whether a Hancock refund class could be certified, and whether that class was entitled to a refund. In its opinion remanding the case back to the trial court for further consideration, this Court held that a Hancock refund class was properly certifiable so long as the requirements of Rule 52.08 were met. It further stated:

We are . . . confident that if the trial court determines that a class action is appropriate and that the plaintiffs' claims entitle them to prevail on the merits, it will fashion a remedy that will acknowledge both the taxpayers' rights under article X, section 22 (a), and the important obligations MSD bears under the environmental laws of the nation and state.

Ring, 969 S.W.2d at 719. Contrary to *Ring*, however, the remedy fashioned by the trial court here – a wholesale denial of a refund of all Charges collected by MSD, despite its finding that such Charges were imposed in violation of the Hancock Amendment – does not “acknowledge . . . the taxpayers’ rights under article X, section 22(a)” at all. Nor does *Ring* support a conclusion that a political subdivision can thwart the requirements of the Hancock Amendment, collect its unlawful charges for several years while a lawsuit is pending, and then not owe any refund to the taxpayers so long as it spends all of the unlawfully collected money before the court renders its decision.

Second, the trial court’s conclusion is inconsistent with its finding that long before this lawsuit was filed, MSD was aware that it might be sued by taxpayers for its imposition of the Charge without voter approval. (LF1787-88, Fact.-Find. ¶¶18-19.) Anticipating such a challenge, MSD had a contingency plan in place; it decided *not* to repeal the *ad valorem* tax portion of the old stormwater funding program, but rather, to reduce it to zero, so that it could “restore this funding should MSD be sued.” (LF1549-50, Fact.-Find. ¶29; LF1788, Fact.-Find. ¶19.) But for reasons known only to MSD management, after suit was filed and the contingency realized, MSD elected **not** to

restore the *ad valorem* tax pending the outcome of the litigation. (Tr. 1359:18-1360:2.) The *ad valorem* tax was not reinstated until after the judgment.

In addition to not reinstating its *ad valorem* taxes while this suit was pending, MSD likewise did not present its Charge to a public vote, place the Charge receipts in escrow, or take any action to reduce its expenses. (Tr. 1362:7-1363:15;1368:14-17; 1370:8-10.) Instead, MSD's management chose to "roll the dice" and wager on the outcome of the litigation, spend the money, and then ask the trial court to save it from its own self-inflicted predicament. (*See, e.g.*, Tr. 1363:16-1365:25;1367:6-11 (testifying that MSD even spent money collected for stormwater bills sent after the trial court ruled that its Charge was unconstitutional)).

If this Court were to affirm the trial court's ruling allowing MSD to retain the taxes it unlawfully collected, it would only incentivize political subdivisions like MSD to raise money by increasing taxes without a public vote, and then spend all of the money collected prior to a judicial determination that the taxes are unlawful. It likewise would thwart the express purpose behind the Hancock Amendment, serving only to deprive taxpayers of the very relief for which the Amendment was enacted. *Beatty v. MSD*, 867 S.W.2d 217 (Mo. banc 1993) ("As an additional bulwark against local government abuse of its power to tax, the voters amended the constitution to guarantee themselves the right to approve increases in taxes proposed by political subdivisions of the state."). The trial court recognized as much in its judgment, noting that its decision not to order a refund "seem[ed] wrong" for the reasons expressed by Plaintiff Zweig and quoted in the judgment:

If I rob a bank and I walk out with illegal money, I should have to give it back if I get caught. If they broke the constitution, if they've collected funds in an illegal manner, they should not be able to sit there and hold on to those funds.

They made the decision to do away with the, quote, tax. They made the decision to violate in my mind the Hancock [A]mendment. They made an illegal act, in my [mind], and they should not be benefited by that act. That only promotes the next person to do the same thing. There are laws to be followed. If you break the law, you pay the fine.

It's irrelevant. It's a violation of the law. If I steal from a bank and use it to pay for all my patients with lung cancers, their chemotherapy, and then I am found to be the culprit who robbed the bank, because I did public good, should I be told just keep the money, it's okay? It's not okay. That money should be returned. It was illegally taken, I believe, in an analogy that fits what's taking place here. I'm not saying what MSD is doing for the public is not providing some good. But the mechanism in which they're trying to create their revenue source in my mind is illegal. That's the issue.

(LF1803-04, ¶65.)

The trial court also denied a refund because it felt that "any refund necessarily would have to be paid by MSD's customers to themselves." (LF1804-05, ¶70.) (Actually, a refund would go to many ratepayers who were charged for the first time under MSD's Charge who do not pay the current *ad valorem* tax – namely, not-for-profit

and governmental entities). If the trial court's reasoning were to carry the day, there would never be a refund in a taxpayer case or, for that matter, in any consumer class action because the taxpayer or end consumer ultimately will pay an increase in the cost of the product or service in order to fund a damages award; that is simply the nature of class action litigation. Thus, this Court should reverse the trial court's judgment denying Plaintiffs a refund of all Charges unlawfully collected by MSD.

III. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's unlawful charges, because it erroneously applied the law, in that it recognized that all of the purposes behind §139.031 were served but still failed to grant a refund.

This Court has acknowledged that the purpose of §139.031 is as follows:

1. to provide the grounds on which the taxpayer claims illegality of the tax;
2. to allow judicial review of the taxpayer's claims; and
3. to provide notice to the taxing authority that the taxpayer claims the tax is illegal.

B & D Inv. Co. v. Schneider, 646 S.W.2d 759, 762 (Mo. banc 1983); *see also Adams v. Friganza*, 344 S.W.3d 240, 248 (Mo. App. E.D. 2011).

This action was timely filed, as Plaintiff Zweig filed this lawsuit within months after MSD first began imposing its Charge on all property owners in the District. (LF1782, Fact.-Find. ¶1; LF1784, Fact.-Find. ¶7.) In doing so, all three of the purposes underlying §139.031 have been served. First, each of the grounds on which Plaintiffs

claim the tax is unconstitutional is set forth in detail in Plaintiffs' Petition. (LF434-52.) Second, the filing of this case allowed judicial review of the constitutionality of MSD's Charge. And third, as the trial court found, by virtue of the filing of this case and its extensive litigation over its wastewater charges from 1985 through 2000, MSD was certainly on notice that taxpayers may sue MSD for its imposition of its stormwater Charge without voter approval. (LF1787-88, Fact.-Find., ¶¶18-19.)

As all of the "essential purposes" of §139.031 were served by the timely filing of this suit, the trial court erroneously applied the law in finding that Plaintiffs' refund claims are barred by §139.031.

IV. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's Charges because it erroneously applied the law, in that, as this Court recognized in *Beatty*, MSD's Stormwater Ordinance expressly authorizes refunds of unlawfully collected charges.

In ruling that Plaintiffs were not entitled to a refund, the trial court ignored the provision of MSD Stormwater Ordinance No. 13022 that expressly authorizes refunds of all Charges paid by the taxpayers. When faced with the question of whether MSD's illegally collected wastewater taxes were required to be refunded to the taxpayers, in *Beatty v. MSD*, 914 S.W.2d 791 (Mo. banc 1995), this Court similarly found that MSD's ordinance explicitly authorized a refund:

In this case, we need not balance the court's inherent power to impose such a remedy against the state's right to be immune from suit. Nor do we need to determine whether the Hancock amendment transcends the defense of

sovereign immunity. Here, MSD has adopted an ordinance that provides in part:

Any funds owed by the District to any Person for any reason may be used by the District as a set-off against any charges owed by the Person to the District, whether delinquent or not. The overpayment by any Person of any charges made by the District, shall be available and may be used by the District as a set-off of any unpaid or delinquent charges against such Person. Ord. 8657, § 12.

The trial court referred to this ordinance in its Judgement [sic] and Decree and apparently tailored its relief in accordance with it. Within the context of this lawsuit, any increased payment of sewer rates by these plaintiffs would certainly constitute “overpayment” entitling them to a credit-refund under Ord. 8657, § 12. *See Hackman v. Director of Rev.*, 771 S.W.2d 77, 81 (Mo. banc 1989) (holding that payment of a tax wholly unauthorized by law was an “overpayment”), cert. denied, 493 U.S. 1019, 110 S. Ct. 718 (1990).

Id. at 796.

Here, Section Twelve of MSD’s Ordinance No. 13022 contains substantially similar language providing for refunds of all amounts “over-billed” to, and “overpaid by,” any taxpayers:

In the event said parcel is being over-billed by the District, and the current owner of said parcel can verify such over-billing, then the District shall

refund the current owner of the parcel any amount verified to be overpaid by said owner.

(Pls' Tr. Ex. 2.) As in *Beatty*, this provision is not limited in time or scope, and explicitly authorizes refunds of all amounts over-billed and overpaid. Just as this Court in *Beatty* concluded that payment of a tax wholly unauthorized by law constitutes an "overpayment," MSD's act of billing unconstitutional Charges to taxpayers constitutes "over-billing," and all amounts collected under this illegal program were "overpaid" under MSD Ordinance No. 13022. *Id.* at 796 (citing *Hackman v. Director of Rev.*, 771 S.W.2d 77, 81 (Mo. banc 1989)). As this Court aptly held in the wake of its decision invalidating MSD's wastewater charges in *Beatty*, "[u]nder the facts of this case it would be glaringly unjust to prohibit party plaintiffs from recovering taxes paid under an ordinance that provided for credit-refunds of overpayments, after a successful challenge to the ordinance's constitutionality." *Beatty v. MSD*, 914 S.W.2d at 800 (denying MSD's motion for rehearing). Therefore, the trial court erred in failing to hold that the plain language of MSD Ordinance No. 13022 authorized a refund of all illegally collected Charges to the taxpayers who "overpaid" them.

V. The trial court erred in ruling that Plaintiffs are not entitled to a refund of MSD's Charges because it erroneously applied the law, in that the plain language of §139.031 demonstrates it was not intended to apply to class actions.

The plain language of §139.031 demonstrates that it was not intended to apply to class actions. For one, there is no explicit reference to class actions anywhere in

§139.031. Second, and perhaps more importantly, it would be unmanageable – not to mention ludicrous – to require every member of the taxpayer class to follow the procedure set forth in §139.031, which requires that a protesting taxpayer:

1. . . . [A]t the time of paying such taxes, **file with the collector a written statement** setting forth the grounds on which the protest is based.¹⁵

2. For all tax years beginning on or after January 1, 2009, any taxpayer desiring to protest any current taxes shall **make full payment** of the current tax bill **and file with the collector a written statement** setting forth the grounds on which the protest is based.

[Thereafter], every taxpayer protesting the payment of current taxes under subsection 1 or 2 of this section **shall, within ninety days after filing his protest, commence an action against the collector by filing a petition** for the recovery of the amount protested in the circuit court of the county in which the collector maintains his office.

Mo. Rev. Stat. §§139.031.1 - 139.031.3 (emphasis added).

Thus, were they mandated to comply with §139.031, each and every one of the over 400,000 individuals in the refund class would have to:

¹⁵ Effective August 28, 2010, portions of § 139.031 were amended. *See* 2010 Mo. H.B. 1316. As the amendment was not effective until after the trial court ruled that MSD's Charges were unconstitutional, the text set forth above is that of the version of §139.031 in effect during the time frame relevant to Plaintiffs' claims.

1. Pay the Charge under protest each month after receiving a bill from MSD;
2. Submit a written statement to MSD accompanying each payment, outlining every ground upon which he claims the Charge is illegal (taking care not to omit any potential basis, or risk it being deemed waived); and
3. Initiate a new lawsuit against MSD – and pay the \$97.00 filing fee (and service costs) – every 90 days.

Each of these steps would have to be taken every month by every taxpayer – all to protest the collection of an unconstitutional tax that is, on average, around \$3.00 to \$5.00 per month, per taxpayer. (LF459, ¶34.) Obviously, this onerous procedure is wholly unworkable in the class action context and, by itself, would constitute a violation of due process if imposed on each individual taxpayer. Surely it was not the intention of the General Assembly to build, on the one hand, such a colossal barrier to the ability of taxpayers to enforce the Hancock Amendment and, on the other hand, incentivize municipal corporations and political subdivisions to defy it.

As §139.031 – by its plain language – does not apply to a class action for a refund of taxes imposed in violation of Hancock, the trial court erred in denying Plaintiffs' request for a refund.

CONCLUSION

For these reasons, this Court should affirm the trial court's judgment declaring that MSD's Charge violates the Hancock Amendment and awarding Plaintiffs their attorneys' fees and litigation expenses as provided under the Hancock Amendment. This Court should reverse the trial court's judgment denying Plaintiffs and the Class a refund of all Charges unlawfully collected by MSD.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with Rule 55.03 and the requirements of Rule 84.06(b), and contains 30,380 words (excluding the cover, table of contents, table of authorities, signature block and this certificate) as determined by the software application for Microsoft Word.

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