

IN THE SUPREME COURT OF MISSOURI

APPEAL 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 the County of St. Louis
Cause No. 08SL-CC03051
Hon. Dan Dildine (by order of the Missouri Supreme Court)**

**On Transfer After Opinion from the Missouri Court of Appeals, Eastern District
Appeal No. ED96110 (Consolidated with Nos. ED96165 and ED96393)**

**SUBSTITUTE REPLY AND RESPONSE BRIEF OF APPELLANT/CROSS-
RESPONDENT METROPOLITAN ST. LOUIS SEWER DISTRICT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
INTRODUCTION TO MSD’S REPLY BRIEF	1
REPLY TO PROCEDURAL ISSUES RAISED BY PLAINTIFFS.....	11
ARGUMENT.....	17
I. Point I must be granted under the correct declaration and application of the <i>Keller</i> factors set forth in MSD’s opening brief, which Plaintiffs have not challenged.....	17
A. Factor 1 – When is the fee paid?	18
B. Factor 2 – Who pays the fee?	26
C. Factor 3 – Is the amount of the fee paid affected by the level of goods or services provided to the fee payer?	34
D. Factor 4 – Is the government providing a good or service?	56
E. Factor 5 – Has the activity historically and exclusively been provided by the government?	61
F. Although necessary only when the <i>Keller</i> factors are inconclusive, other possible factors weigh in favor of the Stormwater User Charge not being a tax.....	63
G. Plaintiffs’ reliance on the recent <i>DeKalb</i> case from the Federal Court of Claims and the <i>Bolt</i> case from Michigan is misplaced because those inapposite cases applied factors different from the <i>Keller</i> factors; instead this Court should look to cases that apply factors similar to <i>Keller</i>	65

II.	Point II regarding the Fees Judgment also should be granted because the attorneys’ fees awarded are unreasonable, and Plaintiffs’ response ignores settled law	78
A.	The award of a 2.0 multiplier has no basis in Missouri law.....	78
B.	Under settled law, attorneys’ fees incurred in Plaintiffs’ unsuccessful refund claim are not recoverable.	82
C.	The Trial Court erred in awarding Plaintiffs all of their litigation expenses.....	84
	RESPONSE TO PLAINTIFFS’ CROSS-APPEAL	87
	INTRODUCTION TO MSD’S RESPONSE	87
	SUPPLEMENTAL STATEMENT OF FACTS.....	87
	RESPONSE ARGUMENT	90
I.	The Trial Court correctly held that statutory tax protest requirements must be met to obtain a refund. [Response to Cross-Appeal Point I]	90
II.	Plaintiffs are not entitled to a refund of the amounts paid under the stormwater user charge because Plaintiffs failed to follow the statutory requirements for tax refunds. [Response to Cross-Appeal Points III and V]	95
III.	The Trial Court properly weighed the equities in denying the refund request. [Response to Cross-Appeal Point II]	99

IV.	Plaintiffs did not meet their burden of proving their entitlement to a refund, and Ordinance 13022 does not authorize a refund. [Response to Cross-Appeal Point IV].....	104
V.	The refund judgment can be affirmed on the alternate ground that <i>Ring</i> should be revisited and overruled by this Court. [Alternate Response to Cross-Appeal Point I]	106
CONCLUSION		111
CERTIFICATE OF SERVICE		113
CERTIFICATE REQUIRED BY RULE 84.06(C)		113

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Arbor Investment Co. v. City of Hermann,</i>	
341 S.W.3d 673 (Mo.banc 2011)	<i>passim</i>
<i>Ashworth v. City of Moberly,</i>	
53 S.W.3d 564 (Mo.App.W.D. 2001)	20, 27, 56, 58
<i>Beatty v. Metro. St. Louis Sewer Dist.,</i>	
No. 62744, 1993 WL 199155 (Mo.App.E.D. June 15, 1993)	12
<i>Beatty v. Metro. St. Louis Sewer Dist.,</i>	
867 S.W.2d 217 (Mo.banc 1993)(<i>Beatty II</i>).....	<i>passim</i>
<i>Beatty v. Metro. St. Louis Sewer Dist.,</i>	
914 S.W.2d 791 (Mo.banc 1995)(<i>Beatty III</i>)	105, 109
<i>Bernard McMenamy Contractors, Inc. v. Mo. State Hwy. Comm’n,</i>	
582 S.W.2d 305 (Mo.App.W.D. 1979)	41
<i>Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.,</i>	
94 P.3d 234 (Utah 2004)	77
<i>Bolt v. City of Lansing,</i>	
587 N.W.2d 264 (Mich. 1998),	70-73
<i>Bldg. Owners & Managers Ass’n v. City of Kansas City,</i>	
231 S.W.3d 208 (Mo.App.W.D. 2007)	23, 57-58
<i>City of Burlington v. Dague,</i>	
505 U.S. 557 (1992)	80

<u>Cases</u>	<u>Page(s)</u>
<i>City of Gainesville v. State of Florida,</i> 863 So.2d 138 (Fla. 2003)	75
<i>City of Gainesville v. State of Florida,</i> 778 So.2d 519 (Fla.App. 2001)	75-76
<i>City of Hazelwood v. Peterson,</i> 48 S.W.3d 36 (Mo.banc 2001)	93, 94, 101
<i>Cnty. Fed. Sav. & Loan Ass'n v. Dir. of Revenue,</i> 752 S.W.2d 794 (Mo.banc 1988)	96
<i>DeKalb County v. United States,</i> No. 1:11-cv-761-LJB (Fed.Cl. Jan. 28, 2013).....	66-70
<i>Feese v. City of Lake Ozark,</i> 893 S.W.2d 810 (Mo.banc 1995)	1, 28, 55
<i>Ford Motor Co. v. City of Hazelwood,</i> 155 S.W.3d 795 (Mo.App.E.D. 2005).....	94, 96
<i>Fort Zumwalt Sch. Dist. v. State,</i> 896 S.W.2d 918 (Mo.banc 1995)	91, 92, 100, 103, 106, 108, 109, 110
<i>Gray v. White,</i> 26 S.W.3d 806 (Mo.App.E.D. 1999).....	14
<i>Green v. Lebanon R-III Sch. Dist.,</i> 13 S.W.3d 278 (Mo.banc 2000)(<i>Green I</i>)	91-92, 94, 95, 96

<u>Cases</u>	<u>Page(s)</u>
<i>Green v. Lebanon R-III Sch. Dist.</i> ,	
87 S.W.3d 365 (Mo.App.S.D. 2002)(<i>Green II</i>)	92
<i>Hensley v. Eckerhart</i> ,	
461 U.S. 424 (1983)	83
<i>Jenkins by Agyei v. State of Mo.</i> ,	
962 F.2d 762 (8th Cir. 1992)	99
<i>Jesser v. Mayfair Hotel, Inc.</i> ,	
360 S.W.2d 652 (Mo.banc 1962)	85
<i>Keller v. Marion County Ambulance Dist.</i> ,	
820 S.W.2d 301 (Mo.banc 1991)	<i>passim</i>
<i>Ketchum v. Moses</i> ,	
17 P.3d 735 (Cal. 2001)	80
<i>Knopke v. Knopke</i> ,	
837 S.W.2d 907 (Mo.App.W.D. 1992)	85
<i>Koehr v. Emmons</i> ,	
55 S.W.3d 859 (Mo.App.E.D. 2001)(<i>Koehr I</i>)	92, 94, 96, 99, 106
<i>Koehr v. Emmons</i> ,	
98 S.W.3d 580 (Mo.App.E.D. 2002)(<i>Koehr II</i>)	92-93, 94, 96
<i>Lane v. Lensmeyer</i> ,	
158 S.W.3d 218 (Mo.banc 2005)	97, 98

<u>Cases</u>	<u>Page(s)</u>
<i>Larson v. City of Sullivan,</i>	
92 S.W.3d 128 (Mo.App.E.D. 2002).....	27, 36, 56
<i>Lett v. City of St. Louis,</i>	
948 S.W.2d 614 (Mo.App.E.D. 1996).....	95
<i>Maine v. Dep’t of Navy,</i>	
973 F.2d 1007 (1st Cir. 1992)	69
<i>Massachusetts v. United States,</i>	
435 U.S. 444 (1978)	69
<i>Massman Constr. Co. v. Mo. Hwy. & Transp. Comm’n,</i>	
914 S.W.2d 801 (Mo.banc 1996)	15
<i>McLeod v. Columbia County,</i>	
599 S.E.2d 152 (Ga. 2004)	67, 76, 77
<i>Metts v. City of Pine Lawn,</i>	
84 S.W.3d 106 (Mo.App.E.D. 2002).....	92, 96
<i>Mo. Growth Ass’n v. Metro. St. Louis Sewer Dist.,</i>	
941 S.W.2d 615 (Mo.App.E.D. 1997).....	<i>passim</i>
<i>Mullenix-St. Charles Props., L.P. v. City of St. Charles,</i>	
983 S.W.2d 550 (Mo.App.E.D. 1998).....	<i>passim</i>
<i>Nichols v. Bossert,</i>	
727 S.W.2d 211 (Mo.App.E.D. 1987).....	86

<u>Cases</u>	<u>Page(s)</u>
<i>Nolte v. Wittmaier,</i>	
977 S.W.2d 52 (Mo.App.E.D. 1998).....	15
<i>Pennsylvania v. Del. Valley Citizens' Council,</i>	
483 U.S. 711 (1987)(<i>Delaware Valley II</i>).....	81
<i>Polish Roman Catholic St. Stanislaus Parish v. Hettenbach,</i>	
303 S.W.3d 591 (Mo.App.E.D. 2010).....	78
<i>Quaker Oats Co. v. Stanton,</i>	
96 S.W.3d 133 (Mo.App.W.D. 2003)	97
<i>Richard's Original Long Creek Lodge v. Seymour Inn, Inc.,</i>	
791 S.W.2d 944 (Mo.App.S.D. 1990).....	40-41
<i>Ring v. Metro. St. Louis Sewer Dist.,</i>	
969 S.W.2d 716 (Mo.banc 1998)	91, 100, 108-09, 110
<i>Roberts v. McNary,</i>	
636 S.W.2d 332 (Mo.banc 1982)	85
<i>Sarasota County v. Sarasota Church of Christ, Inc.,</i>	
667 So.2d 180 (Fla. 1995)	33-34
<i>S.M.B. by W.K.B. v. A.T.W.,</i>	
810 S.W.2d 601 (Mo.App.E.D. 1991).....	82
<i>In re Marriage of Smith,</i>	
283 S.W.3d 271 (Mo.App.E.D. 2009).....	14

<u>Cases</u>	<u>Page(s)</u>
<i>Taylor v. State,</i>	
247 S.W.3d 546 (Mo.banc 2008)	91, 92, 94, 100, 109, 110
<i>Transcont'l Holding Ltd. v. First Banks, Inc.,</i>	
299 S.W.3d 629 (Mo.App.E.D. 2009).....	12
<i>Travelers Indemnity Co. v. Bruns,</i>	
701 S.W.2d 195 (Mo.App.E.D. 1985).....	86
<i>In re Tri-County Levee Dist.,</i>	
42 S.W.3d 779 (Mo.App.E.D. 2001).....	25-26
<i>Tukwila School District v. City of Tukwila,</i>	
167 P.3d 1167 (Wash.App. 2007)	73-75
<i>United States v. City of Renton,</i>	
No. C11-1156JLR, 2012 WL 1903429 (W.D.Wash. May 25, 2012)	68-69
<i>Vogt v. Emmons,</i>	
158 S.W.3d 243 (Mo.App.E.D. 2005).....	96
<i>Williams v. Finance Plaza, Inc.,</i>	
78 S.W.3d 175 (Mo.App.W.D. 2002)	83
<u>Statutes</u>	
R.S.Mo. §137.073.....	90, 92
R.S.Mo. §139.031.....	<i>passim</i>
R.S.Mo. §213.111.....	84
R.S.Mo. §245.180.....	26

<u>Constitution</u>	<u>Page(s)</u>
Mo.CONST. art. X, §18	91
Mo.CONST. art. X, §22	1, 91
Mo.CONST. art. X, §23	79, 85, 90-91
Mo.CONST. art. X, §24	108-09
 <u>Rules</u>	
Mo.R.Civ.P. 52.08	99
Mo.R.Civ.P. 84.04	12, 13, 14, 15, 16, 87
 <u>Other</u>	
WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002).....	79, 109

INTRODUCTION TO MSD'S REPLY BRIEF

Boiled down to their essence, the arguments in Plaintiffs' response brief ("Pls.Br.") are that MSD's Stormwater User Charge violates Section 22 of the Hancock Amendment because the Charge apportions costs of service to customers, because MSD's services have ancillary general benefits to the public, because MSD purportedly has no accountability, because the Charge does not meet a host of other new non-*Keller* factors that Plaintiffs propose, and because their flood of half-truths and irrelevancies was commemorated in the Trial Court's Judgment that Plaintiffs drafted and the Trial Court adopted virtually wholesale. (Pls.Br. at 15-19.)

What their brief fails to do is actually respond to MSD's opening brief ("MSD Br."). Confronted with MSD's analysis of the Trial Court's and Plaintiffs' repeated misstatements of the law, *their* misapplications of the law to the facts, *their* reliance on legally immaterial facts, and *their* mischaracterizations of the facts, Plaintiffs fail to explain why MSD's analysis is wrong or why Plaintiffs' analysis is right. Instead, Plaintiffs continue to deliberately make the same inaccurate, irrelevant, and misleading assertions, to improperly intermingle the *Keller* factors, and to parrot the Judgment that they drafted as if MSD has never argued otherwise. Several examples illustrate Plaintiffs' shortcomings laid bare by MSD's opening brief:

- MSD exposed the Trial Court's and Plaintiffs' erroneous reliance on *Feese v. City of Lake Ozark*, 893 S.W.2d 810 (Mo.banc 1995), for the proposition that services being a "general benefit" weighed in favor of the Stormwater User Charge's being a tax, because this "general benefit" analysis had absolutely

nothing do with the Hancock issues in *Feese*, but was related to an issue regarding ballot language. (MSD Br. 93-94.) On a more basic level, MSD showed how “benefits” is an improper and misplaced consideration under Factor 2 or any *Keller* factor. (*Id.* at 53-58.) Undeterred, and without any response to MSD’s point, Plaintiffs put forward this misplaced and invented consideration, arguing (on at least three of the five *Keller* factors) that the Charge violated Hancock because it “benefits” the public or all people the same, and again mischaracterizing the discussion of “benefits” in *Feese* as being related to the Hancock challenge, which it clearly was not. (Pls.Br. 15-16, 27, 45-46, 63-64, 69.) Indeed, by repeatedly raising this “benefits” analysis, Plaintiffs have based much of their argument in support of affirming the Trial Court’s Judgment on a faulty consideration not found in any application of the *Keller* factors.

- Plaintiffs disingenuously contend that MSD created the additional runoff concept to describe its stormwater services only for trial in order to countermand Plaintiffs’ experts’ opinions. (Pls.Br. 58-59, 61.) But the very Ordinance challenged by Plaintiffs disproves their contention. The definition of “Served” and “Service” in Ordinance 12560 adopted in December 2007 – 8 months before the lawsuit was filed and almost two-and-a-half years before trial – expressly references runoff due to the addition of impervious area “beyond the amount which would occur if such property were undeveloped and in its natural state.” (Def.Ex.B at 3,5(A100,102).) Plaintiffs and the Courts below have never addressed this issue and argument.

- MSD went to great lengths to explain Plaintiffs’ construction of their “total runoff” strawman, how Plaintiffs’ experts compared the wrong numbers (looking at total, not additional, runoff) and used the wrong standard in finding “little, if any relationship” between impervious area and runoff, how it was error for the Trial Court to adopt Plaintiffs’ new standard, and how a direct relationship is met when the right numbers are considered – the additional runoff caused by adding impervious area, which drives the costs of MSD’s stormwater services. (MSD Br. 64-66, 71-77.) In response, Plaintiffs now contend that the premise that adding impervious area increases runoff is “false” (contradicting their experts’ testimony in the process), accuse MSD of improperly using arithmetic to prove its point, and continue to disingenuously contend that MSD never challenged their experts’ conclusions.¹ (Pls.Br. 16.)

- In the clearest terms possible, MSD spelled out what its Rules and Regulations actually require. New development must maintain predevelopment conditions for water *quality* by installing BMPs (Best Management Practices), but

¹ In its opening brief, MSD candidly stated it did not quibble with the calculations performed by Plaintiffs’ experts or disagree with their uncontroversial conclusion that the larger the piece of land the more total runoff there is. MSD did, however, go to great lengths both below and in its opening brief in showing the insignificance of many of their experts’ calculations and the errors in their experts’ contrived standard on Factor 3. (MSD Br. 71-77.) Plaintiffs do not respond.

these BMPs do not reduce the *quantity* of the new stormwater runoff from the development, which drives the costs of services. (MSD Br. 87-88.) Indeed, these BMPs are inundated and ineffectual in the large storms that the stormwater system is designed, built, and maintained to handle. (*Id.*) Thus, Plaintiffs’ contention that “there is no ‘additional’ runoff once property is developed” (Pls.Br. 16) is without a basis in fact, and Plaintiffs know it.

- MSD brought to light Plaintiffs’ and the Trial Court’s misconceptions about how utility rates work and how, if their standard was adopted, no utility would be able to have a charge based on a rate. (MSD Br. 77-78.) According to Plaintiffs and the Trial Court, it is improper for a utility to consider its costs of service in setting a rate, to use a standardized measure of service, and to apply that standard to each customer. (Pls.Br. 17.) What Plaintiffs derisively label “an expedient way to apportion costs” and “simply an accounting function” is the way that any utility (like MSD) can and should charge for its services – determining what the cost of services are and then fairly distributing those costs to its customers through the use of a common metric. And, indeed, Plaintiffs themselves elsewhere recognize the propriety of using a rate – “utilities may not be able to precisely quantify the services they provide to a ratepayer.” (Pls.Br. 62.)

- MSD detailed the reasons why the Stormwater User Charge was adopted – inadequate stormwater services, increased burdens of state and federal environmental laws, and a directive from the Rate Commission. (MSD Br. 9-12.)

MSD further explained its structure (trustees appointed by the elected Mayor of St. Louis City and the elected St. Louis County Executive) and how the voter-approved Rate Commission took six months to review the Stormwater User Charge and thus provided accountability and a check on the possibility that MSD would improperly raise its Charge. (MSD Br. 13-14, 98.) MSD has likewise explained that its Charge is based on the costs of services, that all revenue is spent on providing only stormwater services, and that the amount of the Charge itself was reasonable (with which one of Plaintiffs' experts concurred). (*Id.* 12, 16, 17, 77-78, 84.) Yet Plaintiffs continue to complain about how MSD has no accountability, how the Stormwater User Charge was "unilaterally" imposed, and how there is no "check" on MSD's "taxing and spending power," and then add some hyperbole about how MSD could use its "unbridled power" to increase its Charge with impunity. (Pls.Br. 18.)

The reality is much less exciting than Plaintiffs' portrayal of a governmental entity run amok and conspiring to aggrandize itself with the money of the citizenry. Any MSD charge, according to its Charter and even the Hancock Amendment,² must be related to the costs of services provided, and it cannot be

² It should be noted that, in *Arbor*, the amount of the user charges exceeded the actual costs of providing the services, but this Court held that this was not a ground for finding that the charges violated Hancock and found that the recourse was to apply political

disputed that the Stormwater User Charge was so related here. (MSD Br. 11,n.2.) Moreover, the independent Rate Commission recommends a rate or charge (it rejected part of MSD's original Charge proposal here) that can be rejected by MSD's Board only on the same five specific criteria that the Commission uses to analyze the Charge. (*Id.*) Plaintiffs also conveniently ignore that MSD chose not to raise the Charge from \$0.14 to \$0.17 per 100 ft² in 2010. (Def.Ex.F; Tr.703:4-22.)

- Despite being taken to task by the Court of Appeals (App.E.D.Op. 3-4,10(A79-80,86)) and by MSD for doing so (*see* MSD Br. 45-46, 87-88), Plaintiffs (like the Trial Court) continue to take matters that should be considered, if at all, in *Keller* Factor 3 and use these matters in support of other factors. (*See, e.g.,* Pls.Br. 45-46 (discussion of "general benefits" in Factor 2), 63-64 (same in Factor 3), 68-69 (same in Factor 4).) Not only do Plaintiffs continue this improper conflation of factors, but they now submit *five new factors* for consideration (Pls.Br. 18) that are not found in *Keller* and are contrary to this Court's reaffirmance of the *Keller* factors in *Arbor*.

In addition to their continued reliance on the same improper, inaccurate, irrelevant, and misleading statements and arguments already exposed by MSD in its opening brief, Plaintiffs resort to name-calling, likening MSD to a criminal (bank robber) or a gambler.

pressure on those setting the rates. *Arbor Investment Co. v. City of Hermann*, 341 S.W.3d 673,687 (Mo.banc 2011). That is not the case here.

(Pls.Br. 116-18.) MSD is neither a criminal nor a gambler. Rather, after 15 years of planning and consideration, MSD proposed the Stormwater User Charge to the Rate Commission, which recommended the Charge to fund MSD stormwater services in lieu of the unfair and inadequate system of ad valorem taxes and the \$0.24/month flat charge. (MSD Br.8-10;Tr.667:19-668:22,690:11-700:4.) And the Stormwater User Charge was a success – it provided a fair and reasonable way to fund an increased level of stormwater services to MSD’s customers. (Tr.348:15-350:23,852:19-853:13,1001:23-1002:19.) It was also accepted by MSD’s customers. (Tr.856:10-19,977:21-23.) MSD is hardly a criminal enterprise, and Plaintiffs’ rhetoric has no place in this appeal.

Similarly, Plaintiffs now label the Stormwater User Charge a “causer fee” (whatever Plaintiffs mean by this new, ill-defined label is unclear) and contend that Hancock does not recognize an exception for “causer fees.” (Pls.Br. 15.) Yet this is the type of superficial labeling that *Keller* strove to eliminate from the Hancock calculus (the name of a fee or charge is not outcome determinative). In any event, there are a host of services that have passed muster under *Keller* that deal with demand (the cause) rather than a tangible “use.” For example, wastewater services deal with the demand caused by customers’ production of wastewater, and trash collection services relate to the demand caused by households and businesses generating garbage. So “cause” and “use” are really two sides of the same coin, and a “causer” fee is entirely appropriate under *Keller* and its progeny, notwithstanding Plaintiffs’ turn of phrase.

Left untouched by the flood of Plaintiffs’ improper analysis, misleading and irrelevant statements, and hyperbole is the straightforward, irrefutable analysis of MSD’s

opening brief. MSD's analysis is based on the actual factors adopted by this Court in *Keller* and reaffirmed in *Arbor*, not on snippets from inapposite cases or misstatements and misapplications of the law.

Factor 1 – When Is the Fee Paid? – The Trial Court erred by focusing only on the timing and regularity of the Stormwater User Charge, while failing to consider whether the Charge was due after the provision of the stormwater services and instead adopting the improper “accept, reject, or limit” standard pushed by Plaintiffs. Under the correct legal analysis, there simply cannot be any legitimate dispute that the Charge is paid after MSD's ongoing services are provided in compliance with MSD's Ordinance (identical to the wastewater ordinance approved in *Missouri Growth*). Moreover, the record firmly established that the Charge was billed after the provision of services, as demonstrated, for example, by the fact that when a customer adds or removes impervious area, MSD accordingly increases or decreases the Charge after the date of the change to the property. (MSD Br. 39-41.)

Factor 2 – Who Pays the Fee? – How the Trial Court (and Court of Appeals) found that the Stormwater User Charge was blanket-billed to all residents within MSD's service area remains a mystery. The Trial Court (and Court of Appeals) adopted a self-fulfilling standard that considered only those customers who paid the Charge (rather than all residents), thus assuring a finding of blanket-billing. The Trial Court's error was compounded by its “presumption” that MSD did not bill some 38,000 properties only in an attempt to comply with Hancock, and its misguided conclusion that Factor 2 therefore weighed in Plaintiffs' favor. The more reasoned approach, founded on the settled law

and undisputed facts, is that the Charge is not blanket-billed because 38,000 unimproved properties are not billed the Charge because they have no additional runoff that causes the need for services and because all those who receive services, including non-profit and governmental entities, are billed.

Factor 3 – Is the Amount of the Fee Paid Affected by the Level of Goods or Services Provided to the Fee Payer? – The Trial Court misstated the law and misapplied the facts to the law by embracing the strawman theory constructed by Plaintiffs’ experts (lack of relation between impervious area and *total* runoff) and by misconceiving the nature of MSD’s services and the concept of utility rates. Indeed, if the Trial Court’s and Plaintiffs’ new standard for Factor 3 is affirmed, uncertainty will seep back into what was a settled area of the law after this Court’s decision in *Arbor* less than two years ago. The correct and better approach is based on the actual holdings and analysis in the cases. If a user charge is individualized and variable, rather than averaged and flat, and if the measure of the service relates to the level of services, then the user charge passes muster under Factor 3.

Here, the Stormwater User Charge is individualized and does vary because MSD directly measures each and every customer’s impervious area and bases the Charge on the measured area. So X with 4,000 square feet of impervious area pays more (twice as much) than Y who has 2,000 square feet of impervious area. MSD used impervious area to measure stormwater services because it is the most accurate quantification of stormwater services. And it is practical. The \$5,000-\$10,000 detailed academic study of each property performed by Plaintiffs’ experts not only does not comport with the

realities of how MSD actually operates; it would cost millions, if not *billions*, of dollars to perform, with the result being that the vast majority of the customer's bill would go towards paying for the implementation of the Charge, not for stormwater services. This is the very unnecessary expansion of government that would run afoul of Hancock. Yet it is what Plaintiffs contend is required.

Factor 4 – Is the Government Providing a Good or Service? – No reasoned analysis of this factor can result in finding that MSD does not provide stormwater services. The Trial Court's adoption of an unfounded and legally deficient standard – that a new service must be provided – is contrary to the settled law. And its finding that MSD does not perform services is contrary to the testimony of *every* witness, including Plaintiffs' experts. MSD provides stormwater services, the revenues from the Charge are used only to fund stormwater services, and the Charge provides for new and better stormwater services such as much-needed infrastructure improvement and erosion abatement. There is neither evidence nor law to support a finding in Plaintiffs' favor on Factor 4.³

Factor 5 – Has the Activity Historically and Exclusively Been Provided by the Government? – There is no support in the caselaw for the Trial Court's conclusion that, in order to meet this factor, there must be another entity that provides the exact same

³ This finding, unwittingly adopted by the Trial Court from Plaintiffs' proposed findings, shows how flawed the Trial Court's findings and analysis were. Even the Court of Appeals found "[t]his factor is easily resolved in favor of MSD." (App.E.D.Op. 9(A85).)

stormwater services and charges customers for it. As set out in *Arbor*, there must be others that provide the “kind of services” that MSD provides. Indeed, there are entities providing the same “kind of services” provided by MSD. Individuals, like two of the named plaintiffs, take measures to abate erosion. Subdivisions and other developments build and maintain detention basins or even maintain their own stormwater systems. And commercial and industrial entities have their own stormwater permits and provide management services on site, the same “kind” of services that MSD provides. Therefore, at a minimum, this factor is inconclusive, if not in MSD’s favor.

Other Considerations – *Arbor* instructs that other factors need only be considered in a close case. Nonetheless, the Trial Court erred by creating a “characteristics of a tax” and “general benefits” analysis that focuses on legally irrelevant considerations not previously adopted by any other Hancock case. Plaintiffs compound this error by continuing to imbue this “general benefits” analysis across several *Keller* factors and by creating other improper considerations where the *Keller* factors do not favor their position. This attempt to graft irrelevant considerations onto the clear factors set out in *Keller* and reaffirmed in *Arbor* must be rejected.

REPLY TO PROCEDURAL ISSUES RAISED BY PLAINTIFFS

Attempting to avoid a review on the merits, Plaintiffs dedicate 5 pages (Pls.Br. 19-24) to the predictable respondent’s contentions attacking MSD’s standard of review and Statement of Facts. This collateral attack must be rejected because MSD’s opening brief fully stated and accurately applied the standard of review (which ironically Plaintiffs fail to do), offered a fair and concise Statement of Facts, and otherwise complied with

Mo.R.Civ.P. 84.04. Any contention that MSD's opening brief prevents a review on the merits in this important appeal is utterly meritless.

A. MSD Has Stated and Applied the Correct Standard of Review.

MSD quoted the full *Murphy v. Carron* standard of review (MSD Br. 22-23), and Plaintiffs do not dispute that *Murphy* is the correct standard of review. Indeed, MSD's opening brief stays well within the confines of *Murphy*. See *Beatty v. Metro. St. Louis Sewer Dist.*, No. 62744, 1993 WL 199155, at *7 (Mo.App.E.D. June 15, 1993)(noting that the court was within the standard of review when it "examined the entirety of the trial court's findings and the evidence before the court in making its determination," rather than "extricat[ing] isolated factual determinations from the trial court's extensive findings of fact to support its legal conclusion"). Nonetheless, Plaintiffs argue that MSD misstates and misapplies the standard of review.

First, Plaintiffs' attack on MSD's standard of review and, in fact, their entire response brief, fail to acknowledge the two *Murphy* grounds relating to the erroneous declaration and application of the law. Nor do Plaintiffs acknowledge that the Trial Court's declarations and applications of the law are entitled to no deference. See *Transcont'l Holding Ltd. v. First Banks, Inc.*, 299 S.W.3d 629,643 (Mo.App.E.D. 2009); *Mullenix-St. Charles Props., L.P. v. City of St. Charles*, 983 S.W.2d 550,554-55 (Mo.App.E.D. 1998). Throughout its opening brief, MSD expressly stated when the Trial Court declared the law improperly or misapplied the law to facts (which resulted in facts being found that have no legal relevance). In contrast, Plaintiffs completely ignore these

two grounds for reversal in their brief, instead exclusively focusing on the “no substantial evidence” and “against the weight of evidence” grounds set out by *Murphy*.

Second, when MSD challenged a factual finding of the Trial Court, it expressly stated it was doing so because of lack of evidentiary support. Moreover, much of the evidence presented was uncontroverted; i.e., the parties offered different facts related to their differing interpretation of the *Keller* factors. When evidence is uncontroverted, this Court has held that no deference is due to the court below. (*See* authorities cited at MSD Br. 23.) Plaintiffs simply ignore these authorities and argue that uncontested evidence means only stipulated facts. But Plaintiffs’ cases – two drivers’ license revocation cases (*White* and *Guhr*) and a case that merely held there was no deference due to factual findings based on stipulated facts (*Schroeder*) – did not define uncontested evidence to mean *only* stipulated facts. (Pls.Br. 20-21.) And while Plaintiffs would like to believe that the Trial Court’s Judgment made credibility findings, they can point to no such factual finding in the Judgment they drafted. MSD is not asking this Court to re-try the case, but it must examine the proper declaration and application of the law and must look at the evidence in the record that bears on the issues related to the correct *Keller* analysis.

Finally, Plaintiffs contend that the Trial Court rejected several of MSD’s arguments, but they fail to cite to the Judgment or the record to support these contentions. (*See, e.g.*, Pls.Br. 40.) Similarly, they make statements that simply have no citation to the record at all, because there is no support for the statements. (*See, e.g.*, Pls.Br. 47.) Moreover, rather than cite to record evidence, Plaintiffs repeatedly point to the Judgment they wrote, which, in many instances, itself has no citation to the trial record. Thus, it is

Plaintiffs who have failed to comply with the briefing requirements of Mo.R.Civ.P. 84.04(i) by failing to support their factual statements and legal arguments with appropriate references to the record.

B. MSD's Statement of Facts Does Not Violate Rule 84.04.

Rule 84.04(c) is “to be liberally construed to promote justice and minimize the number of cases disposed of on technical grounds,” and dismissal is not warranted “under Rule 84.04 unless the deficiency impedes disposition on the merits.” *Gray v. White*, 26 S.W.3d 806,815-16 (Mo.App.E.D. 1999). Indeed, as recognized by Plaintiffs’ cases (Pls.Br. 20-21), only blatant and egregious violations of the Rule rendering impossible a review by the Court warrant dismissal.⁴ MSD’s 18-page statement of facts fully meets the Rule’s requirements. It is a concise, fair review of the facts and evidence with each statement supported by citations to the record. It provides a summary of the procedural posture of a three-phase case, explains the Stormwater User Charge and the Ordinance at issue, summarizes the testimony of each witness at trial, and states what the Trial Court held in its judgments (which were attached in the Appendix). Moreover, MSD noted that

⁴ See, e.g., *In re Marriage of Smith*, 283 S.W.3d 271,273 (Mo.App.E.D. 2009)(statement of facts (i) was not concise, (ii) contained extensive discussion of irrelevant matters including pretrial conduct, (iii) was argumentative, (iv) lacked citations to the record and referred to matters not in the record, and (v) “omit[ted], minimize[d], or mischaracterize[d] relevant facts supporting the trial court’s findings”). MSD’s statement of facts contains no such conduct.

relevant facts would be discussed in the Argument section of its Brief (MSD Br. 6,n.1), and, in its Argument, MSD fairly and accurately described the Trial Court's findings.

Plaintiffs make the blanket accusation that the facts violate Rule 84.04 without any specific explanation of how MSD's facts are self-serving, wrong, or otherwise deficient. (Pls.Br. 22-23.) Plaintiffs' chief complaint appears to be that MSD's statement of facts did not cite to the Judgment enough and chides MSD for not doing so. Putting aside that MSD correctly sets out the Trial Court's Judgments in its statement of facts and expressly describes the Trial Court's findings and conclusions throughout its opening brief, it must be remembered that the Trial Court's Judgment was an almost verbatim adoption of Plaintiffs' proposed findings. *See Massman Constr. Co. v. Mo. Hwy. & Transp. Comm'n*, 914 S.W.2d 801,804 (Mo.banc 1996); *Nolte v. Wittmaier*, 977 S.W.2d 52,57-58 (Mo.App.E.D. 1998). Indeed, Plaintiffs' one concrete example is their contention that the trial court rejected the fact: "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." (Pls.Br. 22.) Plaintiffs cite to nothing to support the Trial Court's alleged specific rejection of this fact because no such rejection can be found in the record – the Trial Court simply ignored the fact. Instead, they point to a finding on how MSD apportions costs through the Charge, which has nothing to do with the rationale for the Charge. (*Id.* 23.) Contrary to their assertion, the Judgment specifically recognized MSD's rationale for the Charge (impervious area causes demand) in its factual findings. (J. ¶26;LF1548(A8).) Therefore, Plaintiffs have not shown how MSD's Statement of Facts violates Rule 84.04.

Moreover, Plaintiffs' dissatisfaction has been remedied by submission of their own 8-page Statement of Facts pursuant to Rule 84.04(f). Ironically, some of these supplemental facts are repetitive of the facts MSD provided. (*Compare* Pls.Br. 24-25 (adoption of the Charge) *with* MSD Br. 12-14 (providing same history in more detail).) In fact, their supplemental statement contains several inaccuracies and misstatements that have no true support in the record. For example, Plaintiffs assert the Stormwater User Charge doubled revenue and would eventually result in quadrupling revenue (Pls.Br. 25); this ignores MSD's wastewater subsidy of \$19-20 million per year before the Charge was adopted. (MSD Br. 9.) Plaintiffs contend the Charge was unilaterally imposed (Pls.Br. 25); but the finding they cite has no record support and ignores the fact that the Rate Commission and Board of Trustees adopted the Charge. (MSD Br. 11-14.)

Plaintiffs argue that the Rate Commission is not independent, that its recommendation can be ignored, and that it is not like the Public Service Commission that was created by the General Assembly and derives its power from the state. (Pls.Br. 25-26.) But this ignores that the Rate Commission was created by the Charter amendment adopted by the voters in 2000 and thus derives its power *from the Missouri Constitution* that expressly provides for the creation of MSD, ignores that the Rate Commission entities (not MSD) designate the individual members of the Rate Commission, ignores that the Rate Commission has its own counsel and experts, ignores that a Rate Commission recommendation can be rejected only if the Board finds the recommendation failed to meet five specific criteria set out in the Charter, and, finally,

ignores that the Rate Commission's recommendation was not rejected by the Board.
(MSD Br. 11-14.)

Additionally, Plaintiffs' Statement of Facts for the Refund Judgment exhibits more egregious rule violations than that of which they accuse MSD. For example, their 3-paragraph statement mentions no testimony or evidence and fails to even acknowledge two of the grounds on which the Trial Court denied a refund (i.e., failure to meet statutory tax protest provisions and balancing the equities). (Pls.Br. 30.) Instead, Plaintiffs merely point to self-serving observations equating MSD to a "bank-robber" being allowed to keep the money that have no legal consequence relating to the refund denial. And this heated rhetoric is detached from the reality of this lawsuit – Plaintiffs chose not to seek a TRO or preliminary injunction stopping the collection of the Charge.

For these reasons, Plaintiffs' procedural arguments fail, and the focus should be on addressing the issues on their merits.

ARGUMENT

I. MSD'S POINT I MUST BE GRANTED UNDER THE CORRECT DECLARATION AND APPLICATION OF THE *KELLER* FACTORS SET FORTH IN MSD'S OPENING BRIEF, WHICH PLAINTIFFS HAVE NOT CHALLENGED.

The rationale and functioning of MSD's Stormwater User Charge is uncomplicated and, indeed, self-intuitive. MSD based the Charge on impervious area because development and impervious area relate to the services that MSD provides. Impervious area is the industry standard measure for stormwater services. (Def.Ex.WW

at 124; Tr.609:23-610:19.) There is no dispute that, when impervious area is added to a piece of land, the runoff from that land increases in a direct, linear fashion (Tr.616:16-621:15 (testimony of Plaintiffs' expert Jones)) above what used to naturally occur on the piece of land. It is this additional runoff caused by development that drives the need for and costs of MSD's stormwater services. Plaintiffs try to belittle the Charge by comparing the wrong numbers, numbers that do not relate to MSD's services. (MSD Br. 27.) The serious questions of public interest at stake in this appeal deserve a candid and reasonable analysis of the issues here, rather than a clever and strained analysis offered by Plaintiffs. That candid and reasonable analysis of the *Keller* factors set forth in MSD's opening brief and summarized below leads to an inevitable conclusion – reversal of the Trial Court's Judgment because the Stormwater User Charge is not a tax.

A. Factor 1 – When Is the Fee Paid?

Factor 1 should be found in MSD's favor because, although the Charge is billed periodically, payment is due only after the provision of services. (*See* MSD Br. 39-41.) With respect to Factor 1, Plaintiffs have one thing correct – the Stormwater User Charge is billed on a periodic monthly basis. However, *Arbor* made clear that the analysis does not stop there, and courts should determine if the Charge is paid after services are provided. Plaintiffs ignore the plain application of this second consideration and attempt to revise history by pressing irrelevant considerations as evidence that the Charge was not billed after the provision of services.

1. Plaintiffs Continue to Argue that the Trial Court’s Error in Considering Only Timing and Regularity Was Correct.

Arbor and *Missouri Growth* hold that, although a fee is paid at periodic monthly intervals, it nevertheless meets Factor 1 when the bills are sent out only for service that already has been provided. *Arbor*, 341 S.W.3d at 684; *Mo. Growth Ass’n v. Metro. St. Louis Sewer Dist.*, 941 S.W.2d 615,623 (Mo.App.E.D. 1997).⁵ The Judgment found Factor 1 against MSD merely because it billed on a periodic monthly basis, but without making any conclusion of law regarding whether the Stormwater User Charge was paid before or after MSD provided services. (J. ¶¶101-103;LF1567(A27).) This was clearly a misstatement and misapplication of the law. (MSD Br. 38-39.) However, Plaintiffs still mistakenly imply that *Arbor* approved this approach because this Court noted that *Beatty II* “held that the first factor concerns itself ‘only with timing’ because the fee therein was charged ‘without regard to when the service was used.’” (Pls.Br. 36.) However, *Arbor* cited this passage merely to explain that *Beatty II* did not alter Factor 1 so that “only timing” was to be considered and clarified the correct analysis set forth above. *Arbor*, 341 S.W.3d at 684,n.11. This erroneous declaration and application of the law precluded the Trial Court from finding for MSD on Factor 1.

⁵ *Missouri Growth* was fully briefed and argued in this Court before being sent back to the Court of Appeals to reinstate its decision.

2. Plaintiffs' Ex Post Facto Argument That the Trial Court Found That MSD Did Not Bill for Services Provided in the Prior Month Fails.

As a result of the Trial Court's failure to make any finding on the issue of whether the Stormwater User Charge is billed after services are provided, Plaintiffs attempt to do so now by borrowing Factor 3 considerations and by urging this Court to ignore the holding in *Missouri Growth*. But they cannot avoid the fact that the Judgment made no finding, factually or legally, that the Charge was not billed on or after the stormwater services were provided.

At the outset, the *Keller* factors should be separately analyzed and should not be confused by taking considerations from one factor and using them in another factor. See *Ashworth v. City of Moberly*, 53 S.W.3d 564,576 (Mo.App.W.D. 2001); App.E.D.Op. 3-4(A79-80). Here, Plaintiffs try to support the Trial Court's lack of findings by arguing that MSD did not provide "evidence that its monthly bills bore *any* relationship to the services it actually provided to a ratepayer in the prior month" and notes that the Trial Court found that the Charge was not "based on the actual services MSD provided" because the Charge only apportions the costs of services to customers. (Pls.Br. 36-37.) Albeit flawed, such considerations belong in Factor 3, which concerns itself with whether the fee is dependent on the level of services, and have no bearing on Factor 1.

Plaintiffs recite the Trial Court’s misguided finding that the Charge failed to meet Factor 1 because the Charge did not vary even though monthly rainfall did. (Pls.Br. 36.)⁶ Putting aside that this misconception was explained by MSD in its opening brief (MSD Br. 32-33), the only evidence in the record was that the amount of rainfall each month does not affect the costs of stormwater services. (Tr.375:24-376:8,1030:18-1031:13.) For example, St. Louis had a high amount of snowfall and rain in February 2013, but had miniscule amounts of precipitation in July 2012 during the drought. However, the same stormwater services must be provided in February 2013 as in July 2012. Rain or shine, MSD must operate and maintain its stormwater system and must provide regulatory and planning services. (Tr.705:22-706:11.) Also, the reason why actual monthly rainfall does not matter is because the stormwater infrastructure is built based on runoff calculations for large 15 or 20 year “design storms,” not on any periodic measure of actual rainfall. (MSD Br. 32-33.) Thus, actual rainfall is irrelevant to the costs of services – costs remain steady and continuous.

Plaintiffs further attack MSD for doing the exact same thing with its Stormwater User Charge as it did with the wastewater charge upheld in *Missouri Growth*. (Pls.Br. 37-38.) In *Missouri Growth*, the court relied exclusively on the language of the ordinance to hold that the charge was billed after the provision of services. 941 S.W.2d

⁶ Plaintiffs’ assertion that MSD’s costs vary month-to-month (Pls.Br. 36) is unsupported by their citations to the Judgment. Moreover, the evidence in the record is that MSD’s costs to provide services remained static through the year. (Tr.1030:18-1031:13.)

at 623. This finding was in contrast to the quarterly wastewater charge struck down in *Beatty II*, which was paid without regard to when services were actually provided so that one customer might be billed in advance for three months of service, another might be billed in the middle of a quarter, and yet another might be billed for the preceding three months. *Beatty v. Metro. St. Louis Sewer Dist.*, 867 S.W.2d 217,220 (Mo.banc 1993) (*Beatty II*). The Trial Court did not even discuss *Missouri Growth* in its Factor 1 analysis and made no finding that the Charge conflicted with *Missouri Growth*'s holding. Here, the evidence was not in dispute that MSD used the very same language in its Stormwater User Charge Ordinances as in the wastewater ordinance and always billed its Charge in arrears, never in advance. (MSD Br. 26; Tr.681:18-682:15,704:6-10,705:1-21,970:1-5.)

However, contrary to Plaintiffs' contention (and the Court of Appeals), MSD did not rely only on the holding in *Missouri Growth* and the similarity of the Ordinances. Instead, both below and in this appeal, MSD has pointed to evidence that irrefutably proves that the Charge was billed only *after* the stormwater services are provided (MSD Br. 39-41), including that Ordinance 12560 went into effect on March 1, 2008, but the first bills did not go out until April 1, 2008, for services provided in the prior month. (Tr.970:1-5.). In response, Plaintiffs offer only irrelevancies and non-germane considerations.

In any event, MSD's *motivation* in adopting the language requiring bills to be sent out for services provided in the preceding month is not the issue in Factor 1 – the issue is simply whether or not the Charge is billed in arrears. It is not disputed that the Charge was billed in arrears. Indeed, if a customer's impervious area is increased or decreased,

the amount of the Charge will change accordingly. (Def.Ex.B §§11,20,22(A105,107-08).) So if a customer replaced a concrete patio with a deck and informed MSD of the reduction, the bill sent in the following month would reflect the new level of service in the prior month.

3. Whether a Service Can Be Accepted, Rejected, or Used on a Limited Basis Is Not a Proper Consideration Under Factor 1.

The Trial Court and Plaintiffs relied on *Building Owners & Managers Association v. City of Kansas City*, 231 S.W.3d 208 (Mo.App.W.D. 2007), to support the contention that the Stormwater User Charge does not meet Factor 1 because the stormwater services are mandatory and cannot be accepted, rejected, or used on a limited basis. (Pls.Br. 40-41.) This new consideration is not found in *Arbor*, which clearly held that there are two considerations in Factor 1 – (1) regularity of payment and (2) whether the charge is due after the services are provided. 341 S.W.3d at 684. Therefore, Plaintiffs merely reinforce the error of the Trial Court by continuing to press this accept, reject, and limit consideration when it has no support in this Court’s seminal Hancock decisions.

MSD has demonstrated why *Building Owners* is inapplicable here, how that case misconstrued the facts in *Missouri Growth*, and how that case is contrary to the holding of *Arbor*. (MSD Br. 46-47.) Plaintiffs predictably respond by simply ignoring that *Building Owners* is both legally deficient and factually inapposite and continue to represent that case as controlling without ever explaining how or why the “accept, reject, and limit” consideration has any bearing on Factor 1. (Pls.Br. 38-40.)

Plaintiffs again reveal their and the Trial Court's lack of understanding of utilities generally, and stormwater services specifically. They argue that "[i]n the case of stormwater runoff, the benefit of MSD's stormwater services accrues to the property that the stormwater runs to, not from." (Pls.Br. 40, 42.) Basically, Plaintiffs state that, although uphill and upstream development and impervious area contributes to the need for stormwater services by adding runoff above the natural state, those customers should not have to pay for the services because their properties are uphill and upstream and are not in danger of flooding. In essence, Plaintiffs would have the families who live in places like Pepperdine Court pay to save their own homes from erosion caused by development occurring upstream. (Tr.1053:19-1056:7; Def.Ex.BB.) Apart from really being a Factor 2 argument (who pays), such reasoning turns the very concept of a utility rate squarely on its head, as recognized by Plaintiffs' experts who recognized that the demand caused by impervious area is a proper way to charge for services. (Def.Ex.F4 at 21,22; Tr.396:23-397:17,788:3-789:17.)

Furthermore, Plaintiffs point to a finding that MSD does not identify "what specific stormwater services (or amount of services) it provided to [a customer] in the prior month." (Pls.Br. 40.) This finding reinforces that the Trial Court and Plaintiffs impermissibly relied on Factor 3 considerations in Factor 1 and failed to grasp what it is that utility rates do. Neither *Arbor* nor any other utility case from *Beatty II* to *Missouri Growth* to *Mullenix* require the utility to identify the specific services provided to a customer in each month. Rather, utilities determine the cost of providing the services and then set a rate based on a measure of service that can be applied fairly to each customer,

which is what MSD has done here. The Trial Court's Judgment is contrary to all these prior cases and cannot be allowed to stand.

4. Whether Services Like MSD's Stormwater Services Are Ongoing and Continuous Is a Germane Consideration.

The Court of Appeals, Eastern District held that levee fees "paid by a date certain each year" met Factor 1 "because the service and benefit of the levee district is an ongoing service that continues every year after the levee was built and every year it is maintained." *In re Tri-County Levee Dist.*, 42 S.W.3d 779,786 (Mo.App.E.D. 2001). The building and maintenance of levees every year are analogous to the stormwater system's being built and maintained every year. The Trial Court erroneously stated and applied the law by not following the *Tri-County* case, where the evidence at trial was uncontested that MSD's services were ongoing and continuous, regardless of how much or little it rains. (MSD Br. 41-43.) Indeed, Plaintiffs admit that MSD's services "have no true beginning or ending point." (Pls.Br. 38.)

Rather than challenging the *Tri-County* analysis or contesting that MSD's services are ongoing and continuous, Plaintiffs make a convoluted argument that MSD somehow has contradicted itself by recognizing that its services may have a "general benefit" to the public and by analogizing the levee services and fees in *Tri-County* to its stormwater services and the Charge. (Pls.Br. 41-42.) Plaintiffs claim *Tri-County* is inapplicable because the property at issue was charged the amount of "benefits" the property received from the levee. (*Id.*) Not only does this not address the Factor 1 ongoing service analysis, but it is incorrect and reflects a misunderstanding of levee district fees and

assessments. Under Chapter 245, a levee district assesses “benefits” to all the properties in the levee district (1) to ensure that the total benefits exceed the total costs (or else the levee would not be built) and (2) as the means to *apportion* the levee district’s *costs* to be collected by the annual fee. The fee itself is most definitely based on costs, not benefits. *See* R.S.Mo. §245.180. So in *Tri-County*, the property’s annual levee fee (\$24,000 to \$26,000) was simply that property’s apportionment of the levee district’s annual total costs, as measured by its portion (\$2,101,716) of the total benefits assessed. 42 S.W.3d at 782.⁷

Therefore, for the reasons stated above and in MSD’s opening brief, the Trial Court erred in finding Factor 1 for Plaintiffs, and Plaintiffs’ response does not cure the flawed declaration of the law and the erroneous application of the law to irrelevant facts.

B. Factor 2 – Who Pays the Fee?

Factor 2 should be held in MSD’s favor because the Stormwater User Charge is not blanket-billed and is paid by only those, and all those, who cause the need for and receive the services. Plaintiffs’ scattershot and muddled response on Factor 2 ignores cases (just as the Trial Court did) that show it was legal error to find Factor 2 against MSD, persists with their reliance on a wholly inapplicable case, merely points to the very same finding that MSD demonstrated was without basis in fact or law, and continues to

⁷ Indeed, the assessments in *Tri-County* were an “estimate” of benefits, which is clearly a less demanding standard than MSD’s direct measurement of each property’s impervious area here. 42 S.W.3d at 782.

press a self-fulfilling and circular standard that, in effect, defines blanket-billing as billing those customers who pay the Charge.

1. The Trial Court and Plaintiffs Ignored Dispositive Cases That Are Directly on Point and, Instead, Misinterpret *Feese* to Apply Here.

In its opening brief, MSD discussed how *Arbor*, *Beatty II*, and *Missouri Growth* each found for the utility on Factor 2 because, even though almost all residents paid the charge, almost all residents received services and those few who did not receive services (such as people on septic systems or those who do not use natural gas or electricity) were not charged. (MSD Br. 47-49.) MSD made a principled determination that undeveloped property should not be billed, just as it did with septic tank users in *Missouri Growth*. The Trial Court completely ignored the holding on Factor 2 in *Missouri Growth*. Several other cases further support the conclusion that MSD does not blanket bill. *See Larson v. City of Sullivan*, 92 S.W.3d 128,130,132 (Mo.App.E.D. 2002); *Mullenix*, 983 S.W.2d at 562; *Ashworth*, 53 S.W.3d at 576.

These cases reinforce the key issue – users are charged, and non-users are not charged. The record and MSD’s opening brief undeniably show: (1) 38,000 owners of undeveloped property in MSD were not charged because they do not contribute the additional runoff (above the natural amount) that causes the demand for MSD’s stormwater services; and (2) the Charge was assessed to non-profits and governmental entities with impervious area who previously did not pay for all the services they received because they did not pay ad valorem taxes. (*See* MSD Br. 49-52 and record citations therein.)

Although difficult to follow, Plaintiffs appear to argue that the Trial Court's misguided reliance only on *Feese* was correct (Pls.Br. 42, 45), without addressing the real distinction between the charge in *Feese* and the Stormwater User Charge here. As previously explained (MSD Br. 53-54), in *Feese*, *everyone* paid the full amount of the charge without regard to receiving services. 893 S.W.2d at 812. Here, 38,000 properties (akin to the wronged parties in *Feese*) are not charged, and another 600 MSD customers pay a reduced Charge because they do not use all the services. (Def.Ex.B §27(A109-10); Tr.866:11-868:1,1040:11-1041:24.)

However, Plaintiffs point to the Trial Court's finding (J. ¶52;LF1555(A15)) that undeveloped properties "presumably" benefit from MSD's stormwater services in the same way the customers that pay a reduced Charge do. (Pls.Br. 45.) This ***presumption*** is, once again, without any evidentiary support and was made in error. MSD's opening brief explained why the analysis of both the Trial Court and Court of Appeals was wrong and established that a service could have a benefit to the general public and still meet Factor 2. (MSD Br. 53-58.) Plaintiffs do not respond. Instead, again without citation to the Judgment or the record, they proclaim that the only users of the stormwater system are those properties whose runoff drains into the system, but then also assert that everyone benefits from planning and regulatory services. (Pls.Br. 45-46.) This confusing analysis should be disregarded. First, the evidence is not contested that MSD provides operation and maintenance services relating to the stormwater system as well as regulatory and planning services. (Tr.594:3-9; MSD Br. 17, 82-84.) Because development drives the need for all these services, all properties with impervious area are

charged. But those 600 properties whose runoff does not drain to the stormwater system are not charged for the operation and maintenance of the system (i.e., they receive a credit for that portion of the Charge), but still pay for the regulatory and planning services. (Tr.595:19-23,1041:1-24.) Second, *no one* pays based on their natural runoff from pervious, undeveloped land because that natural runoff is not what causes the need for any stormwater services. (Tr.599:19-25,860:5-19.)

And, as in other factors, Plaintiffs continue to focus on the purported “benefits” received from the stormwater services and surmise that downhill properties or those close to streams and rivers benefit more than uphill properties. Apart from this benefits analysis having no legal basis in the *Keller* analysis, it is the wrong approach. (See MSD Br. 53-58.) In effect, Plaintiffs take the position that the uphill properties whose development may cause flooding in downstream properties should not pay because MSD’s services benefit the downstream property by preventing it from being flooded. This amorphous and arbitrary consideration of who “benefits” and by how much has no place in the *Keller* equation; what should be considered is whether the Charge is blanket-billed and whether all those who use the services and cause the need for the services pay for the services – which is what MSD’s Stormwater User Charge does.

2. Plaintiffs Point to No Evidence or Law to Support the Trial Court’s Finding that MSD Did Not Bill 38,000 Customers Without Impervious Area Merely to Meet Factor 2.

The crux of the Trial Court’s Factor 2 analysis was its “finding” that MSD’s lack of blanket-billing (38,000 properties without impervious area) “*seems* only related to an

attempt to comply with the Keller factors, by not billing everyone.” (J. ¶108;LF1568 (A28)(emphasis added).) This is what MSD characterized in its brief as a “remarkable and speculative” conclusion unsupported by any evidence. (MSD Br. 58-60.) Plaintiffs now conflate MSD’s contention with respect to this clearly unsupported finding with the Trial Court’s other egregious error on Factor 2 – an adoption of a self-fulfilling standard. (See *infra* B.3.) Conspicuously missing from Plaintiffs’ brief, however, is any credible explanation of the Trial Court’s unwarranted and nonsensical finding on Factor 2 – that Factor 2 should be found against MSD because MSD was motivated to comply with Hancock. Plaintiffs, like the Trial Court, point to no evidence in the record regarding this alleged motivation or “subterfuge.” (Pls.Br. 44.) Instead, like the Trial Court, Plaintiffs choose to speculate that the Trial Court’s finding was “likely in part because the testimony of MSD’s own witnesses did not support MSD’s rationale.” (*Id.*) And then Plaintiffs select testimony that it guesses may have led to the Trial Court’s conclusion (Pls.Br. 44-45), when the testimony actually shows no such contradiction. A supposition based on speculation without any evidence is due absolutely no deference, and Plaintiffs’ defense of this finding simply does not hold water.

Likewise, there is no law to support the relevance of the Trial Court’s bare conclusion. (MSD Br. 60.) In fact, the Trial Court’s finding places MSD in a no-win situation. Had MSD billed the 38,000 customers without impervious area, Plaintiffs undoubtedly would argue that MSD was blanket-billing all residents. Moreover, nothing in *Keller* or its progeny involves an examination of the government’s *motivation* for not charging certain customers – either the charge is properly billed or it is not. Regardless,

in making this finding, the Trial Court merely assumed what MSD's possible motivation was, but without any evidence or testimony supporting it. This finding was error.

3. Limiting Factor 2 to Consideration of Only the Customers That Receive the Charge Was Error.

The Trial Court and Plaintiffs ignored the basic test of Factor 2 (whether all or almost all *residents* pay) and instead offered a standard that considers only customers that have impervious area in determining whether the Charge is blanket-billed: "MSD bills its Charge to every resident owning property in the District with impervious surface area." (Pls.Br. 42-43.) Of course, because the only customers that are billed are those with impervious area, the predestined conclusion of the Trial Court was that it was blanket-billed. This self-fulfilling and circular reasoning ignores the caselaw and also ignores the important fact that 38,000 properties are not subject to the Charge.

This error is compounded by the Trial Court's narrow holding that MSD blanket-bills all customers regardless of whether their runoff drains into the stormwater system. (Pls.Br. 42-43.) The Trial Court and Plaintiffs ignore the credit to customers who drain internally or into one of the three major rivers. MSD charges customers only for the services they use (i.e., those who do not use the stormwater system are not charged for it). (Tr.1040:24-1041:13.) Second, even if this were somehow problematic, there are only 600 such customers. (Tr.866:11-868:1,1040:11-1041:24.) Plaintiffs' reliance (Pls.Br. 43-44) on projections from a *report prepared for MSD in 1994* (Pls.Ex.63) supposedly to show that these customers are 7% of the revenue base is useless. MSD relies on the actual, current number (600 people), not an almost two decades old projection. This

“evidence” is the antithesis of “overwhelming” – it is irrelevant snippets of facts applied to an incorrect standard.

Plaintiffs further point to “overwhelming evidence” that purports to contradict MSD’s position that only properties with impervious area cause the need for stormwater services. (Pls.Br. 45.) The evidence Plaintiffs rely upon is non-controversial and is hardly “overwhelming.” Of course MSD’s stormwater system is designed and operated to handle runoff from both impervious and pervious surfaces – it has to be. And the only thing Plaintiffs’ experts showed was the uncontroversial premise that the larger the parcel of property, the more natural runoff it will have. But that misses the point. What matters is who has created the need for the stormwater services and how MSD is going to charge for them. Like it or not, as explained by MSD (MSD Br. 49-51), the reality is that the stormwater system was put in place only after the region was developed, to replace the natural (and free) system that took care of stormwater when the land was in its natural state. This stormwater system continues to be expanded, maintained, and operated as a result of the additional flow of water caused by impervious area. Likewise, the amount of impervious area has a direct relationship to water and stream quality, and thus it is the impervious area that has driven the need for the regulatory services performed by MSD that are mandated by federal and state clean water laws. The pervious, natural land did not cause and does not continue to drive the need for and costs of the stormwater services. Therefore, charging owners for the pervious surfaces of their property just because their naturally occurring runoff enters the stormwater system is manifestly unfair and inappropriate.

An example illustrates the validity of this approach. X and Y are neighbors who each own 20-acre parcels of land covered with woods and pasture. There is natural runoff from these parcels. No stormwater services are required when all property is in its natural state. On the one hand, X develops his 20 acres into a shopping center, and this impervious area will increase the runoff from the property above the naturally-occurring level. It may require new infrastructure, it may require increased maintenance, it may increase the likelihood that downstream creek erosion will need to be abated, and it will affect water quality. On the other hand, Y keeps her 20-acre parcel undeveloped with only woods and pasture. Y has done nothing to increase the flow of stormwater above the natural level. X is billed the Charge and Y is not billed the Charge, because it is the additional runoff above the natural level from X's land that creates the need for stormwater services and the corresponding costs of operating and maintaining the stormwater system. Likewise that additional, new runoff has negative effects on water quality and thus drives the various regulatory services that MSD must perform. While Y's stormwater may well enter the system, her natural runoff does not drive the demand for MSD's services, and thus she should not be charged for services for which she had no part in creating the need.

In fact, charging Y would have a perverse effect. Due to development on other, adjacent properties (like X's), the natural system that handled her natural runoff had to be replaced by man-made services. So Y would be charged for something that was not of her doing. Moreover, Y's undeveloped land actually assists MSD's services by absorbing the runoff from impervious area from other properties like X's. *See Sarasota County v.*

Sarasota Church of Christ, Inc., 667 So.2d 180,185 (Fla. 1995)(holding “undeveloped properties were not assessed because undeveloped properties actually provide a benefit to the stormwater management system itself by assisting in the absorption of runoff created by developed properties”). Under Plaintiffs’ analysis, both of these properties would be charged for their runoff, both natural and additional from impervious area. But then the Charge would not relate to the stormwater services because the undeveloped property has done nothing to create or increase the demand for services. Therefore, not charging undeveloped properties makes sense.

For these reasons, the Trial Court erred by not finding Factor 2 in MSD’s favor because, when the proper standard is applied, the only conclusion that can be reached is that the Stormwater User Charge is not blanket-billed, but is billed to only those, and all those, customers using the services.

C. Factor 3 – Is the Amount of the Fee Paid Affected by the Level of Goods or Services Provided to the Fee Payer?

Factor 3 should be found in MSD’s favor because the Charge is a variable, individualized charge that is affected by and directly related to the level of service. Plaintiffs’ convoluted response does nothing to countermand the straightforward synthesis of the Factor 3 cases and the reconciliation of the parties’ positions provided by MSD. (MSD Br. 61-67.) Plaintiffs’ positions on Factor 3 can be distilled to several points: (1) continuing to perpetuate their experts’ strawman theory that there is no direct relationship between *total* runoff (natural plus additional runoff) and impervious area; (2) misconstruing MSD’s arguments and, in so doing, misapplying the caselaw; (3)

contending that there is substantial evidence to support the Trial Court's findings when, in reality, there is no evidence or the findings are legally irrelevant under the correct application of the law; (4) averring that the Charge cannot be based on a *rate* because, in Plaintiffs' view, a utility must determine the actual services provided to each and every customer in a given month without regard to MSD's costs of services; (5) misunderstanding the nature of MSD's services while focusing on the individual customer in a vacuum without considering MSD's costs of services; and (6) again repeating their legally irrelevant "general benefits" analysis, this time in the guise of applying it to Factor 3.

MSD will first briefly recap why Factor 3 must be found in its favor when the proper standard is considered and then reply to Plaintiffs' points seriatim.

1. The Settled Law, as Stated in *Arbor*, Supports MSD's Analysis of Factor 3, and MSD Has Shown Its Charge Is Dependent on the Level of Services.

The cases applying the *Keller* factors, especially those regarding utilities, unmistakably focus on (1) whether the charge is a flat and uniform fee and (2) whether the charge depends on the amount of service as measured by an appropriate metric.

(MSD Br. 61-63.)

This focus is best illustrated by comparing the decisions involving MSD's wastewater charges in *Beatty II* and *Missouri Growth*. In *Beatty II*, this Court found against MSD on Factor 3 because the charge was based on average water use and thus was identical (or flat) for every residential customer. In *Missouri Growth*, the Court of Appeals, Eastern District (after oral argument in this Court) found for MSD on Factor 3

because the charge was individualized and variable for customers based on water use, the industry standard for wastewater charges. (MSD Br. 61-62, 70.)

Later cases further confirm the standard posited by MSD in this case. In *Arbor*, this Court took one paragraph to find that the city's electric, gas, and water rates depended on those services used and met Factor 3, even though a portion of each customer's bill was a "flat charge" on a quarterly basis. 341 S.W.3d at 685. In *Mullenix*, the Court of Appeals rejected the argument that the sewer and water charges did not bear a direct relationship to the level of services received because the charges included uniform billing costs and capability and availability charges in addition to variable charges. 983 S.W.2d at 562. The court held that such uniform fees did not preclude a finding that a direct relationship exists and found Factor 3 for the city. *Id.* (citing *Mo. Growth*). Similarly, in *Missouri Growth*, the Court of Appeals held that some flat, uniform fees charged by MSD for wastewater billing and collection and system availability did not preclude a finding that the direct relationship existed. 941 S.W.2d at 623. Finally, in *Larson*, the city charged either \$3,750 for a gravity sewer connection or \$4,250 for a grinder sewer connection. 92 S.W.3d at 130. The Court of Appeals, Western District held that the sewer connection fee paid for the costs incurred in the connection and thus that the level of services "is consistent with the fees being charged." *Id.* at 132-33.

In these cases, there was no examination of the actual services provided to each customer or whether the costs or level of those services varied depending on

individualized characteristics of the property. Simply, the charge met Factor 3 so long as it was primarily variable and consistent with the costs of services.

These cases illustrate courts are concerned with: (1) whether the charge is a uniform, flat fee for all customers unrelated to the level of services provided, while allowing for some averages and practicality in setting the charge; and (2) whether the measure of services is a reasonable one and is related to the services. In *Arbor*, *Mullenix*, and *Missouri Growth*, water usage was found to be an accurate measure of wastewater services. However, such a measurement is not perfect. The charge in *Missouri Growth* was based on a winter reading of water usage in order to eliminate warm weather water uses that did not enter the wastewater system (like watering the lawn or filling a swimming pool). In *Arbor* and *Mullenix*, there is no indication that those charges had such precautions, and thus arguably those charges did not always guarantee a perfect measure of service. But perfection is not what these cases require. See *Arbor*, 341 S.W.3d at 685; *Mullenix*, 983 S.W.2d at 562; *Missouri Growth*, 941 S.W.2d at 623. So long as the fee is individualized and the measurement of the service relates to the services, the charge complies with Factor 3.

Importantly, none of these cases prohibits the use of *rates* to allocate costs as the Trial Court's standard here appears to do, and they recognize the necessity of the costs of services in setting the rate. As discussed in its opening brief (MSD Br. 68-69) and above (*supra* at 3), the charge relates to the services provided because impervious area is the correct and best measure of the level of services required for each customer because impervious area and development drive the need for and costs of the services. And,

despite Plaintiffs' specious argument to the contrary (Pls.Br. 52-53), the Charge is individualized and variable because each individual customer's impervious area is precisely measured. (MSD Br. 67-68.) Plaintiffs' response does nothing to shake this conclusion established in MSD's opening brief.

2. The Arguments in Plaintiffs' Response Lack Legal and Factual Merit.

In their response on Factor 3, Plaintiffs continue to press the very arguments that MSD already discredited in its opening brief, fail to properly state the law and analyze seminal cases, and otherwise try to misdirect this Court from the key issues in Factor 3 by adding requirements created solely by Plaintiffs. Due to the confusion and over-lapping in Plaintiffs' response, these arguments are replied to in the order made by Plaintiffs.

a. There Is a Direct Relationship Between Impervious Area and MSD's Services, and Plaintiffs' Total Runoff Strawman Theory Was Improperly Adopted.

Plaintiffs' first argument is that there is little, if any, relationship between impervious area and *total* runoff.⁸ (Pls.Br. 48-50.) Both in its opening brief (MSD Br. 71-77) and above (*supra* at 2-3), MSD exposed the fallacy underlying this argument and showed that there is a direct relationship between impervious area and MSD's stormwater

⁸ Total runoff means the natural and additional runoff calculated on a property with a certain amount of impervious area in the specified design storm.

services. Plaintiffs' response merely repeats what MSD has shown to be irrelevant and legally deficient considerations, but several issues warrant short replies.

The strawman theory erroneously accepted by the Trial Court – the lack of a relationship between impervious area and total runoff from a property – was constructed out of a few references to “runoff” in the Rate Commission proceedings and then knocked down by the uncontroversial opinion by Plaintiffs' experts that the total area of a property had a better relationship to total runoff than the impervious area. (MSD Br. 71-75.) The acceptance of this theory by the Trial Court was simply without basis.

First, the supposed evidence from the Rate Commission never used the term “total” runoff, and the uncontroverted testimony was that the focus of MSD staff, its rate consultant, the Rate Commission, and the Board in developing and adopting the Stormwater User Charge was on the additional runoff from impervious area. (Def.Ex.H; Tr.745:9-19,760:20-25,765:7-766:6.) Indeed, the very definition of “Served” and “Service” in Ordinance 12560 adopted in December 2007 expressly linked MSD's services to the additional runoff that comes from impervious area. (Def.Ex.B at 5.) MSD's argument based on this definition has never been addressed.

Second, the adoption of impervious area as the measure of services was not an untested “assumption” as Plaintiffs claim. (Pls.Br. 47.) MSD hired rate consultants who recommended impervious area as the basis for the Charge, the Rate Commission with its own counsel and consultant agreed with the use of impervious area as the basis for the Charge, impervious area is the most widely used measurement of stormwater services across the country, and even Plaintiffs' experts recognized the widely accepted use of

impervious area. (Tr.609:23-610:19,695:2-25,697:7-22,741:10-17,846:1-851:22.) Thus, impervious area is a tried and true measure of stormwater services that MSD rightly adopted for its Charge.

Third, and contrary to Plaintiffs' and the Trial Court's inexplicable conclusion (Pls.Br. 48), the opinions of Plaintiffs' experts that no relationship existed between impervious area and runoff *were* challenged at trial. The calculations, charts, and graphs prepared by Plaintiffs' experts merely showed that the larger the piece of property, the more total runoff the property had. (Tr.241:23-242:10,552:15-553:19.) However, what MSD proved, largely through Plaintiffs' own evidence and calculations, was that the runoff from a property increases when impervious area is added to the property. (MSD Br. 74-76; Coalition Am.Br. 29-35.) Indeed, when looking at the additional runoff above the natural state (which correlates to MSD's services), Plaintiffs' expert Jones admitted there is a direct, linear relationship between impervious area and that additional runoff, and it does not vary because of slope, soil content, or other factors. (Tr.616:16-621:15.) Now Plaintiffs accuse MSD of improperly attaching tables and charts to the Appendix of its opening brief because such exhibits were not part of the record at trial. (Pls.Br. 16, 58-59.) Aside from the fact that they can be considered by this Court in its review of a court-tried case,⁹ the admission or denial at trial is irrelevant because the charts and tables

⁹ In reviewing a court-tried case, appellate courts may consider all the evidence it finds to be admissible even if the trial court rejected the evidence or held it to be inadmissible.

See, e.g., Richard's Original Long Creek Lodge v. Seymour Inn, Inc., 791 S.W.2d

are simply arithmetic based on the exhibits admitted into trial – the exhibits prepared by Plaintiffs’ experts and relating to MSD’s own runoff formula. (MSD Br. 75-76.)

Tellingly, while Plaintiffs cry foul on a technical ground, they do not dispute the accuracy of the tables and charts, which indisputably show that that the additional runoff from impervious area progresses in a direct, linear fashion as more impervious area is added to the property. (*Id.*)

Finally, Plaintiffs rely on several irrelevant findings by the Trial Court in a final attempt to disprove the direct relationship between impervious area and MSD’s stormwater services. They point to a finding that the soil type of “most St. Louis” properties allows for very little water penetration (Pls.Br. 49); but the actual exhibit admitted at trial showed that there is a wide range of soil types in St. Louis. (Pls.Ex.66-30.) More importantly, the finding is irrelevant because variations in soil type or content are simply not considered by MSD in calculating runoff and actually putting pipes in the ground, and thus has no bearing on the costs of services. (Tr.1024:6-15.) Also Plaintiffs’ expert Jones admitted that slope and soil content do not affect the amount of additional runoff caused by impervious area. (Tr.620:6-17.)

Likewise, they point to a finding that impervious area does not cause or bear a relationship to the level of pollutants on a property (Pls.Br. 49). Yet the amount of pollutants from a property does not relate to MSD’s regulatory services because MSD

944,945 (Mo.App.S.D. 1990); *Bernard McMenamy Contractors, Inc. v. Mo. State Hwy. Comm’n*, 582 S.W.2d 305,314 (Mo.App.W.D. 1979).

does not treat the stormwater; instead, MSD monitors water quality and provides management and planning services aimed at improving water quality that must be done without regard to how much pollutants enter the waterways. (Tr.577:25-578:23,1014:2-1017:14.) And Plaintiffs point to a finding that a number of properties with the same amount of impervious area did not always generate the same amount of *total* runoff, and that the total runoff from undeveloped properties sometimes exceeded the total runoff from developed properties. (Pls.Br. 50.) Conveniently omitted from this “finding” was the variance in the total area of the property. (Pls.Ex.72-44,-65,-66,-69; Tr.636:20-637:13.) It does not take a hydrologist or \$400,000 in expert fees to figure out that a 3-acre parcel of property will generate more total runoff than a quarter-acre property with the same amount of impervious area. But, as demonstrated by Plaintiffs’ expert Jones, the *additional* runoff on these properties would be the same. (Tr.616:10-621:15.) And it is additional runoff, not total runoff, that correlates to MSD’s stormwater services.

b. MSD’s Charge Does Bear a Relationship to the Services It Provides to Customers, and Plaintiffs Merely Argue That a Rate Is Improper.

Over-reading *Beatty II*, Plaintiffs contend that the focus of Factor 3 is on the actual services provided to each customer and that MSD cannot use a rate to recover its costs of services. (Pls.Br. 51.) In their response, Plaintiffs simply ignore MSD’s succinct and convincing synthesis of *Beatty II* and *Missouri Growth* that showed the real issue is whether the charge is individualized and variable rather than uniform and flat and whether the measure used is a reasonable one. (MSD Br. 61-62.)

Moreover, the findings relied on by Plaintiffs in supporting the Trial Court's conclusions merely criticize MSD for using a rate (Pls.Br. 50-51), despite MSD's concise explanation as to how rates work and why costs matter. (MSD Br. 77-78.) Plaintiffs complain that the rate allocates the costs of services to customers and does not exactly measure the services provided to each customer. (Pls.Br. 51.) However, as discussed previously, this is how all utility rates work – including the rates approved in *Arbor*, *Missouri Growth*, and *Mullenix*. (MSD Br. 77-78.) A utility, or any business for that matter, must start with all the costs involved in providing services – from the truck fleet, to employee benefits, to the copy paper used in accounting – in order to determine what to charge its customers. Just like any utility, MSD chose the best and correct measure (i.e., impervious area) to set the rate for all the properties receiving service. (Tr.396:23-397:17,574:23-575:22,788:3-789:17.) This is not merely “divvying up costs” or “simply an accounting function”; rather, it is a principled way to pay for stormwater services that is fair to all classes of customers and easily understood by customers. (Tr.714:1-23, 865:13-866:1.) Indeed, as explained above, impervious area provides a logical and reasonable basis for the rate and is used throughout the country. (Tr.714:1-23,852:19-853:13; Def.Ex.WW at 124; NACWA Am.Br. 6-12.) In fact, Plaintiffs' expert Debo admitted that his book advocated using impervious area as a basis to fund stormwater services (“the more you pave, the more you pay”). (Def.Ex.WW at 121.) In the end, the key determination under Factor 3 leads to only one conclusion – the Stormwater User Charge was an individualized and variable charge where each customer paid, for

example, \$0.12 (rate) multiplied by the direct, individual measurement of the impervious area.

**c. Plaintiffs' Response to MSD's Well-Founded Factor 3
Analysis and Its Analysis of *Beatty II* and *Missouri Growth* Are
Completely Without Merit.**

Plaintiffs misrepresent MSD's explanation on what Factor 3 requires. They assert in their response that MSD is contending only that so long as the Charge was "variable and individualized" that the Charge meets Factor 3 under the controlling cases. (Pls.Br. 51-52.) While whether the Charge is flat and uniform or variable and individualized is a proper consideration under Factor 3, Plaintiffs fail to address the other component of Factor 3 – measurement must relate to service – that MSD proves is also in its favor.

Yet even Plaintiffs' attempt to show that MSD's analysis of the "direct relationship" requirement is incorrect falls short. (Pls.Br. 52.) Curiously absent from the response is an explanation as to why MSD's analysis is incorrect. Plaintiffs then try to show that the Stormwater User Charge is a uniform flat charge like the one rejected in *Beatty II*, rather than an individualized, variable charge like the ones upheld in *Arbor* and *Missouri Growth* by contending a rate (such as \$0.12/100 ft² of impervious area) is really a flat charge and by equating variance in impervious area (basis for the Charge) to average water use (basis in *Beatty II*). (Pls.Br. 52-54.) This argument is faulty. Under Plaintiffs' analysis, all utility rates would be flat charges because, by its very nature, a rate charges a set amount per unit of measurement. Plaintiffs further apparently do not understand that the wastewater charge in *Beatty II* was *the same* for every residential

customer because it *was based on an average use of water*. 867 S.W.2d at 221. In *Missouri Growth*, the flat and average charge was replaced by an individualized and variable charge that was calculated by taking each customer's water usage reading and multiplying it by the rate (\$0.99/100 ft³). 941 S.W.2d at 618,623-24. The Charge here would be like *Beatty II* if MSD had used an average amount of impervious area for each residential customer, but it did not. (Tr.609:23-611:5,680:16-681:2,836:12-837:21.) As described above, the Charge is calculated by measuring each customer's amount of impervious area and multiplying by the rate. This is exactly the same concept as *Missouri Growth*, which approved measured water usage (the most common wastewater measure). Likewise, impervious area is the most common stormwater charge measure. (Def.Exs.B at 3, WW at 124; Tr.609:23-610:19,835:8-836:11.)

Similarly, Plaintiffs unconvincingly distinguish *Arbor* by concluding that the Stormwater User Charge is not akin to the charges in that case, but they fail to explain why. (Pls.Br. 54-56.) Such a bare conclusion without any real analysis warrants no reply.

Next, Plaintiffs attempt to distinguish the wastewater charge in *Missouri Growth* by pointing out some irrelevant differences between MSD's wastewater charge and the Stormwater User Charge. (Pls.Br. 53-54.)

First, Plaintiffs imply that the wastewater charge was upheld because MSD's voter-approved Charter allowed for charges based on water usage or fixtures. Whether water usage was approved by a vote did not matter; the issue was whether or not water usage was directly related to services, which it was.

Second, Plaintiffs complain there is no meter to measure runoff. This is irrelevant. As repeatedly explained (and never refuted by Plaintiffs), MSD's services are not tied to actual rainfall because operation and maintenance and planning and regulatory services are ongoing, rain or shine. (Tr.705:22-706:11,1030:18-1031:13.) Additionally, MSD's system is designed, operated, and maintained based on large 15 and 20-year design storms, and impervious area is the only variable used to calculate the runoff from a property in such storms, thus illustrating that impervious area is the correct measure of stormwater services. (MSD Br. 33-44; Tr.285:6-286:7,289:14-290:20.)

Third, Plaintiffs again (see Factor 1) assert that the stormwater services cannot be accepted, rejected, or limited, ostensibly like the wastewater services in *Missouri Growth*. While still irrelevant, it also just is not true. As a matter of arithmetic, if a customer were to remove or add impervious area, the Stormwater User Charge does indeed decrease or increase. (Def.Ex.B §§11,20,22; Tr.631:10-632:4,788:16-789:17.)

Fourth, Plaintiffs complain that a customer does not receive a credit for allegedly reducing his stormwater runoff through use of a detention basin. (Pls.Br. 53-54.) But the assertion is faulty. As explained in MSD's opening brief (MSD Br. 88-89) and not addressed by Plaintiffs, practices like detention basins do not affect the costs of services. Stormwater from detention basins still enters MSD's stormwater system, and, in any event, detention basins are ignored for stormwater system design purposes. (Tr.1025:19-24,1026:19-1028:14,1039:7-15.) Plaintiffs' experts agreed that such practices do not lower costs and merely incentivize good citizenship. (MSD Br. 49-50; Tr.336:3-14.)

Fifth, Plaintiffs resurrect their and the Trial Court's sound-bite about the Stormwater User Charge not being affected by the amount of rainfall in a given month, despite MSD's clear explanations as to why rainfall in a month does not matter to its continuous, ongoing services. (MSD Br. 32-33.) Whether it rains a little, a lot, or not at all, MSD's services are being provided, and the costs are the same. (Tr.705:22-706:11, 1030:18-1031:13.)

d. Plaintiffs Improperly Focus on the Customer's Receipt of Services and Miscomprehend the Nature of MSD's Stormwater Services.

Plaintiffs' next argument is that the theory of MSD's services (development and impervious area create the additional runoff that causes the need for MSD's services) is incorrect, labeling them "demand services." (Pls.Br. 54-57.) However, Plaintiffs merely conclude that MSD's premise is incorrect; they do not explain why, thus leaving the reasons set forth above and in MSD's opening brief unchallenged. (MSD Br. 67-71.) What remains in Plaintiffs' response is a patchwork of incorrect legal analysis and irrelevant conclusions.

Plaintiffs again overstate the holding of *Beatty II*. (Pls.Br. 56; J ¶¶113-116; LF1569-70.) *Beatty II* requires a direct relationship between the Charge and the *level* of services provided, not an exactitude which the Trial Court and Plaintiffs require. 867 S.W.2d at 221. Indeed, as discussed above, in *Arbor*, *Missouri Growth*, *Larson*, and *Mullenix*, the flat fee aspects in these cases did not preclude a finding in favor of the utilities on Factor 3 because the major part of the rate structure was variable. This case is

a fortiori to those cases because MSD's Stormwater User Charge has no flat fee aspect and, therefore, meets Factor 3.

Plaintiffs then merely conclude that, because MSD took over a developed area, it cannot base its Charge on impervious area. (Pls.Br. 56.) This misses the point. The concept that services relate to additional runoff from development is based on the fact that the region was at one time most definitely not developed, not that it was undeveloped when MSD was formed. Moreover, this conclusion ignores the uncontroverted evidence at trial that development is what causes the need for MSD's services. (MSD Br. 68.) The concept of additional runoff above the natural state was even accepted by Plaintiffs' expert who freely admitted that best management practices and low impact developments are meant to address the negative effects of the addition of impervious area and development. (Tr.602:16-24.) And this criticism of the basis for the Charge is not accurate. While the St. Louis region is highly developed, housing and commercial developments continue to occur. Otherwise, there would be no need for the planning and management services mandated by federal and state law, and there would not be the need to take emergency steps to save houses from creek erosion like MSD did on Pepperdine Court in West St. Louis County. (Tr.1014:2-1017:5,1053:9-1056:7.)

Plaintiffs then follow up with the conclusion that MSD's additional runoff 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." (Pls.Br. 56.) Apart from not being supported by any citation to the record, this statement is no response at all. It simply ignores MSD's opening brief (MSD Br. 67-70), the

explanation set forth above (*supra* at 35-38), and the undisputed evidence at trial that the additional runoff requires MSD to perform stormwater services, that additional runoff is equated to impervious area under the formulas, and therefore that impervious area is the best measure of the level of services for each customer. (Def.Ex.H at 145-146; Pls.Ex.80 (Vol.III)137:4-12; Tr. 357:12-361:4, 602:16-24,606:13-608:5,616:10-621:15,669:23-670:8,708:11-21,710:2-713:25,765:7-766:6,772:13-20,894:11-896:12,1007:7-9,1037:5-24,1071:8-18.) MSD's Charge is based on the most reasonable measurement used in the real world – impervious area – and Plaintiffs offer only an academic analysis and complicated per-property study (well beyond what MSD actually uses to operate its stormwater system) that would cost millions, if not billions to implement. (MSD Br. 79.)

Finally, Plaintiffs argue that the Stormwater User Charge must be a tax, or there would be no limitation to what government could characterize as a user charge, whether it be roads or police. (Pls.Br. 57.) Plaintiffs' inapt hypotheticals are premised on a flat fee, which MSD agrees does not meet Factor 3 and which the Charge certainly is not. Moreover, roads and police are paid for out of the general revenues of government. Furthermore, their hypotheticals presume that everyone would be charged, which is not the situation under the Charge where some 38,000 properties did not pay the Charge. Here, MSD's stormwater services have never been funded from general revenues, and there has always been a separate source (albeit inadequate) of stormwater revenue. (Tr.667:19-668:22.) Also, their examples ignore the inequities caused by funding stormwater services based on the value of property. Aside from large tax-exempt entities not having to pay their fair share of the burden they place on MSD's services, two

residences with the same impervious area should not have to pay vastly different amounts of ad valorem taxes based on the arbitrary characteristic of where their homes are located (i.e., valued).

e. Plaintiffs' Repetitive Arguments That MSD's Additional Runoff Theory Was Properly Rejected Are Belied by the Law and the Facts.

Plaintiffs raise several unrelated issues in responding to MSD's explanation as to why its Charge relates to the level of services provided (Pls.Br. 58-61), which, to the extent they have not been addressed already, are taken in order.

First, Plaintiffs accuse MSD of coming up with the additional runoff concept for its services merely for trial and that it is a "contrivance" created to dispute Plaintiffs' experts' opinions. (Pls.Br. 58-59,61.) This accusation is blatantly false. The definition of "Served" and "Service" in Ordinance 12560 adopted in December 2007 – 8 months before the lawsuit was filed and almost two-and-a-half years before trial – expressly references runoff caused by the addition of impervious area. (Def.Ex.B at 3,5(A100, 102).) And the undisputed sworn testimony of MSD witnesses at trial was that MSD always looked to additional runoff from impervious area as what drove its stormwater services. (MSD Br. 73-74; Tr.745:9-19.) Plaintiffs merely engage in an exercise in projection bias whereby they accuse MSD of the very same offense of which they are guilty – manufacturing a contrived standard for trial that is not based on the evidence.

Second, Plaintiffs do not challenge the logic of MSD's relating its Charge to additional runoff, but contend it has no scientific significance. (Pls.Br. 60.) Yet again,

this misunderstands what utility rates do. When looking at how to set a rate in order to pay for services, using impervious area makes perfect sense because it correlates to additional runoff and, therefore, to MSD's services and the need for those services. (Tr.669:23-670:8,710:2-713:25, 835:8-13,1071:8-18.) This is in contrast to the purely academic analysis performed by Plaintiffs' experts, which has no practical application to rate-setting. Indeed, the books written by Plaintiffs' experts acknowledge that impervious area is a proper and common measure of stormwater services. (Def.Exs.WW at 119,121, F4 at 21-22.)¹⁰

Third, Plaintiffs again rely on their irrelevant total runoff analysis to argue that MSD's system must handle all the runoff from a property. (Pls.Br. 60.) Of course it does, but the issue is who should pay and how, which has been addressed several times now. Additionally, this ignores two key facts. Before the region was developed, a natural (cost-free) system was in place to handle stormwater; once impervious area was added, man-made services were required to handle the burdens caused by the increased

¹⁰ Rather than respond to MSD's explanation of how additional runoff relates to stormwater services, Plaintiffs attempt to convolute and redefine what is meant by additional runoff, complaining it is not used in "hydrologic formulas" or applies only if the entire District were paved. (Pls.Br. 60.) It is nothing of the sort. As repeatedly explained herein, additional, or incremental, runoff is simply the amount of runoff from a developed property over the natural amount. Plaintiffs' expert Debo understood that at trial. (Tr.352:5-24.)

runoff. (Tr.775:12-21,840:13-841:12.) Also, no one is charged for their undeveloped land. (Tr.599:19-25.)

Fourth, Plaintiffs again do not dispute MSD's arithmetic that demonstrates that additional runoff above the natural amount directly relates to the amount of impervious area, but instead complain the calculations were not admitted. (Pls.Br. 61.) What Plaintiffs fail to mention is that their expert Debo was cross-examined on the arithmetic and admitted that it was accurate. (Tr.351:22-354:7,357:12-361:4.) This is not "re-litigation" of the issue as Plaintiffs contend (Pls.Br. 58-59), it is using elementary math to show how the evidence in the record (Plaintiffs' experts' calculations and MSD's runoff tables) supports MSD's position. The utter lack of any substantive response to the accuracy and merits of MSD's position speaks volumes. Plaintiffs also argue that no hydrologist would look only at additional runoff. (Pls.Br. 60.) Perhaps, but the issue in this case is rate-setting and how MSD can recover the costs of providing stormwater services, not a classroom course on hydrology.

Fifth, Plaintiffs again misrepresent the requirement that pre-development conditions be maintained as evidence that impervious area does not relate to runoff or service (Pls.Br. 60-61), but do not challenge the explanation in MSD's opening brief that this requirement matters only for small storms and does not affect MSD's costs. (MSD Br. 88-89.) They likewise assert that the additional runoff from the impervious area on two properties will be different and that this "dismantles" the basis for the Charge. (Pls.Br. 59.) However, putting to the side that Plaintiffs do not cite any evidence in the record to support this "dismantling," the actual evidence in the form of Plaintiffs' expert

Jones's calculations of runoff from his "field study" demonstrated that the additional runoff from impervious area was the same on the properties he analyzed. (Tr.616:10-621:15.)

**f. Plaintiffs' Argument Relating to "Base Services" and
"General Benefits" Is Without Support in Fact or in Law.**

Finally, two fundamental problems underlie Plaintiffs' contention that the Charge fails to meet Factor 3 because MSD charges for "base services" (a term defined by Plaintiffs' counsel at trial), which supposedly provide a general benefit to all customers. (Pls.Br. 61-64.)

First, Plaintiffs concede that "utilities may not be able to precisely quantify the services they provide to a ratepayer," but attempt to distinguish the Stormwater User Charge from other utility charges because they use a meter or a voter-approved measurement or allow for the ratepayer to control his or her bill. (Pls.Br. 62.) This is a distinction without a difference. The Charge uses the most widely-accepted measurement of service just like other utilities, and the fact that a (non-existent) "runoff meter" is not in place is irrelevant because the amount of stormwater runoff in any given month does not affect the level or cost of stormwater services. Indeed, the only "meter" that is required is the one to measure the amount of each property's impervious area, which MSD does very carefully and accurately through aerial photography and photogrammetry. (Def.Ex.B §11(A105).) And, contrary to Plaintiffs' contention, it is possible for an MSD customer to control their bill. A customer can remove a concrete patio and can replace concrete with pervious asphalt or pervious concrete. Taking such a measure

is no more impractical or expensive than a customer spending money on higher efficiency furnaces and using alternative energy to reduce gas and electric use.

Second, Plaintiffs take a concept (“base services”) created solely by their lawyers and apply the concept to a misreading of *Feese*. Plaintiffs contend that 50% of MSD’s services are “base services” and that these services are the same for each customer throughout MSD and conclude that these “base services” are “general benefits,” which do not meet Factor 3. (Pls.Br. 61-64.) Taking each step one-by-one, the fallacy underlying their argument is exposed.

The concept of “base services” was created by Plaintiffs’ counsel. (Tr.771:9-772:20.) It is not mentioned in the Ordinances, in the Rate Commission documents, or in any document in this case (besides the Judgment). Indeed, where Plaintiffs discuss Mr. Theerman’s testimony about “base services,” the testimony was the result of Plaintiffs’ counsel confusing the term with the “Basic Services” concept defined in the Ordinance as operation and maintenance, regulatory and planning services. (*Id.*) Therefore, this “base services” device is not supported by any evidence.

Moreover, when looking at Mr. Theerman’s testimony that Plaintiffs convolute to support the contention that “base services” result in “general benefits” that are “uniform” for everyone, it becomes clear that Mr. Theerman was merely stating, consistent with the Ordinances, that the operation and maintenance, regulatory, and planning services were enjoyed by every customer, and these services were uniform in that they were provided district-wide, not that the services were enjoyed at the same level by each customer or that each customer received the same general benefit. (Tr.771:9-772:20.) Despite

Plaintiffs' spin, this was not an admission that MSD's services were general benefits uniformly enjoyed. Indeed, notwithstanding Plaintiffs' use of imprecise terms, Mr. Theerman still made it clear that the stormwater services were "tied to development" and "driven by development"; that is, the services varied according to impervious area. (*Id.*)

Nonetheless, the point gets Plaintiffs nowhere. With respect to "general benefits," Plaintiffs make the remarkable assertion that **MSD** made a "general benefits" argument. (Pls.Br. 62-63.) This is simply untrue. MSD, in fact, challenged the "general benefits" analysis of the Trial Court in its opening brief (MSD Br. 34-35, 93-95) and demonstrated how this "general benefits" or "all characteristics of a tax" theory was soundly rejected by *Arbor* and should not have been considered by the Trial Court. And MSD has shown that the very basis of Plaintiffs' "general benefits" theory is a house of cards. Plaintiffs adopt this theory from *Feese*, but benefits are discussed in that case only in connection with an issue completely separate from any Hancock issue – an interpretation of ballot language to see whether it authorized the charge. 893 S.W.2d at 812-13. Therefore, it was legal error for the Trial Court to rely on *Feese* in this manner, and Plaintiffs offer no response.

To summarize, under the appropriate application of Factor 3, MSD's variable Charge is related to the level of services provided, and impervious area is a proper measure of those services. The Trial Court's conclusion to the contrary was legally and factually deficient.

D. Factor 4 – Is the Government Providing a Good or Service?

Factor 4 should be found in MSD's favor because the Stormwater User Charge was used to provide stormwater services to MSD's customers. There is wide agreement that MSD provides stormwater services. The Trial Court recognized this in the Phase I Judgment when it referred to these services some 21 times. (MSD Br. 82.) Plaintiffs' expert Debo admitted that these services were provided (despite his switch of terminology to activities). (*Id.*) Their other expert, Jones, testified in depth about the services MSD performed. (*Id.*) Indeed, Plaintiffs referred to the provision or receipt of services on no less than a dozen occasions in their brief. (Pls.Br. 15,17,23,26,27,36,37, 38,47,50,51,65.) Coupled with the extensive testimony and evidence presented by MSD about its services (MSD Br. 82-84), it cannot be credibly questioned that MSD meets *Keller* Factor 4 – is it providing a service – under the cases that have held this factor is met if there is a specific service for a specific charge. *Arbor*, 341 S.W.3d at 685; *Beatty II*, 867 S.W.2d at 221; *Missouri Growth*, 941 S.W.2d at 624; *Larson*, 92 S.W.3d at 133; *Ashworth*, 53 S.W.3d at 577. Indeed, Plaintiffs do not even attempt to counter MSD's argument that the revenues from the Charge were placed in a separate fund and spent only on stormwater services (as opposed to being placed in general revenue).

Nevertheless, incomprehensibly, the Trial Court – buoyed by Plaintiffs' proposed judgment that inexplicably refused to concede the obvious – found Factor 4 against MSD. To do so, the Trial Court and Plaintiffs had to adopt standards that border on the ridiculous and then attempt to prop up these standards with unsupported statements and irrelevant considerations. Even the Court of Appeals could not buy the Trial Court's

finding on Factor 4 and found “[t]his factor is easily resolved in MSD’s favor.”

(App.E.D.Op. 9(A85).)

1. *Building Owners* Is Not Applicable Here for Several Reasons.

The Trial Court’s Judgment is based on a distorted application of the *Building Owners* case (*see* Pls.Br. 67-70), but Plaintiffs have done nothing to refute MSD’s explanation as to why *Building Owners* is inapplicable. (MSD Br. 84-86.) In any event, the situations are completely different. First, in *Building Owners*, the city had been funding a *code enforcement activity* based on complaints with general revenues. Here, MSD previously funded its stormwater services (not enforcement of codes based on citizen complaints) through the stormwater-dedicated flat charge and ad valorem taxes, not general revenues. (Def.Ex.B at 2; J. ¶¶20,23;LF1547-48(A7-8).) Second, in *Building Owners*, the fire department was directed to find a way to generate new revenue in order to support its general operations. 231 S.W.3d at 210,214. Here, as the Trial Court recognized, all monies collected were spent exclusively to provide stormwater services and not to fund other MSD functions. (Refund J. ¶¶66,68;LF1804(A60); Tr.970:5-971:20.) Third, the “revenue-driven policy changes” in *Building Owners* involved the decision to take something that the city was not separately charging for (fire inspections) and converting it into something that was charged separately. Here, despite no evidence to support Plaintiffs’ contention that MSD’s motivation was to generate more revenue to support other functions, stormwater services have always been paid for by readily identified (but inadequate) revenues, and MSD’s stormwater services are not merely code

enforcement like the fire department's role in *Building Owners*. Therefore, any reliance on *Building Owners* is misplaced.

2. Factor 4 Does Not Require That New or Different Services Be Provided, But, Even If It Did, MSD's Stormwater Services Were Vastly Different.

There is no requirement that new or different services must be provided in order to meet Factor 4 as the Trial Court and Plaintiffs contend. (Pls.Br. 67-68.) Indeed, this is another instance of a non-existent standard invented by Plaintiffs and accepted by the Trial Court. If this were a requirement, then the charges in *Beatty II*, *Missouri Growth*, and *Larson* certainly would have failed Factor 4 because, in each of those cases, the sewer utility had been providing the very same services, but had been paying for the services in a different way. Moreover, this requirement makes no sense, even under Plaintiffs' "revenue-driven policy changes" analysis. As previously noted, a governmental entity is allowed the flexibility to explore different ways to pay for services it provides. *See Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301,304 ("The Hancock Amendment . . . does not prohibit [government] from shifting the burden to the private users of these services."); *Ashworth*, 53 S.W.3d at 577 (finding Factor 4 for city where new fee paid for a service that had been a drain on the general fund). Plaintiffs try to explain away this flexibility by arguing it is available only when the governmental entity has political accountability. (Pls.Br. 69.) Plaintiffs misread *Keller* and ignore *Arbor*, which explained that the issue of accountability is *not* a Hancock tax versus fee consideration. The "how much to charge" issue that generated the Court's comment

about accountability dealt with the contention that the charge was too high. *Arbor*, 341 S.W.3d at 680-81, 687. In any event, Plaintiffs ignore that MSD does have accountability in the form of its Board of Trustees and the voter-created Rate Commission. (MSD Br. 7-9, 11-12).

Furthermore, even if a new or different service were required to meet Factor 4, it cannot be disputed that MSD's stormwater services changed after it adopted the Stormwater User Charge. Before the Charge, stormwater services were being provided at an inadequate level, and the level of services varied widely depending on the location of the property (because ad valorem taxes varied throughout MSD). (Tr.682:24-683:25.) Maintenance was done on a band-aid, emergency basis, and no infrastructure improvement occurred. (*Id.*; Tr.1001:6-21.) Under the Charge, MSD was able to provide regular maintenance and was beginning capital improvements. (Tr.1001:23-1002:19.) Likewise, before the Charge, a property in West St. Louis County would be receiving the bare minimum of services, whereas a property in a special Operation, Maintenance, and Capital Improvement (OMCI) district would be receiving more and better services. (Tr.1402:18-1405:23,1407:20-1409:1.) Under the Charge, each customer, no matter the location, received the same kind of services. (Tr.1402:18-1405:23.)

3. Plaintiffs' Unsupported Assertions and Inaccurate Statements Cannot Overcome the Trial Court's Error.

Central to Plaintiffs' response on Factor 4 is the Trial Court's alleged ruling that MSD recast its existing activities as services to be a user fee, that MSD's services are not individually measured, and that the services are more like typical government services.

(Pls.Br. 68-69.) However, Plaintiffs fail to direct MSD or this Court to the record citations that support them.

Thus, once Plaintiffs' unsupported argument is cast aside, the true nature of MSD's position, as supported by uncontroverted evidence, is clear. MSD adopted the Charge because it was fairer than the old system of taxes and flat fee, where some customers paid regardless of their contribution to the need for services, and others like the tax-exempt and governmental entities paid little or nothing despite their use of services. (Tr.626:15-23,958:14-959:3; Pls.Ex.79 at 169:13-170:8.) The Charge also was adopted because it would fully cover the costs of service (eliminating the wastewater subsidy) and allow for increased services. (Tr.667:19-668:22; Pls.Exs. 18 at 2-11, 45 at 27:14-28:14.) What MSD did was the very opposite of a revenue-driven money grab, it got rid of taxes that bore zero relation to services and adopted a fair and principled means by which to charge only those, and all those, who contribute to the need for stormwater services.

4. Plaintiffs' Reliance on Irrelevant Considerations That Also Are Found in Its Analysis of Other Factors Should Be Ignored.

Plaintiffs further argue that MSD does not provide services because allegedly 50% of its services are a general benefit and because property owners who develop land per MSD's Design Standards supposedly have no additional runoff, but are charged for services they do not receive. (Pls.Br. 69-70.) Plaintiffs make the very same arguments in support of Factor 3 and elsewhere, and this is a prime example of Plaintiffs improperly leaking considerations into other factors. Putting aside that these considerations are not

proper in any factor, if they are to be considered, they relate to the level of services (Factor 3), not to the fact of services (Factor 4).

While MSD has addressed the general benefits and predevelopment conditions issues above (*see supra* at 1-2, 3-4), Plaintiffs misread *Beatty II* yet again when they contend that “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.” (Pls.Br. 70.) *Beatty II* holds no such thing, but the quote aptly illustrates the illogical nature of the Judgment and Plaintiffs’ argument. How can a rate or charge be set without considering costs? It is not as if stormwater service, sewer service, and water service have some intrinsic, quantifiable value that can be individualized for each customer. Costs do matter, they drive what services are provided and how services are to be funded.

As demonstrated by the foregoing, the Trial Court erred in finding against MSD on Factor 4.

E. Factor 5 – Has the Activity Historically and Exclusively Been Provided by the Government?

Both parties recognize that *Arbor* clarified the seemingly different emphases that courts have placed on Factor 5 by setting out three elements courts should consider. (MSD Br. 90-91; Pls.Br. 71.) However, the Trial Court did not have the benefit of *Arbor* when it decided Factor 5 against MSD, and this Court can decide Factor 5 anew. Under *Arbor*, Factor 5 should be found in favor of MSD because private individuals and entities also provide the same kind of stormwater services as MSD. (MSD Br. 90-93.)

Plaintiffs' attempt to apply the Trial Court's findings retroactively to *Arbor* fails. First, their and the Trial Court's reliance on the 1955 *Dalton* case (Pls.Br. 71) does not answer the questions posed by *Arbor* and otherwise is irrelevant to the issue at hand. Second, there is no requirement in *Arbor* that the person or entity performing the kinds of services that MSD is providing must be a for-profit corporation as implied by Plaintiffs. (Pls.Br. 71-72.) Third, the Trial Court (J. ¶80;LF1562(A22)) did not find that MSD's evidence about others providing similar kinds of services was not credible; the Trial Court, without any factual or legal support, concluded that these services were not similar to the services that MSD provides. This is factually inaccurate because MSD and developers both construct stormwater facilities, and a retention pond is a stormwater-related facility. (Tr.217:6-25,876:18-877:14.) Finally, Plaintiffs' comparison to a homeowner doing electrical wiring as providing the services of an electric utility is not apt. (Pls.Br. 73.) The private provision of services here (like infrastructure construction, maintenance, and erosion control) are precisely some of the same stormwater services that MSD provides. (Tr.590:17-592:9,593:13-594:2,715:18-717:18.) But MSD did not provide them either for policy reasons or due to lack of funds (such as Plaintiff Milberg's erosion situation). (Def.Ex.B §5(A104); Tr.157:4-19.)

Therefore, under *Arbor*, Factor 5 should be found in MSD's favor or, at worst, this factor should be inconclusive as in *Beatty II* and *Missouri Growth*.

F. Although Necessary Only When the *Keller* Factors Are Inconclusive, Other Possible Factors Weigh in Favor of the Stormwater User Charge Not Being a Tax.

In their response, Plaintiffs simply ignore the issues raised by MSD on this point, misstate what MSD maintained in its opening brief, and argue that the Stormwater User Charge is a tax because of the possibility of a lien and because there allegedly is no accountability for MSD. (Pls.Br. 75-77.)

First, based on this Court’s rejection of a very similar argument in *Arbor*, MSD argued that the Trial Court erred when it created and considered the vague and amorphous “All the Characteristics of a Tax” factor. (MSD Br. 93-95.) This is what MSD rightly claimed was erroneous, not (as Plaintiffs claim, Pls.Br. 74) that a court could not consider any other factors in a close case. Plaintiffs’ lack of any attempt to justify or defend the Trial Court’s analysis of this improper factor demonstrates that it was error. Instead of trying to justify this consideration as another factor, Plaintiffs have again taken the “general benefits” findings made by the Trial Court in this improper factor and contaminated other factors (like 2, 3, and 4) as discussed above. This shell game of moving an improper factor into others should not be allowed.

Second, Plaintiffs do not even respond to three possible factors offered by MSD – deference to rate-setting, fair and reasonable charge, and the Rate Commission proceedings – to support the finding of a true user fee. (MSD Br. 96-98.) As such, these factors should be considered if the *Keller* factors are inconclusive.

Third, Plaintiffs again misrepresent what MSD stated in its opening brief when Plaintiffs aver that MSD admitted that the Trial Court properly considered whether a lien could be imposed on property for non-payment. (Pls.Br. 75.) In reality, MSD acknowledged that the lien issue (even though not indicative of a tax) could be considered in a close case as directed by *Arbor*, but further demonstrated that MSD had not used its lien power and instead uses late fees and collection lawsuits to collect overdue charges as the city in *Arbor* did. (MSD Br. 96.) In contrast, Plaintiffs do not recognize that the lien power is only considered when the *Keller* factors are inconclusive and instead improperly characterize it as a sixth factor in the analysis. (Pls.Br. 75.) Plaintiffs also ignore MSD's argument relating to numerous statutory liens available to non-governmental entities for non-payment of bills for services provided. (MSD Br. 96.)

Fourth, undeterred by MSD's showing that the Trial Court erred in considering the inappropriate "All Characteristics of a Tax" factor, Plaintiffs try to graft yet another element onto the *Keller* factors – the accountability of the governmental entity. (Pls.Br. 76.) In manufacturing this proposed new factor, Plaintiffs rely on this Court's statements in *Arbor* that, if residents think a fee is too high, they can vote the officials out of office. 341 S.W.3d at 687. A fair reading of *Arbor* leads to the conclusion this is the very *antithesis* of a *Keller* factor. This Court was holding that the city's charge in excess of costs was not a consideration because the Hancock Amendment was not meant to be a remedy for all citizens' complaints. *Id.*; see also discussion *supra* at 58-59.

Similarly, Plaintiffs complain that, because MSD's Board is appointed and not elected, MSD's power is left unchecked. (Pls.Br. 76.) But this is not so. MSD's Board

is appointed by the Mayor of the City and the County Executive, who are elected officials with political accountability. In fact, in 2003, five of six MSD trustees were asked to resign by the Mayor and County Executive and did so. Heather Cole, *Slay, Westfall Appoint New MSD Trustees*, ST. LOUIS BUSINESS J., March 7, 2003, available at <http://www.bizjournals.com/stlouis/stories/2003/03/03/daily89.html>. Even more directly, MSD has a Charter and a Rate Commission that provide direct checks and balances on MSD's ability to raise charges. (Pls.Ex.22 §§5.010,.030,7.040.) MSD cannot violate its Charter. And before it can raise its charges, it must submit them to the Rate Commission process, which takes 6 months and involves public participation, and which results in a recommendation on rates that the Board must accept if it meets the requirements of the Charter. (Pls.Ex.22 §§7.270,.300; Tr.388:11-23,635:9-18,661:19-662:20.) Additionally, MSD's decision not to raise the Charge from \$0.14 to \$0.17 per 100 ft² in 2010 (as scheduled) is indicative of MSD's restraint and accountability. (Def.Ex.F; Tr.703:4-22.) Therefore, even if this element should be considered, there is most assuredly accountability – direct and indirect – in MSD.

G. Plaintiffs' Reliance on the Recent *DeKalb* Case from the Federal Court of Claims and the *Bolt* Case from Michigan Is Misplaced Because Those Inapposite Cases Applied Factors Different From the *Keller* Factors; Instead This Court Should Look to Cases That Apply Factors Similar to *Keller*.

Throughout the course of this litigation, Plaintiffs have taken the rigid stance that the law from another state or anything that a non-Missouri stormwater utility does are not relevant because Missouri "has the Hancock Amendment," as if it were the only body of

law raising the tax versus fee issue. (*See, e.g.*, Tr.824:17-826:13; LF1432.) Plaintiffs now change their tack and spend almost 10 pages advocating that this Court look to cases decided by the Federal Court of Claims under federal law and by the Michigan Supreme Court under Michigan law. Of course, out-of-state decisions may be persuasive authority so long as they examine similar issues using analysis similar to that of Missouri law. As set forth herein, however, Plaintiffs' cases are not persuasive authority because they apply different factors and standards than the well-settled Missouri law applying the *Keller* factors and are otherwise distinguishable on their facts. On the other hand, in its opening brief MSD cited a series of relevant persuasive authorities that apply standards and factors similar to the *Keller* analysis. (MSD Br. 97-98; *see also* NACWA Am.Br. 13-17.) The great weight of authority of these other cases favors MSD.

1. *DeKalb County v. United States* Should Not Be Followed.

In *DeKalb County v. United States*, No. 1:11-cv-761-LJB (Fed. Cl. Jan. 28, 2013), a case decided over a month after MSD submitted its opening brief, the County sought to recover six years of unpaid stormwater fees from the federal government by suing the government in the Federal Court of Claims in Washington, D.C. (Pls.Br.A11.) As Plaintiffs' recognize (Pls.Br. 77), what was at issue in the case was the Supremacy Clause of the U.S. Constitution, waiver of sovereign immunity, and questions of federalism. (Pls.Br.A22-24.) Indeed, the court specifically noted that it would not follow state law, including the decision from the Georgia Supreme Court holding that impervious-based

stormwater charges were fees and not taxes,¹¹ because of the federal rights involved. (Pls.Br.A24.) Therefore, at the threshold, *DeKalb* is not persuasive authority because it involved the application of federal law to very specific issues of federalism – none of which exist in this case.

Factually, the charge at issue in *DeKalb* was much different from MSD’s Stormwater User Charge. That charge used the Equivalent Residential Unit (“ERU”) method where the County took a statistical sampling of single-family dwellings and took the median impervious area as the ERU. (Pls.Br.A4-5.) Under the charge, all residences were charged 1 ERU or \$4 per month, and the bill was charged annually on the property tax bill. *Id.* Thus, the *DeKalb* charge involved averages and uniform flat charges, which would not pass muster under Missouri law. As such, the remainder of the court’s analysis is of little value.

However, despite finding that the federal government did not have to pay the charge, the *DeKalb* court recognized something that Plaintiffs continue to deny – that the additional runoff from impervious area causes the need for stormwater services:

But when land is developed, and the property is covered with impervious surfaces such as buildings, parking lots, sidewalks, and roads, rainfall cannot be absorbed and flows onto adjacent land in higher volumes and at higher velocities than if the land had remained in an undeveloped state.

¹¹ This case, *McLeod v. Columbia County*, 599 S.E.2d 152 (Ga. 2004), is cited in MSD’s opening brief (MSD Br. 98) and is discussed below.

This additional runoff increases the risk of flooding for nearby properties and also contributes to water pollution because the stormwater collects debris, chemicals, and other materials on the pavement and other impervious surfaces as it travels towards natural waterways. *Stormwater runoff from impervious surfaces* also impairs water quality through erosion and sedimentation.

In response to the *increased stormwater runoff attributable to development*, local governments have constructed and operated stormwater management systems for many years. The cost of operating such systems has increased dramatically in recent years, due to the accelerated pace of development and new requirements, especially requirements related to the abatement of water pollution, imposed by both state and federal law.

(Pls.Br.A2 (emphases added).) With even their own cited cases recognizing this fact, Plaintiffs cannot continue to credibly dispute this well-settled fact with their strawman theory.

Legally, the three-part test applied by the *DeKalb* court bears zero resemblance to the *Keller* factors, and, for this reason, *DeKalb* is not persuasive authority here.

However, before demonstrating how the *DeKalb* test is at odds with Missouri law, it must be noted that federal courts themselves are divided over whether an impervious-based stormwater charge is a tax and over what test to apply in these cases. In *United States v. City of Renton*, No. C11-1156JLR, 2012 WL 1903429 (W.D.Wash. May 25, 2012), the district court held that the federal government was required to pay a stormwater charge

based on the amount of impervious area and noted that the fees charged did not have to “be used solely for dealing with stormwater pollution attributable to that entity’s property or for facilities near its property.” *Id.* at *7,12. Moreover, in finding that the charge was not a tax, the court followed a different test than the one applied in *DeKalb*. The *City of Renton* court applied the test from the Supreme Court’s decision in *Massachusetts v. United States*, 435 U.S. 444,467 (1978), which analyzes if a fee: (1) is charged in a non-discriminatory manner; (2) is a fair approximation of the use of the services; and (3) does not produce revenue in excess of the services provided. *City of Renton*, 2012 WL 1903429, at *7; *see also Maine v. Dep’t of Navy*, 973 F.2d 1007,1014 (1st Cir. 1992) (holding regulatory fees were not taxes under the *Massachusetts* test and that “the law does not require a precise correlation between regulatory fees collected and regulated services provided”). Thus, because of its similarity to *Keller* Factors 2 and 3, the *Massachusetts* test and the cases applying it, in particular *City of Renton*, are persuasive.

The test applied in *DeKalb* is foreign to the *Keller* factors. The first consideration – which entity imposed the charge – is not remotely similar to any *Keller* factor. If it is to be applied, it would favor MSD here because MSD collects its own stormwater user charge for use in providing stormwater services.

The second consideration – which parties must pay the charge – is similar to *Keller* Factor 2, but its application in *DeKalb* is squarely at odds with the way Missouri courts apply Factor 2. The *DeKalb* court found this factor was indicative of a tax because the charge was assessed against a majority of property owners rather than a narrow group. (Pls.Br.A30.) In contrast, on *Keller* Factor 2, Missouri courts instruct that even

though “almost all” residents are subject to the charge, it still passes Factor 2 so long as only those who use the services are charged. (MSD Br. 48.)

The third consideration in *DeKalb* – for whose benefit are the revenues spent – is found in no case applying the *Keller* factors and is only shoe-horned into this case by Plaintiffs’ mischaracterization of *Feese*. (MSD Br. 93-95.) The *DeKalb* court’s application of this consideration illustrates its inapplicability. The court found this factor was indicative of a tax because, as Plaintiffs urge here, even undeveloped properties downhill from extensive development allegedly “benefit” more from stormwater services than the uphill properties creating the burden on the services. (Pls.Br.A35.) Under this faulty logic, the properties causing the need for services will pay nothing, while the parties not causing the need for the services will pay for all of them. This analysis is anathema to the purpose of *Keller*, which allows for user fees so long as the proper parties are paying for the services.

A final consideration by the *DeKalb* court – the involuntary nature of the charge – is again found nowhere in any case applying the *Keller* factors.

Therefore, because there is a divergence as to what test federal courts are to apply to charges like MSD’s and because the test applied in *DeKalb* is contrary to the *Keller* factors, *DeKalb* is not only not binding on this Court, but also is not persuasive authority.

2. *Bolt v. City of Lansing* Is Likewise Inapplicable.

As with *DeKalb*, Plaintiffs’ reliance on a case decided by the Michigan Supreme Court fifteen years ago, *Bolt v. City of Lansing*, 587 N.W.2d 264 (Mich. 1998), also is misplaced for many of the same reasons. This case is clearly distinguishable and

inapposite and is of no persuasive authority in deciding whether MSD's Stormwater User Charge is subject to Missouri's Hancock Amendment.

In *Bolt*, in order to fund construction of separate sanitary and storm sewers (that affected only a portion of the system), the City of Lansing imposed an *annual* stormwater service charge “on *each parcel* of real property located in the city using a formula that attempts to *roughly estimate* each parcel's storm water runoff.” *Id.* at 267 (emphases added). However, residential properties with less than two acres were charged flat fees based on a predetermined number of “equivalent hydraulic area” units. *Id.* The stormwater charge provided for partial credits to properties that had neither stormwater system service (25%) nor wastewater system service (25%). Thus, everyone received a charge regardless of receiving service.

In analyzing Lansing's charge, the Michigan Supreme Court considered factors that are very different from Missouri's *Keller* test: (1) a user fee serves “a regulatory purpose rather than a revenue-raising purpose”; (2) “user fees must be proportionate to the necessary costs of the service”; and (3) a user fee must be voluntary so that property owners can refuse or limit their use of the service. *Id.* at 269-70.

First, the court found that most of the costs of separating the combined system related to capital improvement (rather than regulation), that Lansing made no effort to allocate the costs evenly, and that the revenue was far in excess of the costs of the payers using the system. *Id.* at 270. Thus, the court concluded it constituted a tax because the charge's purpose was to raise revenue. In contrast, MSD's impervious-based Charge allocates costs fairly among its customers by way of direct measurement of impervious

area, the revenues from the Charge are used only to fund current services, and the Charge pays for numerous regulatory, planning, and management services. (MSD Br. 15-17.)

Second, in *Bolt*, the court held that the charge did not “correspond to the benefits conferred” because 75% of Lansing property owners were served by a separate, not a combined, system, and, thus, the benefit was to the general public, not the individual property owner. *Id.* at 271. Moreover, the court stressed that “virtually every person” in Lansing was considered a user and was required to pay the charge. *Id.*

The charge at issue here is completely different. It was not used to fund capital improvements benefitting only 25% of MSD’s customers. Instead, the Stormwater User Charge funded services that each customer with impervious area caused the need for and thus received. MSD customers who have no impervious area on their property are not charged because they are not causing the need for services. MSD customers whose properties drain internally or into a major river receive a 50% credit because they are not using the stormwater system, but are using MSD’s regulatory, Phase II permit, and planning services. In Lansing, even those properties not using the system (there was no regulatory aspect of the charge) were still billed the charge. Furthermore, unlike Lansing, MSD does not charge every person in its District – 38,000 parcels of land are not subject to the Stormwater User Charge. Also, the Stormwater User Charge is not a flat rate for residential customers like the one in Lansing. Additionally, rather than “roughly estimating” like the charge in Lansing, MSD directly measured the impervious area of all properties within the District.

The court's analysis of whether the charge is voluntary is irrelevant under Missouri law. The five *Keller* factors guide this Court's analysis of MSD's Stormwater User Charge under the Hancock Amendment. The so-called "voluntariness" of the charge is not one of those factors. In any event, the Stormwater User Charge is voluntary in the sense that a customer can reduce demand for services and the amount of the charge by reducing the impervious surface area on a parcel of property.

Finally, in *Bolt*, the court expressed concern that the charge could "be increased any time without limit." 587 N.W.2d at 273. But that is not a concern here. Any charge, fee, or increase thereto must go through the rigorous, six-month Rate Commission process, in which that independent Commission examines whether the charge complies with all laws (including Hancock) and whether a fair and reasonable burden is placed on customers. Thus, MSD cannot arbitrarily and without limit raise its Charge.

For these reasons, the *Bolt* case has no application to the Stormwater User Charge.

3. The Relevant Authority From Other States Applies Factors Similar to or Analogous to *Keller* and Thus Are Instructive Here.

Contrary to Plaintiff's unfounded conclusion (Pls.Br. 87-89), the cases cited by MSD in its opening brief (MSD Br. 97-98) and others (NACWA Br. 13-17) are persuasive authority because those cases applied standards to impervious-based stormwater charges that are similar to the *Keller* factors.

For instance, Washington courts apply factors similar to our *Keller* analysis. In *Tukwila School District v. City of Tukwila*, 167 P.3d 1167 (Wash.App. 2007), the city established a stormwater fee based on estimating the average impervious area on a

property in the city. *Id.* at 1169. The fee could be enforced through a lien on non-paying properties. *Id.* Moreover, while some credits were available, no credits were given for private detention/retention systems. *Id.* at 1175. In holding that the impervious-based charge was not a tax, the court utilized a test that had at least two factors very similar to *Keller* – whether the revenues collected are spent on the services provided and whether a direct relationship exists between the rate and the service received or the burden contributed by customers. *Id.* at 1171-72. With respect to the former factor, the court found that the funds were spent to provide services and to relieve the burden created by impervious areas. *Id.* at 1172-73. With respect to the latter factor, the court held:

Here, the City charges the fee to real property owners with impervious surfaces on their land because these surfaces require storm and surface water systems to alleviate the burdens their presence imposes on neighboring land. We agree with the City that it rains everywhere and all parcels within the City benefit from a system that manages the quantity and quality of storm and surface water runoff to prevent flooding, erosion, sedimentation, pollution, and danger to life and property. While there is certainly an overall public benefit, the fees assessed are still based on the amount and rate of runoff a parcel of property generates. As with garbage removal, there is a benefit to the public-at-large from having the City provide garbage removal that is paid for based on the amount of waste generated. So long as the rate is *reasonably based on usage* – i.e., the

amount of the property owner's contribution to the problem – the fee is *directly related* to the service provided.

Id. at 1174 (emphases added). Thus, even though impervious areas were merely estimated, the court found there was such a direct relationship between the impervious-based rate and the services provided. The same holds true for MSD's Charge.

Florida's courts also provide guidance on stormwater fees using analyses similar to *Keller*. In *City of Gainesville v. State of Florida*, 863 So.2d 138 (Fla. 2003), in concluding that the fee (based on ERU estimate) was not a tax, the court utilized a multi-factor test that, like the *Keller* test, analyzed the relationship between the fee and the service provided, whether the fee is blanket-billed, and when the fee is paid. *Id.* at 145. First, the court found that the fee was voluntary because properties without impervious area were not charged and properties that were internally drained were exempted. *Id.* at 146. Second, the court recognized that "the need is created by impervious area Therefore, the City properly based its fee on the amount of impervious area on each property." *Id.* at 147. The court rejected the argument that the fee was a tax because the city did not measure the customer's actual use of the system and found that courts typically uphold "rates that do not precisely correlate with actual use." *Id.* at 148. In this way, the court noted the similarity between stormwater fees and wastewater and sewer fees. *Id.* at 146.

In an earlier, but separate, case also styled *City of Gainesville v. State of Florida*, 778 So.2d 519 (Fla.App. 2001), the State contended the stormwater fee was a tax because a customer could not refuse the service and because the user did not receive a benefit

from the service, just like Plaintiffs do here. *Id.* at 524. In holding that the fee was not a tax, the court found that the user could refuse the stormwater management services “by refraining from developing the land or, if the land has been developed, by preventing runoff from leaving the property.” *Id.* Thus, the court reasoned that just as the user could haul its own garbage to a landfill, generate its own electricity or get its own water from a well, it could make itself internally drained by “construct[ing] swales, berms, retention ponds and the like to contain all stormwater runoff on its own property” and avoid the stormwater fee. *Id.*¹² Likewise, the court found that the user did receive a benefit from the services in the same way a wastewater user received a benefit, in that the purpose of stormwater services “is to route the water in a way that avoids flooding of other lands and allows the runoff to flow” so that some contaminants are taken out before reaching receiving waters; thus, the court found stormwater fees were akin to wastewater charges (which also cannot be metered) that have routinely been found to be fees and not taxes. *Id.* at 527 (relying on *Missouri Growth*).

Other states also use factors very similar to *Keller*. In *McLeod v. Columbia County*, 599 S.E.2d 152 (Ga. 2004), the Georgia Supreme Court upheld an impervious-based charge and found “that the amount of impervious surface is *the most important factor* influencing the cost of stormwater management services. Accordingly, the

¹² The same is true for MSD’s customers. If a customer is naturally internally drained or is able to make itself internally drained so that no stormwater leaves the property, a 50% reduction in the Charge is available. (Def.Ex.B §27(A109-10).)

County’s method of apportioning the costs of the stormwater services is not arbitrary and bears a *reasonable relationship* to the benefits received by the individual developed properties” *Id.* at 156 (emphases added)(internal quotations and citations omitted). Thus, under a Factor 3-type analysis, the charge was upheld.

The Utah Supreme Court held that a school district did receive a service (*Keller* Factor 4) in the form of handling stormwater runoff from district property and the prevention of damage resulting from such runoff. *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.*, 94 P.3d 234,240 (Utah 2004). The court further found, under an analysis similar to Factor 3, that the district’s impervious areas contributed to the need for the services and compared stormwater services to wastewater services because both deal with the removal of unwanted substances from a property. *Id.* Thus, the court held that the stormwater fee was just like any other utility charge (water, electricity, etc.) and not a tax. *Id.*

The above cases demonstrate that courts across the country have upheld impervious-based stormwater fees against challenges that the fees were taxes. Like *Keller* and its progeny, these cases focus on the service provided and the relationship between the fee and the service, and thus hold that impervious area is a proper way to measure service. Moreover, most of the fees in these cases do not go as far as MSD’s Stormwater User Charge because they use estimates and averages – yet they are held not to be taxes.

As shown above, Plaintiffs have failed to respond to the arguments in MSD's Point I, thereby warranting reversal of the Trial Court's Judgment that the Stormwater User Charge is a tax.

II. POINT II REGARDING THE FEES JUDGMENT ALSO SHOULD BE GRANTED BECAUSE THE ATTORNEYS' FEES AWARDED ARE UNREASONABLE, AND PLAINTIFFS' RESPONSE IGNORES SETTLED LAW.

Although this Court need not reach this issue if it grants MSD's Point I regarding the validity of the Stormwater User Charge, in which case the fee award would be vacated, the award of attorneys' fees and expenses to Plaintiffs' counsel should be reversed. Unlike Plaintiffs' implication (Pls.Br. 89-90), the trial court's discretion with respect to an award of attorneys' fees does not include the discretion to incorrectly state and apply the law. *See Polish Roman Catholic St. Stanislaus Parish v. Hettenbach*, 303 S.W.3d 591,595,605 (Mo.App.E.D. 2010). Here, the Trial Court misstated and misapplied Missouri law (A) by awarding the multiplier of 2.0, (B) by awarding fees on an unsuccessful claim, and (C) by interpreting the term "costs" to include all expenses. In their response, Plaintiffs fail to point to any controlling or even persuasive authority as to why the Trial Court's award of attorneys' fees and expenses was a proper declaration and application of Missouri law. Instead, Plaintiffs point to inapplicable and irrelevant caselaw and ignore the realities of the underlying case.

A. The Award of a 2.0 Multiplier Has No Basis in Missouri Law.

Section 23 of the Hancock Amendment provides that a prevailing plaintiff may recover "costs, including reasonable attorneys' fees *incurred* in maintaining such suit."

MO. CONST. art. X, §23 (emphasis added). This Court need go no further than the plain language of Hancock in order to reject a multiplier of attorneys' fees in Hancock challenges. Section 23 uses the term "incurred," which necessarily means that the fees must be expended or earned in prosecuting the case. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, at 1146 (2002)(defining "incur" as "become liable or subject to"). A multiplier would be cross-wise with this language because a multiplier of the fees would result in awarding fees to Plaintiffs that were not "incurred" in prosecuting the case.

Plaintiffs recognize that there is no Missouri case authorizing a multiplier in statutory fee-shifting cases. (Pls.Br. 90.)¹³ Plaintiffs do not mention, let alone address, the convincing holdings from the U.S. Supreme Court that reject multipliers for the very reasons that Plaintiffs claim a multiplier is warranted here. (MSD Br. 101-05.) Instead, Plaintiffs merely point to two cases (from the Eighth Circuit and the Eastern District of Missouri) ostensibly to show that multipliers are allowed in Missouri fee-shifting cases. (Pls.Br. 90-91.) But these two cases (*Johnston* and *Charter*) are wholly inapplicable here

¹³ Plaintiffs are correct that this Court may reach a decision in *Volkswagen Group of America, Inc. v. Berry*, No. SC92770, before this case. But a decision there may not necessarily be controlling here. In particular, the parties and circumstances are very different. Volkswagen is publicly-traded, for-profit manufacturer of products; MSD is a governmental entity.

as *neither involved fee-shifting provisions* and because both addressed the award of fees from a class action common fund settlement, not the award of a multiplier.¹⁴

Moreover, Plaintiffs contend their “unadorned lodestar” of over \$2 million is somehow inadequate because it “does not properly compensate for the risk that the attorney will not receive any payment if he does not prevail,” relying on a class action treatise and a case from California, *Ketchum v. Moses*, 17 P.3d 735 (Cal. 2001), that allows for a multiplier due to contingency risk. (Pls.Br. 91-93.) As noted by MSD (MSD Br. 103-104), this contingency risk¹⁵ notion was specifically rejected by the U.S. Supreme Court because the lodestar accounts for any difficulty in prevailing on the merits and such enhancement would improperly subsidize unsuccessful contingency cases taken by attorneys. *City of Burlington v. Dague*, 505 U.S. 557,562-66 (1992). Thus, in *Dague*, the Court explicitly held “that enhancement for contingency is not permitted under the fee-shifting statutes at issue” and reversed a 25% lodestar enhancement. *Id.* at 567. The Supreme Court also recognized that a contingency risk multiplier “penalizes the defendant with the strongest defense, and forces him to subsidize the plaintiff’s attorney for bringing other unsuccessful actions against other

¹⁴ The “precedent from a number of other states” referred to by Plaintiffs (Pls.Br. 90) are primarily cases from California and Florida and, in any event, were already shown by MSD to be inapplicable or against U.S. Supreme Court precedent. (MSD Br. 105-07.)

¹⁵ If this were a true class action contingency risk situation, Plaintiffs’ counsel would have gotten zero fees because they did not recover any damages on behalf of the class.

defendants.” *Pennsylvania v. Del. Valley Citizens’ Council*, 483 U.S. 711,721-22 (1987) (*Delaware Valley II*)(plurality opinion rejecting contingency enhancement). Thus, while private plaintiffs are free to agree to an enhanced contingency fee with their attorneys, that rationale does not apply in the *fee shifting* scenario. Because Missouri courts have followed U.S. Supreme Court precedent in other respects regarding fee awards, this Court should follow the U.S. Supreme Court (rather than California or Florida courts) and reject a multiplier to subsidize contingent risk. (MSD Br. 101-06.)

Furthermore, the Trial Court and Plaintiffs both erroneously claim that a multiplier should be awarded because, otherwise, there might not be counsel to represent plaintiffs in Hancock challenges. (Pls.Br. 92.) But this is what the fee-shifting provision accomplishes on its own – attracting and fully compensating counsel. And Plaintiffs’ “unadorned” lodestar in excess of \$2 million (at full rates and unfettered hours) was certainly more than fair compensation (especially compared to MSD’s fees of less than \$1 million). (Tr.1141:20-1142:7; Def.Ex.U-5.) In any event, this notion that no other counsel would accept this case is belied by the fact that other competent counsel unsuccessfully attempted to intervene. (LF18-41,LF538.)

Finally, Plaintiffs deploy a bootstrap argument to support the improper award of a multiplier by contending that, if they had been successful on their refund claim, Plaintiffs’ counsel would have been entitled to over \$22 million, and the Trial Court’s award is only 1/4 of that amount. (Pls.Br. 92-93.) Indeed, Plaintiffs’ counsel claim they have been “deprived” of such a large contingency fee because MSD spent the money it collected under the Charge providing services to its customers, rather than setting it aside

for Plaintiffs' counsel. (*Id.* 92.) Of course, this ignores the highly relevant fact that *Plaintiffs were not successful on the refund claim*. Moreover, this argument ignores the fact that, if a contingency fee of over \$22 million were awarded, it would be MSD's customers that would pay for it, all while getting only 75 cents on the dollar of any refund so that Plaintiffs' counsel would not be "deprived" of their large fee. A multiplier is not warranted here.

B. Under Settled Law, Attorneys' Fees Incurred in Plaintiffs' Unsuccessful Refund Claim Are Not Recoverable.

Plaintiffs' unsuccessful refund claim was tried in the bifurcated Phase II trial. In response to MSD's unassailable argument that the Trial Court erred by awarding fees on the unsuccessful refund claim, Plaintiffs misstate the Trial Court's holding and incredibly conclude, without real analysis, that the issues were "so intertwined" to determine the amount of time Plaintiffs spent on the unsuccessful refund claim. (Pls.Br. 94-100.)

The Trial Court and Plaintiffs apply the incorrect burden of proof in stating that MSD did not meet its burden to prove that reductions were appropriate. The party *seeking* attorneys' fees bears the burden of proving the fees sought are "reasonable and necessary to the case." *S.M.B. by W.K.B. v. A.T.W.*, 810 S.W.2d 601,607 (Mo.App.E.D. 1991). And Plaintiffs' response underscores the reasons why they failed to meet their burden regarding the fees on the refund claim.

Plaintiffs first assert the Trial Court rejected MSD's well-founded legal position that Plaintiffs cannot recover fees incurred on unsuccessful claims by "finding that 'MSD failed to prove that any . . . reductions were appropriate.'" (Pls.Br. 94; Fees J. ¶8;

LF2639(A66).) Plaintiffs are guilty of selective quotation and taking the findings out of context. Plaintiffs omit the term “additional,” and, when read in context, the Trial Court’s finding was merely that Plaintiffs’ counsel had removed “excessive, duplicative or unnecessary time” (only after being challenged by MSD) and that MSD had not proven that other reductions were necessary. (Fees J. ¶8;LF2639(A66).) This was not a legal conclusion that Plaintiffs’ claims were too intertwined so that fees incurred on the refund claim could not be determined. Indeed, the Trial Court made no such finding. (MSD Br. 108-09.)

Plaintiffs’ main argument is that the issues were so intertwined that *bifurcation* of the issues was necessary. This is backwards, if not bizarre. In fact, it was because the Hancock and refund claims involved *different facts and legal theories* that bifurcation was possible. If the facts and legal theories were so intertwined and related, then bifurcation could not have practically been accomplished, and the Hancock and refund claims would have been tried together. Likewise, if the facts and legal issues were so intertwined, then Plaintiffs presumably would not have had to appeal the denial of the refund. But they did. Indeed, in the cases relied on by Plaintiffs, *Williams v. Finance Plaza, Inc.*, 78 S.W.3d 175 (Mo.App.W.D. 2002) and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), there was no bifurcation, and the claims involved the same set of facts.

Plaintiffs further downplay the significance of the denial of the \$90 million refund as “incidental” to the Hancock claims. (Pls.Br. 99.) Aside from begging the question as to why they would need to appeal such an inconsequential (\$90 million) ruling if Plaintiffs got full relief otherwise, the importance is not at issue. Plaintiffs did not prevail

on the refund claim, the certification of the class was in no way a victory for Plaintiffs, and the fees expended on that phase of the trial are easily segregated.

Reducing the amount of attorneys' fees awarded Plaintiffs on the refund claim takes nothing away from the result achieved on the Hancock claims, but it is settled law that MSD is not required to pay Plaintiffs' fees on this unsuccessful claim. Therefore, the Fees Judgment should be reversed on this ground.

C. The Trial Court Erred in Awarding Plaintiffs All of Their Litigation Expenses.

Plaintiffs do not dispute that the term "costs" is defined narrowly by Missouri courts. Nor do they dispute that Missouri statutes expressly provide for recovery of litigation expenses and expert witness fees when the Legislature deems recovery of such items necessary. (MSD Br. 111-12.) None of the arguments offered in Plaintiffs' response affect the conclusion set out in MSD's opening brief – "costs, including attorneys' fees" means just that and only that.

Plaintiffs strain to conclude that the use of "costs, including attorneys' fees" in §23 of the Hancock Amendment, rather than the language "court costs and attorneys' fees" used in one statute (R.S.Mo. §213.111.2), means that the intent of the "legislature" was to award all expenses in Hancock cases. (Pls.Br. 100-01.) This tenuous argument misses the mark. First, Plaintiffs obviously are speculating about what the "legislature" did in drafting §23 because the *legislature did not draft the Hancock Amendment*. The Amendment was adopted by voter initiative and presumably drafted by its proponents. Second, despite MSD's examples of statutes whose plain language expressly allows

recovery of expenses and expert fees (MSD Br. 111-12), Plaintiffs somehow conclude that “costs, including attorneys’ fees” is broader than costs and attorneys’ fees. Yet a plain reading of §23 is that it ensures a prevailing plaintiff will recover attorneys’ fees as well as court costs; it does not give a court carte blanche on what to award.

Likewise, Plaintiffs’ expansive proclamation that litigation expenses and expert fees should be included in the term “attorneys’ fees” was rejected by the cases cited by MSD in its opening brief. (MSD Br. 112-13.) Additionally, Plaintiffs’ cases are not applicable here. (MSD Br. 113.) In *Knopke v. Knopke*, 837 S.W.2d 907 (Mo.App.W.D. 1992), and *Jesser v. Mayfair Hotel, Inc.*, 360 S.W.2d 652 (Mo.banc 1962), the plaintiffs created and maintained a common fund to benefit others, which is not the case here. Moreover, in *Jesser*, the trust agreement specifically provided for recovery of litigation expenses from the trust. *Id.* at 663. Also, reliance on *Roberts v. McNary*, 636 S.W.2d 332,338 (Mo.banc 1982), is misplaced because *Roberts* was overruled (albeit on other grounds) by *Keller*, but, perhaps more importantly, involved only \$1,100 in expenses.¹⁶

Furthermore, as with their authorities on the multiplier issue, the cases Plaintiffs cite (Pls.Br. 101-02) to support their contention that class action cases permit recovery of all litigation expenses involve common fund class action settlements. These cases are not relevant here because Plaintiffs are not receiving fees or costs from a common fund, but under a fee-shifting provision. This does not translate into recovery of expenses as of right without express statutory or constitutional authority.

¹⁶ Therefore, *Roberts* should be overruled on the expenses issue or limited to its facts.

Finally, the Declaratory Judgment Act cases that award expenses or expert fees involved “exceptional circumstances” that do not exist here. *Nichols v. Bossert*, 727 S.W.2d 211,213-14 (Mo.App.E.D. 1987), held that no such special circumstances existed and recognized that “[t]he general rule is each party is responsible . . . for paying the fees necessary to bring in experts needed to make his case.” In *Travelers Indemnity Co. v. Bruns*, 701 S.W.2d 195,197 (Mo.App.E.D. 1985), the court found exceptional circumstances where expert fees in the amount of \$790 were awarded where the prevailing party needed to hire an expert regarding the validity of a letter, which should have been avoided had opposing counsel addressed the obvious problems with the letter with his clients. Here, the expenses and expert fees were not exceptional, but were undertaken in the normal prosecution of the case. Proof of this lies in the fact that both parties hired expert witnesses to testify below.

For the reasons set forth above, although not necessary if this Court grants Point I, the judgment for attorneys’ fees and expenses in Plaintiffs’ favor must be reversed.

RESPONSE TO PLAINTIFFS' CROSS-APPEAL

INTRODUCTION TO MSD'S RESPONSE

Consideration of Plaintiffs' cross-appeal is only necessary in the event this Court affirms the Trial Court's Judgment that the Stormwater User Charge is a tax. If considered, the unavoidable conclusion is that the Trial Court's rejection of Plaintiffs' \$90 million refund request was properly founded on the law, the facts, and the equities because Plaintiffs failed to meet statutory requirements for a refund, a refund would be inequitable and against the public interest, and a refund would conflict with the very purpose of Hancock.

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiffs' three-paragraph Statement of Facts in support of their cross-appeal is wholly inadequate. (Pls.Br. 30.) It refers to only two largely irrelevant facts regarding MSD's past Hancock litigation and the awareness of MSD staff that a Hancock challenge was possible here. (*Id.*) There is no reference to, or even summary of, any testimony or evidence. Even when setting forth the Trial Court's decision, Plaintiffs omit most of the grounds for the Trial Court's denial of the refund (failure to follow statutory tax protest requirements and against the weight of the equities). Accordingly, MSD offers this short statement of facts pursuant to Mo.R.Civ.P. 84.04.

The trial reconvened on Plaintiffs' Phase II refund claim on October 6, 2010, about three months after the Phase I Judgment. (Tr.1296:1-3.) Plaintiffs, without any testimony from the class representatives or other witnesses, rested after admitting into

evidence a handful of exhibits and a stipulation showing the amounts MSD collected and a calculation of pre-judgment interest that Plaintiffs were seeking. (Tr.1296-1311.)

MSD put on two witnesses – Jan Zimmerman, its Director of Finance, and Jeff Theerman, its Executive Director. (Tr.1313-1419.) Their testimony was not challenged by any other witness and established the following facts.

After the Phase I Judgment on July 9, 2010, MSD promptly suspended the Stormwater User Charge and reinstituted the old system of flat fees and ad valorem taxes effective August 1, 2010. (Tr.1315:11-1316:2,1382:2-1383:21,1384:6-13; Def.Ex. N5.)

Under the Stormwater User Charge, MSD collected \$90.7 million from April 1, 2008 to July 31, 2010. (Tr.1314:18-1315:10; Def.Ex. F5.) All of the \$90.7 million collected, plus some wastewater revenues from the phased-out subsidy, was spent on providing stormwater services. (Tr.1334:17-1336:4.)

If a refund were to be ordered, the only way to fund such an award would be for District voters to approve a charge or tax to pay for the refund and for a lower level of services – i.e., MSD would be asking customers to charge themselves to pay themselves back, but at 75 cents on the dollar after Plaintiffs’ counsel is paid its 25% contingent fee of \$22 million. (Tr. 1369:13-1370:7;1414:15-1416:11(offer of proof).)

Plaintiffs brought their lawsuit after the Charge was already implemented. MSD did not escrow the money it collected from the Stormwater User Charge because that was its only source of revenue and the money was needed to provide required services. (Tr.1412:1-15.) Also, the Charge had been approved by the Rate Commission and MSD’s Board, and MSD had represented to its customers (and the Rate Commission and

Board) that there would be no taxes. (*Id.*) Likewise, MSD did not suspend the Stormwater User Charge and reinstate the flat fee and ad valorem taxes because this old system was unfair and inadequate and a new, fair, and better system of revenues and services was in place. (Tr.1413:21-1414:8.)

MSD followed the requirements of R.S.Mo. §139.031 by holding in an interest bearing account the amounts that 37 customers (53 accounts) paid under protest. (Tr.1338:22-1340:15.) The total amount in this account at the time of the trial was \$39,657.43. (*Id.*)

As a result of suspending the Charge, depending on the ad valorem taxes generated, some areas of the District will receive a desirable level of services (OMCI districts), while others will have reduced or no maintenance services, and every category of service will drop, while some areas (annexed western area) will see practically no service or minimum service. (Tr.1402:18-1405:23,1407:20-1409:1.)

Suspending the Stormwater User Charge resulted in a funding shortfall for FY2011 of \$17.1 million, which MSD was able to cover with a \$6.5 million stormwater project fund balance, eliminating \$12.5 million in stormwater projects, and a reduction in operation and maintenance services of \$1.8 million. (Tr.1322:24-1323:15,1388:22-1389:7; Def.Ex.J5.)

In denying the refund request, the Trial Court found that the statutory requirements of R.S.Mo. §139.031 must be met. (Refund J. ¶64;LF1803(A59).) Therefore, no refund was possible because Plaintiffs did not follow the statutory requirements. (*Id.* ¶67;LF1804(A60).) The Trial Court further held that the equities,

including the public interest, weighed against a refund because MSD used the monies collected under the Charge providing services to customers and meeting obligations under environmental laws. (*Id.* ¶¶68-69;LF1804(A60).) The Trial Court further held that a refund would conflict with the very purpose of Hancock by increasing the tax burden on customers because any refund would have to be paid for by the customers to themselves, less any contingency fee awarded to Plaintiffs’ counsel. (*Id.* ¶¶66,70; LF1804-05(A61-62).)

RESPONSE ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT STATUTORY TAX PROTEST REQUIREMENTS MUST BE MET TO OBTAIN A REFUND.

[RESPONSE TO CROSS-APPEAL POINT I]

Again, this issue need not be reached if the Court hold the Charge is a user fee. Nevertheless, the Trial Court properly declared and applied the law when it held that the statutory requirements for tax refunds set forth in R.S.Mo. §§137.073 or 139.031 apply to Hancock cases and must be followed to obtain a refund of taxes. (Refund J. ¶¶64,67; LF1803-04(A59-60).)

Conspicuously absent from Plaintiffs’ cross-appeal is the operative language of the Hancock provision at issue. (Pls.Br. 106.) Section 23 of the Hancock Amendment merely provides that taxpayers may bring suit “to enforce the provisions of [the Hancock Amendment] and, if the suit is sustained, shall receive from the applicable unit of government his costs, including reasonable attorneys’ fees incurred in maintaining such suit.” MO.CONST. art. X, §23. Tellingly, the Hancock Amendment does expressly

provide for a refund of excess state revenue collected (*id.* §18(b)), which demonstrates that Hancock provides what revenues and taxes could and should be refunded. *See also Taylor v. State*, 247 S.W.3d 546,548 (Mo.banc 2008)(holding that §23 allows only an interpretative or declaratory remedy, not a judgment for damages or injunctive relief).

Likewise, this Court has held that a money judgment is not necessary to vindicate taxpayers' Hancock rights and a refund that requires a government to spend more money would "thwart" the purpose of Hancock. *Fort Zumwalt Sch. Dist. v. State*, 896 S.W.2d 918,923 (Mo.banc 1995)(citation omitted); *see also Taylor*, 247 S.W.3d at 548. Here, the Trial Court's declaration of unconstitutionality and Plaintiffs' being relieved from paying the Stormwater User Charge adequately enforces Hancock §22. And ordering customers to pay out of pocket to refund themselves, minus 25% for Plaintiffs' counsel, would "thwart" the rationale underlying Hancock.

Subsequently, this Court held that "[t]he enforcement of the right to be free of increases in taxes that the voters do not approve in advance may be accomplished in two ways" – (1) seeking an injunction or (2) bringing a "timely action" for a refund of the tax increase. *Ring v. Metro. St. Louis Sewer Dist.*, 969 S.W.2d 716,718-19 (Mo.banc 1998).

Ring has since been clarified, first by Judge Wolff in a concurring opinion and later by the Court of Appeals, Eastern District so that Section 23 "gives taxpayers standing to bring 'actions for interpretation' of the Hancock Amendment and includes a provision for 'reasonable attorneys' fees.' Except for the provision relating to attorneys' fees, the enforcement provision of the Hancock Amendment, section 23, is not a consent to suit for money judgment." *Green v. Lebanon R-III Sch. Dist.*, 13 S.W.3d 278,287

(Mo.banc 2000)(*Green I*)(Wolff, J., concurring)(citing *Fort Zumwalt*, 896 S.W.2d at 923); *see also Taylor*, 247 S.W.3d at 548.¹⁷ Accordingly, Judge Wolff found that an action for tax refund “*must conform to statutory requirements.*” *Green I*, 13 S.W.3d at 287(emphasis added). Judge Wolff’s analysis has been adopted as a “correct declaration of the law” by Missouri courts. *See Koehr v. Emmons*, 55 S.W.3d 859, 863 (Mo.App. E.D. 2001)(*Koehr I*); *Green v. Lebanon R-III Sch. Dist.*, 87 S.W.3d 365, 367 (Mo.App.S.D. 2002)(*Green II*).

Since adopting *Green I*, the Court of Appeals repeatedly has held that the statutory refund requirements (R.S.Mo. §§139.031, 137.073) must be followed in order for plaintiffs to seek refunds in Hancock cases. In *Metts v. City of Pine Lawn*, 84 S.W.3d 106 (Mo.App.E.D. 2002), the court followed *Ring* and held that §139.031 applied to taxes and charges challenged under the Hancock Amendment, and found that plaintiff could not obtain a refund because of failure to follow §139.031. *Id.* at 109. Likewise, in *Koehr I*, the court reversed a class certification because plaintiffs did not follow the procedures of both §§139.031 and 137.073. *Koehr I*, 55 S.W.3d at 863-64. Moreover, in *Koehr v. Emmons*, 98 S.W.3d 580 (Mo.App.E.D. 2002)(*Koehr II*), the court dismissed the Hancock challenge due to the plaintiffs’ failure to follow §§139.031 and 137.073 and held that “[i]t has been determined that the statutes which provide the mechanism by

¹⁷ Although the Judgment denying a refund should be affirmed under current Missouri law, MSD respectfully suggests that *Ring* was wrongly decided and provides an alternate ground for affirmance here. *See infra* Response Part V.

which taxpayers can protest taxes must be followed when the tax is challenged on a constitutional basis.” *Id.* at 584 (citation omitted). Therefore, Missouri courts expressly hold that R.S.Mo. §139.031 must be followed in order to obtain a refund under the Hancock Amendment. This rule is entirely consistent with *Ring*, which pronounced the broad rule, but provided no mechanism to follow it.

Faced with this reasoned authority, Plaintiffs argue that these cases were incorrect in not applying *City of Hazelwood v. Peterson*, 48 S.W.3d 36 (Mo.banc 2001), or are somehow distinguishable from the case at hand. (Pls.Br. 106-14.) These arguments do not warrant reversal.

First, *Hazelwood* has not been applied because, by its own pronouncement, this Court limited the decision to its own unique facts by holding that the trial court did not abuse its discretion in certifying a class “[u]nder the facts of this case.” 48 S.W.3d at 41.¹⁸ Moreover, its unique facts make *Hazelwood* inapplicable here. In *Hazelwood*, the fire district collected a new ad valorem tax rate increase despite a previously-filed election contest that challenged the validity of the election that approved the tax increase by just thirteen votes. 48 S.W.3d at 38. Thus, the case involved the interpretation of Hancock in conjunction with Missouri’s election contest statutes and is thus

¹⁸ It should be noted that Judge Romines, who was the trial judge in *Hazelwood*, held that it was inapplicable to this case in affirming the refund denial in the Court of Appeals’ majority opinion because *Hazelwood* only authorized a class action. (App.E.D.Op. 17(A93).)

distinguishable for that reason alone. *See Koehr II*, 98 S.W.3d at 583-84. Also, there was no dispute that the vote at issue in *Hazelwood* was a **tax** increase admittedly subject to Hancock, whereas, here, there was a dispute about whether the Charge was a user fee or a tax. Furthermore, in *Hazelwood*, only the \$0.10 increase, or 13%, of the \$0.76 was subject to the refund, not 100% of the Charge as here. 48 S.W.3d at 38. Nor was there evidence that the 13% increase collected had been spent on fire protection services. In addition, the cases cited above holding that statutory requirements must be strictly followed to obtain a refund reinforce that *Hazelwood* has been limited to its unique set of facts.

Aside from these differences, if indeed the lower courts have incorrectly failed to apply *Hazelwood* as Plaintiffs assert, this Court presumably would have granted transfer to correct this interpretation, yet this Court declined to do so in several of these cases. *See, e.g., Koehr II*, 98 S.W.3d 580, *application for transfer denied*; *Koehr I*, 55 S.W.3d 859, *application for transfer denied*. Indeed, these cases are consistent with this Court's decision in *Taylor*, which held §23 is not a basis for a judgment for damages. *See Taylor*, 247 S.W.3d at 548.

Second, Plaintiffs' attempt to distinguish these cases is unavailing. (Pls.Br. 108-14.) Plaintiffs contend that *Green I* and the other cases were concerned only with delay and notice, but nowhere do these cases hold that §139.031's requirement that payment be made under protest can be ignored. To the contrary, the statutory requirements for a refund must be strictly followed. *Koehr I*, 55 S.W.3d at 864; *Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795, 798 (Mo.App.E.D. 2005). And, as recognized by Plaintiffs

(Pls.Br. 111), a key determination by Judge Wolff in *Green I* was: “Finality in taxation is essential to local government.” 13 S.W.3d at 289. This is on all fours with the purposes underlying the statutory tax protest statutes, which are meant to give local government notice and finality. (*See infra* Response Part II.) Moreover, Plaintiffs’ argument that the notice requirements discussed in *Green I* were met because MSD acknowledged that a challenge might occur makes no sense. (Pls.Br. 114.) Practically speaking, it would be impossible for MSD to have notice of a lawsuit challenging its Charge before the lawsuit is even filed or before the Stormwater User Charge Ordinances were even adopted. Indeed, MSD certainly did not have notice that Plaintiffs would wait for 8 months after the Charge had been adopted and after millions had been spent in implementing the Charge and providing services.

Therefore, the Trial Court did not err by requiring compliance with statutory requirements to obtain refunds in reliance on settled Missouri law applying this Court’s precedents.

II. PLAINTIFFS ARE NOT ENTITLED TO A REFUND OF THE AMOUNTS PAID UNDER THE STORMWATER USER CHARGE BECAUSE PLAINTIFFS FAILED TO FOLLOW THE STATUTORY REQUIREMENTS FOR TAX REFUNDS. [RESPONSE TO CROSS-APPEAL POINTS III AND V]

“A suit for the refund of taxes paid in error or collected illegally is looked upon with disfavor for public policy reasons.” *Lett v. City of St. Louis*, 948 S.W.2d 614,620 (Mo.App.E.D. 1996)(citation omitted). “Government budgets are prepared on an annual cash basis. . . . Accordingly, in the absence of statutory authority, taxes voluntarily,

although erroneously paid, albeit under an unconstitutional statute, cannot be refunded.”
Cnty. Fed. Sav. & Loan Ass’n v. Dir. of Revenue, 752 S.W.2d 794,797 (Mo.banc 1988)
(citations omitted). Indeed, “[f]inality in taxation is essential to local government.”
Green I, 13 S.W.3d at 289 (Wolff, J., concurring).

If the taxpayer fails to meet certain strict requirements, the taxpayer is not entitled to a refund. See *Koehr I*, 55 S.W.3d at 864; *Metts*, 84 S.W.3d at 109; *Koehr II*, 98 S.W.3d at 584; *Vogt v. Emmons*, 158 S.W.3d 243,250 (Mo.App.E.D. 2005). Here, Plaintiffs were required to follow R.S.Mo. §139.031, which requires a taxpayer to pay taxes under protest and to “file with the collector a written statement setting forth the grounds on which the protest is based. The statement shall include the true value in money claimed by the taxpayer if disputed.” R.S.Mo. §139.031.1. Section 139.031 “must be strictly construed and enforced . . . [and] must be meticulously followed.” *Ford Motor Co.*, 155 S.W.3d at 798. *Metts* is directly in point because the taxpayer there failed to properly protest the taxes, and the court held:

[W]e have required that section 139.031 be followed when the protest is based on unconstitutionality. . . . *Taxpayers who fail to protest property taxes under 139.031 cannot obtain refunds.* . . . This failure to timely protest and timely commence suit is fatal, even when the protest is based on a Hancock challenge.

84 S.W.3d at 109 (emphasis added)(citations omitted).

Therefore, it is settled law that Plaintiffs were required to pay their Stormwater User Charge under protest, file a written statement setting forth the reasons for the

protest, and then file suit within 90 days. It is undisputed that Plaintiffs failed to follow §139.031, this failure to meet these statutory requirements is fatal to their refund claims, and the Trial Court properly so held. (Refund J. ¶67;LF1804(A60).)

Plaintiffs attempt to salvage their refund claims and avoid §139.031 by arguing in their Point III that the “purposes” of §139.031 were met by filing this lawsuit. This argument must be rejected.

In addition to the taxpayer making it known that payment is not voluntary, the purpose of §139.031 is to “alert the taxing authority to the amount of the refund claimed so that the challenged tax can be segregated and held until resolution of the dispute.” *Quaker Oats Co. v. Stanton*, 96 S.W.3d 133,138 (Mo.App.W.D. 2003)(citation omitted). Unless this is done, “the collector might collect taxes for several years and disburse them, in reliance upon their apparent validity, and then suffer financial hardship if ordered to make later refunds.” *Lane v. Lensmeyer*, 158 S.W.3d 218,222-23,n.7 (Mo.banc 2005). It is the filing of the protest that triggers the obligation of the governmental entity to escrow the money and allow interest to accrue for a possible refund (or for possible use by the subdivision). These protest procedures provide for a readily identifiable source of funds at the end of a tax protest case. Without a protest and the subsequent escrow of funds, the governmental entity (like MSD here) continues to approve budgets and use the funds to provide services. Unless the challenger follows §139.031, there is no way a government could somehow budget for costs and services if its revenues could be reduced retroactively by a refund. Certainly, a government cannot be expected to wait five or ten years after receipt of revenues before it could spend the revenues on services without fear

that a lawsuit could be brought to bankrupt it. No government could properly function under such a cloud of uncertainty. Yet this is exactly what Plaintiffs contend MSD should have done – escrow all the money collected after the lawsuit was filed and hold it until the lawsuit is resolved five years later.

In contrast to Plaintiffs, MSD *complied* with §139.031 by escrowing amounts paid by customers who arguably met the requirements of §139.031. (Tr.1338:22-1340:15.) Plaintiffs did not comply with §139.031 in any way, shape, or form (the class excludes those who arguably complied) and cannot claim that the filing of their lawsuit met the purpose of §139.031 when it plainly did not. As discussed more fully in Part III below, Plaintiffs did not challenge the Stormwater User Charge before it was implemented (despite the Charge’s adoption in December 2007 and implementation in March 2008). Nor did Plaintiffs ever seek any preliminary injunctive relief. Instead, Plaintiffs sat idly by as MSD collected the Charge and spent it providing necessary services. This is in stark contrast to the plaintiffs in *Beatty II* who sued before the wastewater charge was implemented and sought a preliminary injunction. For these reasons, Plaintiffs’ argument that they met the “purposes” of §139.031 must be rejected.

Plaintiffs next contend in their Point V that §139.031 does not apply to class actions. MSD agrees that nothing in §139.031 authorizes class actions, *see Lane*, 158 S.W.3d at 222-23,n.7, but fails to see how this supports Plaintiffs’ point. The fact remains that the *class representatives* did not follow §139.031 in this case, which should cut off any further discussion as to the remaining class members. Moreover, it should be noted here that the Trial Court certified a class (excluding those who followed §139.031)

in order to *deny* the refund. It does not follow that, if a refund were somehow deemed appropriate here, a class should be certified. Thus, if the Trial Court's decision on the refund is reversed, there will need to be a determination on remand as to whether a class properly falls within Mo.R.Civ.P. 52.08(b)(1), (2) or (3), if at all. (LF1648-52,1747-52.)

Furthermore, Plaintiffs' assertion that §139.031 is too onerous (Pls.Br. 123-24) is rejected by the cases discussed above that hold that strict compliance with §139.031 is required to assure that government can function properly when tax issues arise. And, practically speaking, §139.031 can easily be met with amendments to petitions. *See Koehr I*, 55 S.W.3d at 854. Additionally, despite Plaintiffs' bare assertion (Pls.Br. 130), §139.031 does not violate due process. *See Jenkins by Agyei v. State of Mo.*, 962 F.2d 762,766 (8th Cir. 1992).

For these reasons, it was not error for the Trial Court to deny a refund because Plaintiffs failed to follow §139.031.

III. THE TRIAL COURT PROPERLY WEIGHED THE EQUITIES IN DENYING THE REFUND REQUEST. [RESPONSE TO CROSS-APPEAL POINT II]

Even if statutory requirements need not be followed in a Hancock refund claim (which they must), a refund is not automatic. The trial court must still determine whether a refund is appropriate under the equities.

A. MSD Collected and Used the Revenues in Providing Important Services, and Plaintiffs Did Not Seek Preliminary Relief to Prohibit this Collection and Use.

The Trial Court held that no refund was warranted because the equities, including the public interest, weighed against a refund where MSD used the revenues from the Stormwater User Charge in providing services and in meeting obligations under federal and state environmental laws. (Refund J. ¶¶68-69;LF1804(A60).) In their Point II, Plaintiffs lump the equities together and accuse MSD of acting in bad faith by spending the revenues during this litigation. (Pls.Br. 114-18.) But this does not affect the serious consequences a refund would have on the public interest and ignores equitable principles.

First, despite Plaintiffs' attempt to re-write *Ring* (Pls.Br. 115-16), this Court held that any remedy must "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. Here, through the declaratory and injunctive relief precluding MSD from collecting the Charge, Plaintiffs' rights under §22 were fully vindicated. *See Fort Zumwalt*, 896 S.W.2d at 923; *Taylor*, 247 S.W.3d at 548-49. In contrast, the record demonstrates that a refund would have dire consequences on MSD's ability to provide necessary stormwater services (including services mandated by federal and state environmental laws). (Tr.1418:19-24.) Indeed, as it stands, even without the refund, the undisputed evidence showed that stormwater services have been radically reduced for almost three years and that employee layoffs may become necessary at some point. (Tr.1407:2-1409:1.) A refund would only exacerbate this situation.

Moreover, the refund sought here represented the entirety of MSD's stormwater revenues for over two years, not just the typical small increase to a tax or fee at issue in many cases. *See, e.g., Hazelwood*, 48 S.W.3d at 38 (10 cents invalidated of a 76 cents/\$100 assessed value tax). Therefore, ordering such a refund would, in effect, shut the District down and force bankruptcy. The equities certainly do not favor such a result.

Furthermore, the equities are against a refund where, as here, MSD used the money providing services to its customers. (Refund J. ¶¶68;LF1804(A60).) Plaintiffs and all MSD customers received the value of stormwater services, and there is no dispute that all the money was spent by MSD in providing those services. (Tr.386:22-387:1,596:22-597:7,1334:17-1336:4.) A refund, in effect, would mean that Plaintiffs not only would receive the value of the services, they also would receive the same value again in the form of a refund.

Boiled down to its essence, Plaintiffs' Point II is that the equities are against MSD because it did not voluntarily stop the Stormwater User Charge when this lawsuit occurred and "rolled the dice" when it did so. This argument is unconvincing.

First, Plaintiffs' argument is basically that MSD should have given Plaintiffs a preliminary injunction without Plaintiffs having to move for and obtain one. In fact, it is Plaintiffs who sat on their rights by waiting 8 months after the adoption of the Ordinance to file suit, by not seeking a preliminary injunction, and by opposing an expedited hearing on the merits. (LF1-17.) Under Plaintiffs' reasoning, MSD (or any government) should shut down services or return to a prior funding system when one citizen, and later three,

file suit. That is not equitable and is simply bad public policy, and the more reasonable result is for Plaintiffs (who have the burden) to move for preliminary relief.

Second, MSD could not simply stop collecting the Charge and reinstate the \$0.24 fee and ad valorem taxes when suit was filed. The Rate Commission had found that the flat fee and tax system was unfair. (Def.Ex.H at 149-50; Tr.1413:21-1414:8.) MSD spent millions in adopting and implementing the Charge. (Tr.969:2-22.) And MSD promised to provide new services demanded by its customers (and federal and state laws). (Tr.1412:1-15.) Indeed, MSD did exactly what it said it would do – it used the revenues from the Charge in providing more and better stormwater services to its customers.

Third, Plaintiffs attempt to curry favor by comparing MSD to an irresponsible gambler, a bank robber who gets to keep the money, or some nefarious organization bent on taking money from the public and keeping it for its own aggrandizement. (Pls.Br. 116-18.) Reality and common sense show otherwise. MSD spent almost 15 years developing the Charge before various citizen committees and groups, spent 6 months before a public Rate Commission (which rejected a vote on taxes), and held numerous public information meetings about the Charge. (Tr.388:11-23,689:9-690:4,846:1-849:15.) This is hardly the work of some conspiracy. There is no motivation for MSD to carry out the ridiculous plot of raising money without a vote and then spending the money on services only to deprive ratepayers of a Hancock refund. In fact, Plaintiffs' nonsensical rhetoric is contradicted by their own experts, who acknowledged the necessity and importance of MSD's services and agreed that the amount of the Charge

was reasonable. (Tr.375:1-376:8,388:11-23,396:4-17,594:3-595:23,635:9-18.) Even if the Trial Court agreed with Plaintiffs' conspiracy theory, the Trial Court still found the equities in MSD's favor, which shows how far the equities discussed above weigh in MSD's favor.

B. Any Refund Would Have Been Paid by MSD's Customers, Which Defeats the Purpose of the Hancock Amendment.

Acknowledging the elephant in the room, the Trial Court properly held that a refund – which necessarily would have been paid by an additional charge to MSD's customers – conflicted with the very purposes of the Hancock Amendment. (Refund J. ¶¶66,70;LF1804-05(A60-61).) This conclusion is well-founded in both law and fact.

This Court has recognized that refunds are disfavored because refunds could result in increased tax burden on citizens, which is against the very purpose of the Hancock Amendment. *Fort Zumwalt*, 896 S.W.2d at 923. Plaintiffs' refund request aptly illustrates this problem. If a refund were awarded, MSD's customers would need to vote to approve a new charge to finance the refund. They would then pay the money to MSD, only to receive 75 cents on the dollar in return after Plaintiff's counsel is awarded its fee. (Tr.1414:15-1416:11.) This would be on top of whatever customers are charged for the services that MSD has to provide. Therefore, MSD's customers would be paying additional amounts for no other reason than to pay Plaintiffs' counsel. This is an absurd result that the Trial Court properly avoided.

Oddly, Plaintiffs argue that a full refund would go to non-profit and governmental entities because they would not pay the new "refund" taxes. (Pls.Br. 118.) While

perhaps true, this only underscores the inequity of a refund where the remaining MSD customers would be subsidizing a full refund and services for customers that may no longer pay for stormwater services.

Plaintiffs further contend that a denial of a refund here means that a refund could not be awarded in any consumer class action because defendants in those cases pay for damages by raising prices on consumers. (Pls.Br. 118.) But this is a faulty comparison. Unlike a for-profit company, MSD does not have profits, dividends, or retained earnings, it cannot raise funds through shareholders, and it cannot raise its charges to suit market conditions.

For these reasons, the Trial Court properly weighed the equities in denying the refund claim.

IV. PLAINTIFFS DID NOT MEET THEIR BURDEN OF PROVING THEIR ENTITLEMENT TO A REFUND, AND ORDINANCE 13022 DOES NOT AUTHORIZE A REFUND. [RESPONSE TO CROSS-APPEAL POINT IV]

Plaintiffs offered only a few exhibits and a stipulation in support of their refund claim. They put on no witnesses to counter MSD's evidence about the source of a potential refund and the equities involved. At no time did Plaintiffs offer any idea as to how the refund could be achieved. In essence, Plaintiffs merely took the refund as a *fait accompli* and asked for over \$90 million. Under the evidence, the Trial Court rejected the refund claim because Plaintiffs failed to meet their burden of proof.

Only late in the game did Plaintiffs latch onto an amendment made to the Stormwater Ordinance in January 2010 as evidence of their entitlement to a refund. The

Trial Court did not err by rejecting Plaintiffs' argument that §12 of Ordinance 13022 required MSD to refund all payments made under the Stormwater User Charge. (Pls.Br. 120-22.)

First, the uncontested testimony of Jan Zimmerman (Director of Finance) was that §12 dealt with billing errors and adjustments in the ordinary course of MSD's business (such as an incorrect impervious area calculation, other arithmetical errors, or a bill sent to the wrong address or account), and was primarily intended to limit MSD's ability to correct billing errors in its favor. (Tr.1348:21-1351:1.) In no way can this section be interpreted to apply to the situation here: where the entire Stormwater User Charge has been held to be invalid. To suggest that MSD intended otherwise – *during the same time this case was being litigated* – is absurd.

Further, the *Beatty III* case does not support Plaintiffs. *Beatty v. Metro. St. Louis Sewer Dist.*, 914 S.W.2d 791 (Mo.banc 1995)(*Beatty III*). There, this Court held that the three individual plaintiffs were entitled to a credit on their sewer bills under that ordinance for what they lost by reason of the erroneous trial court judgment that denied them an injunction before the wastewater rate increase even went into effect. *Id.* at 796. This Court carefully limited its ruling: “*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.” *Id.* (emphases added). The unique situation present in *Beatty III* does not exist here. Moreover, even if applicable, the provision would benefit only the three named Plaintiffs – *not any class* – because there is nothing in the ordinance's provisions authorizing a class action.

Finally, even if §12 of Ordinance 13022 provided for a refund here, the provisions that Plaintiffs now cite were not in the prior stormwater ordinances, so only bills sent after January 14, 2010 (when Ordinance 13022 was adopted) would be impacted. Plaintiffs presented no evidence on the amount of these so-called “over-bills.”

In a similar vein, if a refund were proper, a refund of the full amount collected (over \$90 million) cannot be awarded, and a remand would be necessary for several reasons. Hancock prohibits only tax *increases*, so only a refund in excess of what MSD would have collected under its system of ad valorem property taxes and flat fees would be appropriate. Moreover, some of Plaintiffs’ refund claims would be reduced by the applicable statute of limitations – any amounts collected by MSD before the lawsuit was filed cannot be refunded and, pursuant to *Koehr I*, the amounts collected under MSD Ordinance 12789 from January 1, 2009 to June 24, 2009, is not subject to refund because Plaintiffs failed to timely challenge that Ordinance until they filed their Second Amended Petition on June 24, 2009. 55 S.W.3d at 863-64.

V. THE REFUND JUDGMENT CAN BE AFFIRMED ON THE ALTERNATE GROUND THAT *RING* SHOULD BE REVISITED AND OVERRULED BY THIS COURT. [ALTERNATE RESPONSE TO CROSS-APPEAL POINT I]

In *Fort Zumwalt*, the Court held that sovereign immunity protects the state from a money judgment for a violation of the Hancock Amendment. 896 S.W.2d at 923. Several taxpayers sought a declaratory judgment in connection with the state’s alleged violation of the “unfunded mandates” provision of Section 21 of the Hancock Amendment. The taxpayers also sought a money judgment to recover the amounts

expended to comply with the state's mandate but for which the state had not provided adequate funds. *Id.* at 919-20. The Court reversed the trial court's summary judgment for the state on the Hancock violation, but also held that, even if the state violated Hancock, the taxpayers were not entitled to a money judgment because sovereign immunity protected the state from such a judgment. *Id.* at 922-23. The Court reasoned:

Here, Article X, Section 23, authorizes taxpayer suits to enforce the provisions of Section 21 without saying what remedies are available other than attorneys fees and costs. If Section 23 is a consent by the state to be sued for general money damages to enforce Section 21, the consent exists by way of inference or implication. This Court will not infer or imply that a waiver of sovereign immunity extends to remedies that are not essential to enforce the right in question.

Other equally effective but less onerous remedies *than permitting a money judgment against the state* are available to enforce a taxpayer's interests under Section 21. Specifically, a declaratory judgment relieving a local government of the duty to perform an inadequately funded required service or activity is an adequate remedy.

Id. (emphasis in original). The Court held the taxpayers were not entitled to a refund, but only their reasonable attorneys' fees and costs, which are expressly allowed by Section 23. *Id.*¹⁹

Shortly thereafter, in *Ring*, the issue was whether Section 23 constituted a waiver of sovereign immunity for a refund of the amounts MSD collected under the wastewater charges previously declared invalid in *Beatty II*. 969 S.W.2d at 718. The Court endeavored to apply the same *Fort Zumwalt* analysis, this time to a violation of Section 22(a). The Court repeated the same rule, that it “will not infer or imply that a waiver of sovereign immunity extends to remedies that are not *essential* to enforce the right in question.” *Id.* (emphasis added). The Court then defined the “right in question” as “the right to be free of increases in taxes that the voters do not approve in advance.” *Id.* Next, the Court identified two ways to enforce this right: first, “taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined”; second, the taxpayer may file a “timely action to seek a refund of the amount of the unconstitutionally-imposed increase.” *Id.*

¹⁹ The *Fort Zumwalt* court further reasoned that one purpose of the Hancock Amendment “is to limit expenditures by state and local government” and a “judgment requiring the state to spend more money would thwart that purpose.” 896 S.W.2d at 923.

Accordingly, because a judgment for money damages is not essential and is contrary to Hancock’s general purpose, the Court would not read §23 to allow a suit for a money judgment. *Id.*

The first method – a lawsuit seeking declaratory relief and an injunction prior to payment of the taxes – is the remedy approved in *Fort Zumwalt* and in *Beatty III*. See *Beatty III*, 914 S.W.2d at 796 (lawsuit seeking declaratory relief and injunction “is an appropriate method to enforce the Hancock amendment”). The second method – a refund – had to be newly inferred or implied. However, if another remedy to enforce the right in question is available, the inferred/implied remedy is, by definition, **not essential**. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, at 777 (2002) (defining “essential” as “necessary, indispensable”). Moreover, consistent with Section 24 of Hancock, there already was an existing **refund** remedy available – under R.S.Mo. §139.031. See MO. CONST. art. X, §24(b) (“The provisions contained in sections 16 through 23, inclusive, of this article are self-enforcing; provided, however, that the general assembly may enact laws implementing such provisions which are not inconsistent with the purposes of said sections.”). Because there were other, less onerous remedies available – declaratory and injunctive relief under Section 23 and a refund under §139.031 – the inferred constitutional refund remedy cannot be essential. The *Ring* Court therefore mistakenly inferred an additional refund remedy in Section 23 when it held “generally that article X, section 23, operates as a waiver of sovereign immunity and permits taxpayers to seek a refund of increased taxes previously collected by a political subdivision in violation of article X, section 22(a).” 969 S.W.2d at 718-19.

Most recently, this Court held in *Taylor* that Section 23 allows only an “interpretive” remedy. 247 S.W.3d at 548 (“section 23 authorizes declaratory relief but does not mention other forms of relief, such as injunction or damages”)(citing *Fort*

Zumwalt, 896 S.W.2d at 923). “The court may, under article X, section 23, declare a statute constitutional or unconstitutional. The limited nature of the declaratory, or interpretive, remedy does not authorize a court to enter a judgment for damages or injunctive relief.” *Taylor*, 247 S.W.3d at 548. Thus, *Ring* is also inconsistent with *Taylor*.

Here, a money judgment in the form of a refund is not “essential” to enforce the “right to be free of increases in taxes that the voters do not approve in advance” because “a declaratory judgment relieving [plaintiffs] of the duty to [pay MSD’s stormwater user charge] is an adequate remedy.” *See Fort Zumwalt*, 896 S.W.2d at 923; *Ring*, 969 S.W.2d at 718. Plaintiffs were granted that declaratory and injunctive relief. Plaintiffs did not comply with the refund remedy available under §139.031. A further, contrived “Hancock refund” is not essential and should not be inferred or implied.

Fort Zumwalt got it right. There is no refund remedy in Section 23. *Ring* erred by inferring one. To the extent *Ring* has not already been overruled by *Taylor*, it should be overruled now.²⁰ As *Ring* (as relied on by *Hazelwood*) provides the only possible basis

²⁰ Because *Hazelwood* relied on *Ring*’s incorrect holding that §23 allowed a money judgment refund, it too must fall. Also, *Hazelwood* exacerbates the error in *Ring* because, when faced with long-settled Missouri law that a sovereign immunity waiver was limited and did not allow a class action refund, it discarded sovereign immunity altogether in contradiction of both *Fort Zumwalt* and *Ring*.

for Plaintiffs' refund claim, the Judgment denying the refund may be affirmed on this alternate ground as well.

CONCLUSION

For the reasons set out above and in MSD's opening brief, the Trial Court's ruling that the Stormwater User Charge was a tax must be reversed, and judgment should be entered in MSD's favor. If reached, the award of attorneys' fees and expenses should be reversed for including improper amounts, including the 2.0 multiplier, and the denial of Plaintiffs' refund claim should be affirmed.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Substitute Reply and Response Brief of Appellant/Cross Respondent Metropolitan St. Louis Sewer District was served on this 20th day of March, 2013, through the electronic filing system on:

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CERTIFICATE REQUIRED BY RULE 84.06(c)

The undersigned hereby certifies that the foregoing Substitute Reply and Response Brief of Appellant/Cross-Respondent Metropolitan St. Louis Sewer District (1) includes the information required by Rule 55.03 and (2) complies with the limitations contained in Rules 84.06(b) in that it contains 30,891 words (excluding the cover, signature block, certificate of service and this certificate) according to the word count of the Microsoft Word 2003 word-processing system used to prepare the brief.

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