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## Case to Watch

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## CASE TO WATCH

*Missouri Growth Association v. Metropolitan St. Louis Sewer District*, 941 S.W.2d 615 (Mo.App. E.D.), rehearing or transfer denied Mar. 20, 1997

In this case, the trial court ruled in favor of the Metropolitan St. Louis Sewer District (MSD) finding that MSD's ordinance was lawful and not in violation of Article X, §22(a) of the Missouri Constitution, and the Missouri Court of Appeals affirmed. Article X, §22(a) of the Missouri Constitution is part of the Hancock Amendment adopted by this state in 1980.

At issue was MSD Ordinance No. 9029, which provided a schedule for wastewater user charges. In Count I, Petitioners contended that the charges levied by Ordinance No. 9029 were taxes in nature and, therefore, subject to the Hancock Amendment. Because the ordinance had been adopted without voter approval, Petitioners contended that the ordinance was in violation of the Hancock Amendment. Count II alleged that MSD had a duty to submit a proposed increase in wastewater charges to the voters for approval pursuant to the Hancock Amendment. Petitioners sought a preliminary writ of mandamus requiring MSD to act.

The trial court granted MSD's motion to dismiss and quashed the preliminary order in mandamus, holding that the ordinance was not in violation of the Hancock Amendment. After first determining that the claim was not barred by *res judicata*, and that the organizational plaintiffs did not have standing (the individual plaintiffs, however did have standing), the appellate court considered the applicability of the Hancock Amendment.

Specifically, appellants contended that the MSD ordinance, issued without voter approval, was in violation of the Hancock Amendment because the

charges levied by the Ordinance were regular sewer service charges subject to voter approval. The appellate court was asked to first consider whether the charges were a user fee or a tax given the factors presented in *Keller v. Marion County Ambulance District*. The factors established in *Keller* are "used to determine whether a revenue increase by a local government is an increase of a tax, license, or fee, which requires voter approval under the Hancock Amendment."

The court resolved the first factor under *Keller* in favor of MSD. This factor considers the timing of when a fee is paid. Because the MSD payment was due only after provision of the service, the court found it to be more like a user fee than a tax. The court also found the second factor to be in favor of MSD because the fee charged was paid by only those individuals who actually use the sewer service. The third factor asks if the amount of the fee is affected by the level of services provided. Again, the court found for MSD on this factor because the sewer services are measured by an individual customer's water usage. Although the fee does consist of two flat-rate charges, customers are also billed according to their individual consumption resulting in wastewater volume. Moreover, the court found the fourth factor ruled in favor of MSD. This determination was made by relying on *Beauty II*. In evaluating the fifth factor, however, the court did not find it to be in favor of MSD, but instead it was determined to be inconclusive. This factor asks whether the activity has been historically and exclusively provided by the government. The court did not directly answer this factor in the instant case, but instead concluded that since it found in favor of MSD on four of the five factors, that the scale tipped in favor of MSD. Thus, the court concluded that the charge

resulting from Ordinance No. 9029 was a user fee, and hence not a tax subjected to the Hancock Amendment.

Appellants alternatively argued that the *Keller* factors did not apply to the instant case for three reasons. However, the appellate court summarily dismissed this argument by again citing to the decision in *Beauty II*, which gives deference to the authority of the Missouri Supreme Court.

The second issue, the Court was asked to resolve was whether MSD by writ of mandamus should be required to comply with the Hancock Amendment. The court stated that the issuance of a writ of mandamus requiring MSD to present the ordinance to the voters for approval was moot because it had found the ordinance not subject to the Hancock Amendment.