

No Standing News

Since we have no standing, we stand with those left standing

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Is the RMU “fee wrapped in a tax” a tax or a ruse?

What the Rolla Council hasn't been told about the Hancock Amendment

Next Monday, the Rolla City Council will take their second and final vote on an ordinance to raise their kickback from RMU from 5% to 6%, a back-door tax increase which RMU will pass on to every Rolla ratepayer. The 1% increase will inflate this year's \$600,000+ annual payment to about **\$1.3 million**, a cash increase of **110%**. RMU tried a pre-emptive strike when their board voted on July 14, to **increase all electric rates 12.5% and water rates by 10%**. They also announced at the July 18th council meeting that they would start putting the council's kick-back on utility bills so people can see the 'cut' the city is taking off the top of gross electric and water revenues. In the 1998 petition audit, State Auditor Margaret Kelly called it a “hidden tax” which cause utility rates to be set higher to recover actual costs. In the face of RMU's combined **22.5%** water and electric rate increases will the council vote to more than double the skim from their back-door utility tax? It may depend upon how many phone calls they get.

When raising fees, occasionally, a council member will ask if they are violating Hancock Amendment but they are always assured by **City Administrator John Butz** that they aren't. He never offers any proof; they just take his word for it. It defies the odds of probability that in the 25 years since the people of Missouri passed the **Hancock Amendment** to the **Missouri Constitution** to restrain bureaucratic lust for cash, that the City of Rolla has never once violated Hancock. It's implausible because the council have never been told how they can tell what a Hancock violation looks like. Like mushrooms, they're best kept in the dark.

John Butz is always the one who provides “legal opinions” to the council and the longer he explains why the public doesn't get to vote on any proposed “fee” increases the more incoherent his reasoning becomes. When **Councilman Matt Williams** asked if raising the RMU “in-lieu-of-franchise-tax” would be a Hancock violation Butz said it wasn't a tax increase even though it walks like one, quacks like one and smells like one. Butz explained, “It's a fee wrapped in a tax.” (Yeah, he really said that. “A fee wrapped in a tax” is not really a tax...?)

In their increasingly frenzied search for more money to spend the council has never stepped back and looked at their total fiscal policies (if you can call raising fees while giving away property taxes a fiscal policy) and the impact they are having on the cost of living for the 56% of Rolla households who earn less than \$35,000 a year. They also don't consider the pressure they are putting on Rolla's small

independent businesses - people who are never eligible for the property tax breaks or revenue bond low-interest financing that the city gives away to what have been called, “Rolla's Crown Jewels,” larger local businesses with the ‘right’ connections. Both the new **22.5%** utility rate increases and the city's increase in the RMU “in-lieu-of-franchise tax” will hurt families and small employers who are least able to support City Hall's growing burden of taxes, fees and rates. Is the Rolla Chamber fighting this latest bureaucratic attack on Rolla's families and small businesses? No, the Chamber Welfare Queens are silent. They wouldn't risk annoying the council and losing the **\$500,000** handout they've been promised from the sale of Buehler Park.

The Keller test for a Hancock violation. Below are the criteria the Missouri Supreme Court established in 1991 in *Keller v. Marion County Ambulance District*. Anyone can use it to decide whether all those increased “fees” you've been paying for the last 25 years were really tax increases in violation of Hancock that voters should have been allowed to decide. The criteria can be used to measure any tax or fee increase since 1980. Our comments in parenthesis are for the purpose of comparing the *Keller* criteria to the city's current issue, the proposed 1% increase in the 5% RMU back-door tax which the city likes to call a PILOT or “payment in-lieu-of-franchise fee.” (PWSD ‘fee’ payers should take note of the *Keller* test.)

Missouri Supreme Court in *Keller v. Marion County Ambulance District*: “In order to determine whether a revenue increase by a local government is an increase in a “tax, license or fees” that requires voter approval under the Hancock Amendment, the following are critical:

- 1) **When is the fee paid?**--Fees subject to the Hancock Amendment are likely due to be paid on a periodic basis while fees not subject to the Hancock Amendment are likely due to be paid only on or after provision of a good or service to the individual paying the fee. (The RMU “in-lieu-of-franchise-fee” is paid on a periodic basis; therefore, YES it requires a Hancock vote.)
- 2) **Who pays the fee?**--A fee subject to the Hancock Amendment is likely to be blanket-billed to all or almost all of the residents of the political subdivision while a fee not subject to the Hancock Amendment is likely to be charged only to those who actually use the good or service for which the fee is charged. (It is blanket billed to all, therefore, YES it requires a Hancock vote)

- 3) **Is the amount of the fee to be paid affected by the level of goods or services provided to the fee payer?**--Fees subject to the Hancock Amendment are less likely to be dependent on the level of goods or services provided to the fee payer while fees not subject to the Hancock Amendment are likely to be dependent on the level of goods or services provided to the fee payer. (RMU customers get the same service whether the city gets 5% or 6%; therefore, YES it requires a public vote.)
- 4) **Is the government providing a service or good?**--If the government is providing a good or a service, or permission to use government property, the fee is less likely to be subject to the Hancock Amendment. If there is no good or service being provided, or someone unconnected with the government is providing the good or service, then any charge required by and paid to a local government is probably subject to the Hancock Amendment. (N/A? This probably applies to true franchises such as telephone, cable, gas, etc.)
- 5) **Has the activity historically and exclusively been provided by the government?**--If the government has historically and exclusively provided the good, service, permission or activity, the fee is likely subject to the Hancock Amendment. If the government has not historically and exclusively provided the good, service, permission or activity, then any charge is probably not subject to the Hancock Amendment. (The government has historically, for 60 years, and exclusively - RMU is a government monopoly - provided the service; therefore YES it requires a vote.)

"Based on these criteria, property taxes, sales taxes, franchise taxes, and income taxes, among others, are subject to the Hancock Amendment. See Wenzlaff v. Lawton, 653 S.W.2d 215, 217 (Mo. banc 1983); Goode v. Bond, 652 S.W.2d 98 (Mo. banc 1983). The above criteria are helpful in examining charges denominated as something other than a tax. No specific criterion is independently controlling; but, rather, the criteria together determine whether the charge is closer to being a "true" user fee or a tax denominated as a fee."

Is there such a thing as a "fee wrapped in a tax?" What then, is a "tax" and how is it different from a "fee," "levy," "special assessment," or "in-lieu-of-franchise-fee" or some other cover name? That question also was asked and answered by the Missouri Supreme Court in *Roberts v. McNary* in 1982, shortly after the Hancock Amendment was passed by a statewide referendum.

In *Roberts v. McNary* the Missouri Supreme Court in 1982 said that "denominating" or calling something a "fee wrapped in a tax" or even a "tax wrapped in a fee" to disguise the fact that it's a tax won't fly. They said words must be used in their "ordinary and customary meanings" so they used Webster's and Black's Law Dictionaries:

- (1) **tax**- "a pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes: a forced contribution of wealth to meet the public needs of a government"; (a forced contribution indeed.)
- (2) **license**- "a right or permission granted in accordance with law by a competent authority to engage in some business or occupation, to do

some act, or to engage in some transaction which but for such license would be unlawful"; (i.e. phone, gas, cable, merchant license, liquor license, etc.)

- (3) **fee**- "a fixed charge for admission; a charge fixed by law or by an institution for certain privileges or services; a charge fixed by law for services of a public officer." (i.e. use of community hall, extra trash pick-up, etc.)

This Court has recently spoken on two of these words: The term 'tax' has been defined variously, but the appropriate definition for us is found in Leggett v. Missouri State Life Ins. Co., 342 S.W.2d 833, 875 (Mo. banc 1960) in which we stated: "Taxes are "proportional contributions imposed by the state upon individuals for the support *336 of government and for all public needs." * * * Taxes are not payments for a special privilege or a special service rendered * * * Fees or charges prescribed by law to be paid by certain individuals to public officers for services rendered in connection with a specific purpose ordinarily are not taxes * * * unless the object of the requirement is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures * * * rather than compensation of public officers for particular services rendered * * *."

So the 5% back-door tax that the council prefers to mask as an "in-lieu-of-franchise-fee" or "PILOT is, in fact and in law, simply a tax because city hall's object *is* "to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures." The fact that the city has in the past "chosen" to spend millions of it to pass secretly to RCDC in the form of cash to buy property or free land purchased with this back-door tax is illegal as well but their compounded illegal acts are irrelevant for purposes of deciding if this is a tax increase and if the electorate have the right to decide whether it will be raised or not. It is and they do.

But what about the "in-lieu-of-franchise" tax of a public utility department? Well, Butz explained, it's okay because everybody else does it. We tell children that's an unacceptable excuse. If, as Butz says, it is legal to extract an "in-lieu-of-franchise" tax from a city department because everybody else does it, why aren't they also extracting a similar "franchise fee" from the sanitation department? Using their logic, the council has the right to collect from the public an annual in-lieu-of-franchise tax for every public service department. Such a tax, in their view, is the citizen's ...what, *their punishment* for being compelled to buy from Rolla's electric monopoly, a monopoly the people own? They admit in both the old and new versions of their own ordinance that this tax is the same as a property tax: "The purpose of this transfer monthly (quarterly) is to take the place of the franchise tax *and general property tax* heretofore paid by the Missouri General Utilities to the city." Butz even admitted to the council that it is "to replace the loss of *taxation*" of the formerly private utility. No matter how you slice it, it's a tax.

A franchise is: "A special privilege conferred by government on an individual or corporation" *A franchise fee cannot then, by definition, be charged to a city-owned government department.* The citizens of Rolla own the utility department – they paid cash for it. To demand of them a payment "in-lieu-of" a fee that you can't legally charge a

city-owned department is preposterous. *If there is no franchise, there can be no franchise fee. If there is no franchise fee, there can be no payment “in-lieu” of it.* Wrap your tax around that.

“An ill disguised display of bureaucratic avarice.” In the *Keller* opinion there was a comment by the dissenting judge on Hancock that we think is worth repeating. (emphasis added)

Justice Holstein: “In addition, requiring voter approval of user fees is not necessarily a bad policy. The facts in this case are a stark example of how onerous unrestrained user fees can be. The trial court found and the record reflects that when the fee increases at issue were adopted, the ambulance district was in the best financial condition of its history. In an ill disguised display of bureaucratic avarice, user fees were increased one hundred percent. The board unjustifiably contended the fee increases were necessary to put the district on a “profitable” basis, to improve services and to maximize payments from private insurance and public medical coverage providers. To the contrary, the trial court found no proven need to increase fees to maintain the service. This case is a remarkable example of the type of governmental action by a “political subdivision” which the Hancock Amendment is designed to curb. To suggest otherwise defies logic and thwarts the will of the people.”

The voters, by adopting restrictions on fees, may well have been concerned about the symbiotic relationship that exists between the board of a political subdivision and the staff of a political subdivision. That relationship makes it difficult for board members to resist the entreaties of the staff to increase fees. That is particularly true in cases like this, where the burden of fee increases will fall on relatively few or on private or public insurance programs and may go unnoticed by the majority of the voters. In this case the only ones who suffer the direct impact of increased user fees are the truly unfortunate few who need ambulance services but are covered by neither public nor private health insurance. It is reasonable to believe the voters who adopted the Hancock Amendment intended to prevent self-serving public boards and self-serving public employees of tax supported entities from increasing fees in such a way as to place critical services beyond the reach of persons of ordinary means.”

He might have been describing RMU. They have now raised rates **32.5%** in the last two years. They have \$8 million in reserves (more than city reserves) and they’re increasing fees” at a usurious rate which will “place critical services beyond the reach of persons of ordinary means.”

The Right to “Extract” More Money. On July 18th, **Councilman Matt Williams** also tried to dispute the fairness of raising this tax. Butz claimed that “several” council members have told him they want to increase the RMU “not-really-a-franchise-tax” because they believe that (hold on to your socks) “What we *extract* out of a public utility *should be more* because a public utility doesn’t have stockholders to pay.” Did we really elect people to the council who think like that? Do they really think its okay to “extract” more money from publicly-owned utility customers just because it is a publicly-owned monopoly and therefore rate payers *aren’t* getting stock dividends? Williams tried to attack the illogic of that statement but how can you destruct such a warped and self-serving excuse?

In 1945 Rolla voters were urged to tax themselves with a \$450,000 G.O. bond issue to buy the private utility because, they were told, if the utility company belonged to the public and *didn’t* have to pay profit-seeking owners and stockholders, their utilities would be cheaper. They were told their “dividend” for their investment would be cheaper power and water. Now, sixty years later some of our city council members would punish the electorate because there *aren’t* any stockholders to pay? There’s a perfect example of the “ill disguised display of bureaucratic avarice” that Hancock was designed to curb. Like their broken promise to keep Buehler Park...“FOREVER”, we can always count on City Hall to go back on their word.

Why are Beger and Bushie silent? When this ordinance containing the 1% tax increase was first handed to the council on July 5, they should also have been given the *Keller* criteria and the tax/fee definitions for taxes and fees so they could clearly see their choices. Any legislative body *should* want to know how to spot a Hancock violation before they commit it because the penalty can be a crippling refund of the illegal tax. Instead, the council has wasted a month discussing red herrings when they had only one simple question to answer: Do we want to submit this tax increase to the voters? If we do, how can we justify asking them to pay our back-door utility tax when it has nothing to do with providing their utilities? You can see why some prefer the pretense that this isn’t a tax increase.

Always sitting right there with the Mayor and Butz when Butz gives the council ‘legal’ advice, are real lawyers, either **Beger** or **Bushie**, but neither ever speak up even when the council obviously need legal advice. However, for \$2,000 a month, Beger and Bushie do read the titles of ordinances, a task which must leave them limp with fatigue. Do they not know anything about major issues of municipal law like the Hancock Amendment, the *Keller* test and the definition of tax vs. fees in *Roberts*? If not, they had plenty of time to do the research (it took us about 30 minutes) in the several months this ordinance was being discussed before its July 5 introduction.

On July 18, whichever one of the two lawyers was there that night again doing nothing but reading ordinance titles said nothing while Butz assured the council that increasing this fee *did not* require a vote of the people. Butz sold the council his opinion with a long story about a Columbia Missouri test case – a case that never happened. What did happen in Columbia (we checked the source) was that *their* city attorney did inform the council about the *Keller* criteria. They concluded that they had to put their municipal utility “franchise fee” increase to a public vote. They did and Columbia voters turned it down.

Have these two highly-paid attorneys been ordered to keep quiet and not to offer any help to the council even when they’re heading in the wrong direction? How many times have they sat mute while the council passed a fee or tax increase which, if challenged, could require the city to pay back every dime just like the State of Missouri was forced to do just a few years ago when they violated the same law? Why do council members never address their questions

directly to Beger or Bushie? Have they been told they are *not allowed* to question the city’s own lawyers? Why do Beger and Bushie never volunteer any legal advice even when it is clearly in order for them to do so? Is there more profit in

fixing council mistakes than in preventing them? Does someone benefit from keeping the council ignorant, isolated and blundering into errors? This is a dysfunctional way to run a city government.

Did RCDC ‘short’ the City 10 acres on the Incubator trade?

About that RCDC land trade... While researching “Hy Point the Black Hole...” we found several City/RCDC mystery properties that are referred to in old city minutes and records but not described well enough to locate on a map so we asked the city this question: How many properties such as the 40-acre “Schumann property,” the 10 acres purchased for \$100,000 referred to in one city audit and this property in the Rolla Industrial Park, (land between Old St. James Road and the RR tracks where Cantex is located) has the city bought and given away to RCDC? The answer from City Hall was that it would be difficult to find those records and it would cost \$25 an hour for an unknown number of hours to find out. You would think that the city would have a big bulging file marked: “Land and Cash We Gave to RCDC” but it they don’t. The answer we always get when we hit a sore spot is, “It will cost \$25 an hour” to find out. Fortunately there was more than one way to skin that cat.

On July 5th a council resolution approved a trade of 14.5 acres of land west of Cantex (plus \$81,250 cash) from the RCDC in exchange for the \$906,000 Incubator Building that was described in Exhibit “A” of the city resolution as “Lot 4.” But the deed recorded in Book 361/30 at the courthouse says that Lot 4 and part of Lot 1 in the Rolla Industrial Park *is only 4 acres* m/l. Was the City shorted 10

acres in this deal? The deed also shows that on April 29, 1987 that same property, Lot 4 and part of Lot 1 *had been transferred to RCDC by the City of Rolla!* As we suspected they only got *back their own land which RCDC marked up to \$7,500/acre!* That’s like giving a car to your neighbor; he drives it around the block then sells it back to you for \$108,750.

If this is the last city deal with RCDC, somehow it is grimly appropriate that this final fraud has turned out just like all the others. If the missing 10 acres can’t be found or explained the council should cancel the deal. That’s what people do when they are cheated on a contract.

Shop Lebanon First! The City and County got their faces rubbed in their decision not to participate in the Back-to-School Sales Tax Holiday last weekend. Lebanon’s Chamber of Commerce and the Downtown Merchants Association advertised in the RDN inviting shoppers to come to Lebanon to save sales taxes on their Back-to-School shopping and Sidewalk Sale. The Lebanon Chamber of Commerce actively supports their local merchants and small businesses. They have to earn their keep because they don’t get a welfare check from city hall.

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