

MSD's Stormwater Charge  
Violates State Tax Law

by

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The Supreme Court of Missouri recently decided that the stormwater user charge assessed by the Metropolitan St. Louis Sewer District ("MSD") from March 1, 2008 to July 2010 was an illegal tax that required voter approval. The high court ruled, however, that MSD did not have to refund to its customers the estimated \$90,000,000 it had collected under the program.

The case is *Zweig v. The Metropolitan St. Louis Sewer District*, 2013 WL 5989221, decided November 12.

MSD's stormwater services include operating and maintaining a stormwater drainage system and providing stormwater oversight functions. MSD's powers are limited to those set forth in its original charter pursuant to Missouri's Constitution.

MSD has the power to levy property taxes, special assessments for infrastructure improvements, and to establish a schedule of rates and other charges.

Prior to 2008, MSD funded its stormwater operations through a combination of taxes levied on all real property in the district. These taxes generated approximately \$12.3 million in 2007. MSD also levied a monthly surcharge for stormwater operations which generated another \$1.2 million in 2007.

In 2007, MSD spent nearly \$33,000,000 on its stormwater operations which required MSD to subsidize these operations with \$19,000,000 from its sewer revenues. MSD decided to remedy these shortcomings by implementing a program to replace its existing stormwater revenue scheme with a stormwater user charge.

The new stormwater user charge was based on the square footage of a customer's impervious area (such as roofs, patios, parking lots, streets). MSD estimated this new charge would generate annual revenues in excess of \$57,000,000.

In 1980, Missouri voters approved Article X of the Missouri Constitution commonly known as the Hancock Amendment. The Hancock Amendment

required that various local taxes could not be increased without direct voter approval. A user fee did not require voter approval.

MSD argued that the charge was a proper user fee because it insured the “continuous and ongoing” availability of the stormwater drainage system regardless of the weather. MSD acknowledged it would be impossible to make a specific assessment to each customer based on how much stormwater use took place.

The Supreme Court concluded that the user of MSD’s stormwater services was the district as a whole, not each individual customer. Therefore, this user fee was really a tax.

In reaching its decision, the court noted that when MSD enacted this program it gave itself the authority to place a lien on the property of any customer who failed to pay the stormwater user charge. This in effect was a tax having the same force as any other tax levied by the state or any county.

The court also noted that under the program, MSD claimed it had the right to terminate a customer’s sewer services by cutting off its water supply even though MSD did not have any direct control over or responsibility for the water provided to its customers. The court found that this also weighed against MSD’s contention that this program was a user fee.

Regarding the estimated \$90,000,000 that MSD had collected, the court found that the customers were not entitled to a refund because the Hancock Amendment did not expressly provide for such a refund in a circumstance such as this.

The only monetary relief the law allows a court to provide is the award of attorneys’ fees and expenses. In this case, the trial court awarded the hourly fees plus a lodestar (an additional amount, in essence a bonus, given the complicated nature of the case and the possibility that the attorneys would not recover anything unless they were successful).

The Supreme Court affirmed the trial court’s award in this case of attorney fees of \$4.3 million as well as an additional \$470,000 in various court expenses including experts.

In reaching this result, the Supreme Court acknowledged sympathy with MSD’s predicament. The services MSD believed it was required to provide may have cost more than the district voters were willing to pay, and thus if it had been presented to the voters, it may have not passed.

The court noted that the Hancock Amendment expressly provides that it is up to the voters to decide in their collective interest what is best and it is not for

the court or any government entity such as MSD to deny the voters their right to make this decision for themselves.

The court also noted the irony that this result created in that the customers of MSD were paying the lawyer bills. “Such staggering sums simply are not acceptable when taxpayers are paying both sides of the bill,” the high court stated.

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