

Supreme Court Hancock Decision, Census Issues, & Auditor's TDD Report

Missouri Supreme Court Reaffirms User Fees are Not Taxes – In a case in which CVR acted as counsel to the Missouri Municipal League as *amicus curiae*, the Missouri Supreme Court issued a unanimous decision in [Arbor Investment Co. LLC v. City of Hermann, SC 91109](#) (May 31, 2011) affirming the City's right to impose utility rates above actual costs and make transfers of excess utility revenue to the City's general fund.

The City prevailed before the trial court under the 5-part *Keller* test against allegations that the City's utility charges were grossly in excess of its costs of providing services, and that transfers of portions of utility revenue to the City's general fund was evidence that the utility charges were a hidden tax in violation of the Hancock Amendment. However, the Court of Appeals (E.D.) reversed and appeared to change the *Keller* test to one dispositive factor by holding that if "the object of the fees is to fund the City's general revenue, then this constitutes a violation of Hancock..."

However, the Supreme Court affirmed the trial court and specifically rejected the appellants' and AG's proposed change to the *Keller* test that would make the utility charges a tax when the utility is a sole provider and charges anything above cost. The Court reaffirmed that a user fee is not subject to Hancock, noting that while a user fee can become subject to Hancock if the charge is "so excessive as to be effectively unrelated to the service being provided," even a charge double actual cost, on its own, is not enough to convert the fee to a tax. The Court held that a City may charge above costs to cover the overhead of delivering that service, and if the fees are unpopular, the remedy is to vote those persons setting the fees out of office.

In the end, the decision upholds the law as understood by most cities and keeps the current *user fee v. tax* analysis intact – averting the widespread adverse effects on municipal budgets across the state had the Court of Appeal's decision been allowed to remain in place.

Timeframe for Local Challenges to Census Data Begins – Local block census data from the [2010 Census](#) is currently being released on a rolling basis from April 2011 to July 2011. The [2010 Census Count Question Resolution Program](#) ("CQR") **starts on June 1, 2011 and ends June 1, 2013** and allows local governments to challenge 2010 census data. The CQR involves 3 types of challenges:

1. **Boundary** – Challenges ensuring that the geographic assignment information reflects changes made after January 2010.
2. **Geocoding** – Challenges alleging that living quarters and associated populations were placed in the wrong local government's boundaries and census tabulation blocks.
3. **Coverage** – Challenges alleging that specific living quarters and persons associated with them identified during the census were included as duplicates or excluded due to processing errors (the CQR will not entertain re-counting challenges that require going back into the "field," e.g., that 4 people, not 3, live in a residence).

Local governments should review the census data with an eye for these 3 types of challenges. For example, an error which includes an apartment building in an unincorporated area or in the wrong local government can have dramatic effects on that local government's census report.

Census Data May Require Reapportionment of Wards – Changes in population reflected by the 2010 Census may require cities to consider whether reapportionment of wards is necessary to comply with the constitutional "One Person, One Vote" requirements. Courts and commentators have identified the following as some of the considerations that should be kept in mind during the reapportionment process:

- Wards should have "substantial equality of population among the various districts, so that a vote of any citizen is approximately equal in weight to that of any other citizen."
- Wards should be based on total population, not registered voters.
- Generally, a deviation of greater than 10% between ward populations is unacceptable.
- To avoid challenges of illegal gerrymandering, redistricting decisions should be based on traditional districting principles such as: compactness, contiguity, preservation of communities of interest, preservation of core of existing boundaries, protecting existing incumbent representation, and race-neutral boundaries in compliance with the Voting Rights Act.

Mo. State Auditor Releases Report on TDDs – Missouri State Auditor Todd Schweich released a [Report on Transportation Development Districts](#), which reviewed several TDDs throughout Missouri (through December 31, 2008) and highlighted several requirements and problems common to TDDs. Areas of problems discussed in the report include:

- Construction Contracts and Expenditures, including failures to competitively bid constructions contracts.
- Engineering Services, including improper documentation of selection of engineering service providers.
- Budgetary Matters, including failures to approve annual budgets, overspent budgets, and budgets in improper form.
- Annual Financial Reports, including failures to submit annual financial reports to the State Auditor's office as required by [§ 105.145.8 RSMo](#). (Including \$500 per-day fine specifically applicable to TDDs for failure to timely file annual financial reports.)

Any Missouri municipality that is currently responsible for administering a TDD or contemplating utilizing a TDD to undertake transportation projects should review this report to get a better understanding of the administrative aspects of TDDs required by state law. Additionally, many of the issues in the TDD report may be applicable to other limited-purpose political subdivisions, such as Community Improvement Districts (CIDs).

If you need further assistance on any of these matters, please consult your City Attorney or Legal Department for particularized guidance or contact us at:

info@municipalfirm.com
Cunningham, Vogel & Rost, P.C.
legal counselors to local government
Suite One, 75 W. Lockwood
St. Louis, MO 63119
314.446.0800
314.446.0801 (fax)

To access previous reports on our website: [CLICK HERE](#).

CVR IS MOVING!

Effective **August 1, 2011** Cunningham, Vogel & Rost, P.C. is relocating to new, larger offices in historic downtown **Kirkwood, Mo.** Our new address will be:

**333 S. Kirkwood Road
Suite 300
St. Louis, MO 63122**
([map](#))

Telephone, fax, and email contacts for CVR will remain unchanged.

Upcoming Dates & Deadlines for Missouri Municipalities*

June 21 - Notify MoDOR of ordinance opting-out of "Back to School" Sales Tax Holiday (at option of City).

June 30 - Annual liquor licenses expire.

July 1 - City Treasurer makes report of revenues and expenditures of City to Board of Aldermen (4th class cities)

July regular meeting - 3rd class cities select city depository for one year term (4 weeks notice required)

Mid-late August - Conduct public hearing on property tax rate with 7-day newspaper notice (Cities not in charter Counties).

August 28 - New state statutes go into effect.

Sept. 1 - Set property tax levy (Cities not in charter Counties).

*This list is not exhaustive. For the complete **Calendar of Procedural Deadlines for Missouri Municipalities**, click below:

[Jan. 1 - Dec. 31 Fiscal Year](#)

[July 1 - June 30 Fiscal Year](#)