

**IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
CIVIL COURT DEPARTMENT**

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|--|---|----------------------|
| First Baptist Church of Mission; The Roman |) | |
| Catholic Archdiocese of Kansas City in Kansas, a |) | |
| Non-Profit Corporation; and St. Pius X Catholic |) | |
| Church, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Case No. 10 CV 11275 |
| vs. |) | |
| |) | Div. No. 3 |
| City of Mission, Kansas, |) | |
| |) | Chapter 60 |
| Defendant. |) | |
| |) | Jury Demanded |

FIRST AMENDED PETITION

[Pursuant to Chapter 60 of the Kansas Statutes Annotated]

Plaintiffs First Baptist Church of Mission, The Roman Catholic Archdiocese of Kansas City in Kansas, a non-profit corporation, (“Achdiocese”), and St. Pius X Catholic Church hereby petition for such declaratory, injunctive and other equitable relief as may be necessary to permanently enjoin and restrain Defendant City of Mission, Kansas from enforcing its Transportation Utility Fee Chapter of the City of Mission, Ordinance No. 1332 §I, 8-18-10, popularly referred to as the “driveway tax,” as more fully set forth below. Plaintiffs also petition for damages.

On February 7, 2011, Defendant’s Counsel, Michael Seck, pursuant to Rule of Civil Procedure 60-215(a)(2), provided written consent to Plaintiff’s Counsel by email for the filing of this First Amended Petition.

In support of this First Amended Petition, Plaintiffs allege and state as follows:

Jurisdiction

1. The District Court of Johnson County, Kansas has general original jurisdiction over the subject matter of this civil action, K.S.A. 20-301, and statutory authority to grant relief under the provisions of K.S.A. 60-1701 et seq. (declaratory judgment), and K.S.A. 60-901 et seq. (injunction).

Parties

2. Plaintiff First Baptist Church of Mission is a church, established and existing as a non-profit religious corporation under the laws of the State of Kansas, recognized as a church by the United States Internal Revenue Service, and is currently located at 5641 Outlook, Mission, Kansas.

3. Plaintiff First Baptist Church of Mission also owns a parsonage located at 5501 Walmer, Mission, Kansas.

4. Plaintiff The Roman Catholic Archdiocese of Kansas City in Kansas, a non-profit corporation, is established and existing as a non-profit corporation under the laws of the State of Kansas and holds title to property within the City of Mission at 5500 Woodson.

5. St. Pius X Catholic Church is a church of the Roman Catholic Archdiocese of Kansas City in Kansas, and operates its church from the Archdiocese property located at 5500 Woodson, Mission, Kansas.

6. Defendant City of Mission, Kansas (“Mission” or “City”) is a duly organized and existing municipal corporation and political subdivision of the State of Kansas which is governed by a city council and has the capacity to be sued in accordance with K.S.A. 12-101. Pursuant to the provisions of K.S.A. 60-304(d)(3), Defendant Mission may be served with process by personal

delivery or certified mail addressed to City Clerk Martha Sumrall or Mayor Laura McConwell at 6090 Woodson, Mission, Kansas, 66202.

Facts

7. On August 18, 2010, the Mission City Council adopted Ordinance No. 1332 that established a Transportation Utility Fee (“TUF”).

8. The TUF charges properties based on the number of vehicle trips (actual or estimated) each property generates over a period of time.

9. All developed properties within the City of Mission pay the TUF.

10. The TUF Ordinance defines the phrase “Developed property” as, “A parcel or legal portion of real property, on which an improvement exists or has been constructed. Improvement on developed property includes, but is not limited to buildings, parking lots, landscaping and outside storage.”

11. The TUF Ordinance states that the assessments imposed under the Ordinance shall apply to “property which may be entitled to exemption from or deferral of ad valorem property taxation.”

12. The TUF is billed and collected with ad valorem real estate taxes annually.

13. The TUF is calculated by estimating the average number of vehicle trips generated by a property.

14. The City primarily uses a manual compiled by the Institute of Transportation Engineers (“ITE Manual”) in order to estimate the average number of vehicle trips generated by each property.

15. The ITE Manual classifies property in different categories and provides estimates of the total vehicle trips generated by the property.

16. The ITE Manual has a classification for churches.

17. The ITE manual describes a church as “a building in which public worship services are held. A church houses an assembly hall or sanctuary; it may also house meeting rooms, classrooms and, occasionally, dining, catering, or party facilities.”

18. First Baptist Church of Mission is a Church as described in the ITE Manual.

19. St. Pius X Catholic Church is a Church as described in the ITE Manual.

20. The ITE Manual estimates that for each seat in a worship area, a church produces on average 5.8 total vehicle weekly trips.

21. Plaintiff First Baptist Church of Mission was assessed a TUF by the City’s use of the ITE Manual estimate of trips generated by a Church.

22. Plaintiff Archdiocese was assessed a TUF by the City’s use of the ITE Manual estimate of trips generated by a Church.

23. The TUF Ordinance allows the City Administrator to create policies for the administration and interpretation of the TUF.

24. Pursuant to the authority granted in the TUF, the City Administrator has created certain policies to aid in the administration and interpretation of the TUF.

25. Administrative Policy 6 states that “Churches and other worship centers shall be assessed based on the number of seats in the worship area or, in the event the worship space does not provide seating, based on the maximum capacity of the worship space according to fire code. If the exact number of seats is unknown, an estimate will be made by taking the gross square footage of the service area and dividing by a factor of 23.00 (sq. ft.).”

26. Single family homes pay a TUF at the fixed rate of \$72.00 per year.

27. Plaintiff First Baptist Church of Mission’s parsonage was assessed a TUF at the single

family home rate.

28. The proceeds collected from the TUF assessments are allocated by the City to a “Transportation Fund,” and are to be used for “Transportation System Maintenance Items.”

29. The phrase “Transportation System Maintenance Items” is defined as street maintenance and repair “including but not limited to surfacing and resurfacing, curb and gutter maintenance and repair, bridge maintenance and repair, sidewalk maintenance and repair, trail maintenance and repair, transit facility maintenance and repair, bicycle lane maintenance and repair, landscape enhancements along rights-of-way, street tree replacement and street lighting.”

30. The items identified in the TUF ordinance as “Transportation System Maintenance Items” have been paid for in the past by City general fund revenues together with some federal, state, and local funding.

31. The TUF Ordinance specifically states that “the City considers the maintenance of its streets to be a proprietary function.”

32. Streets are designed for use by the general public.

33. The TUF raises revenue for the maintenance of the streets which are offered for use by the general public.

34. Owners of developed property in the City of Mission cannot voluntarily avoid payment of the TUF.

35. The payment of a TUF does not bestow a benefit on the owner of developed property that is not shared by other members of the general public.

36. By paying the TUF, the owner of developed property in Mission does not receive any special benefit, service, or privilege not automatically conferred upon the general public.

37. Pursuant to the TUF Ordinance, Plaintiff First Baptist Church of Mission was assessed a

“Transportation Utility Fee” of \$898.77 for its property at 5641 Outlook. *See* Exhibit “A”.

38. Plaintiff First Baptist Church of Mission has already paid the first half of the assessed TUF for its property at 5641 Outlook.

39. Pursuant to the TUF Ordinance, Plaintiff First Baptist Church of Mission was assessed a “Transportation Utility Fee” of \$72.00 for its parsonage at 5501 Walmer. *See* Exhibit “B”.

40. Plaintiff First Baptist Church of Mission has already paid the first half of the assessed TUF for its property at 5501 Walmer.

41. Pursuant to the TUF Ordinance, Plaintiff Archdiocese was assessed a “Transportation Utility Fee” of \$1,685.19 for its property at 5500 Woodson where St. Pius X Catholic Church is located and operates. *See* Exhibit “C”.

42. Plaintiff Archdiocese has already paid the first half of the assessed TUF for its property at 5500 Woodson.

43. Plaintiffs are exempt from ad valorem or property taxes on their properties pursuant to K.S.A. §79-201.

44. Plaintiffs should be considered exempt from the TUF for all their properties.

Count 1

45. The TUF is not a fee.

46. The TUF is a property tax.

47. The property tax authorized by the TUF Ordinance is levied against properties considered exempt from ad valorem or property taxes by K.S.A. §79-201.

48. The property tax authorized by the TUF Ordinance violates Article 12, section 5(b) of the Kansas Constitution as it conflicts with K.S.A. §79-201 which is applicable uniformly to all Cities.

49. The property tax authorized by the TUF Ordinance conflicts with a statute of uniform applicability and thus fails as an invalid exercise of home rule power by the City of Mission.

Count 2

50. The TUF is an excise tax on the use of property.

51. The TUF is based on the use of property as the amount assessed is based on the amount of use of the driveway of the property.

52. The TUF is calculated based on the number of uses of the driveway of each property assessed.

53. The TUF is based on the use of the property because only properties that are developed or used are assessed.

54. The TUF violates K.S.A. §12-194 because it is an excise tax or a tax in the nature of an excise.

55. The tax authorized by the TUF Ordinance violates Article 12, section 5(b) of the Kansas Constitution as it conflicts with K.S.A. §12-194 which is applicable uniformly to all Cities.

56. The tax authorized by the TUF Ordinance conflicts with a statute of uniform applicability and thus fails as an invalid exercise of home rule power by the City of Mission.

57. Plaintiffs demand a trial by jury.

Request for Relief

WHEREFORE, based on the foregoing, Plaintiffs pray for relief as follows:

58. That this Court issue a Permanent Injunction to enjoin the Defendant, Defendant's officers, agents, employees and all other persons acting in active concert with them, from enforcing the TUF Ordinance so that:

- a. Plaintiffs are exempt from the TUF Ordinance pursuant to K.S.A. §79-201.

- b. The TUF Ordinance will not be applied to the Plaintiffs or any of the Plaintiffs' properties in any way.

59. That this Court issue a Permanent Injunction to enjoin the Defendant, Defendant's officers, agents, employees and all other persons acting in active concert with them, from enforcing the TUF Ordinance as an invalid excise tax or a tax in the nature of an excise in violation of K.S.A. §12-194.

60. That this Court render a Declaratory Judgment declaring Defendant's TUF Ordinance in conflict with K.S.A. §79-201 and thus an invalid exercise of City power, and further declaring that:

- a. Plaintiffs are exempt from the TUF Ordinance pursuant to K.S.A. §79-201.
- b. The TUF Ordinance will not be applied to the Plaintiffs or any of the Plaintiffs' properties in any way.

61. That this Court render a Declaratory Judgment declaring Defendant's TUF Ordinance in violation of and in conflict with K.S.A. §12-194 and thus an invalid exercise of City power.

62. That this Court award to Plaintiffs such damages as are reasonable and just under the circumstances in the amount of \$970.77 for Plaintiff First Baptist Church of Mission and in the amount of \$1,685.19 for Plaintiff Archdiocese, as well as any other further amounts that become due during the course of this litigation, as a direct and proximate result of the Defendant's invalid exercise of power.

63. That this Court adjudge, decree, and declare the rights and other legal relations with the subject matter here in controversy, in order that such declaration shall have the force and effect of final judgment.

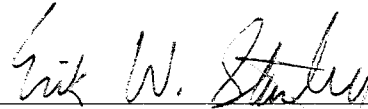
64. That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's

order.

65. That this Court award Plaintiffs the reasonable costs and expenses of this action.

66. That this Court grant such other and further relief as this Court deems equitable and just under the circumstances.

Dated this 9th day of February, 2011.



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Alliance Defense Fund

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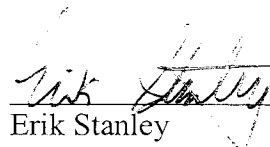
(913) 685-8001 – Fax

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 9th day of February, 2011, via U.S. Mail, first class delivery, postage prepaid, on the following:

Michael K. Seck
Fisher, Patterson, Sayler & Smith, LLP
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Attorney for Defendant



Erik Stanley