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CASE NO. 2014-SC-000383-T
COURT OF APPEALS NO. 2014-CA-001076

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GREATER CINCINNATI/NORTHERN
KENTUCKY APARTMENT
ASSOCIATION, INC. ET AL.

APPELLANTS

v.

ON APPEAL FROM
CAMPBELL CIRCUIT COURT, DIVISION II
CASE NO. 13-CI-00956

CAMPBELL COUNTY FISCAL COURT, ET AL.

APPELLEES

BRIEF OF AMICI CURIAE

**KENTUCKY ASSOCIATION OF COUNTIES, KENTUCKY COUNTY JUDGE
EXECUTIVE ASSOCIATION, KENTUCKY MAGISTRATES AND
COMMISSIONERS ASSOCIATION, GARRARD COUNTY KENTUCKY AND
GARRARD FISCAL COURT**

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CERTIFICATE OF SERVICE

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Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Fred A. Stine V, Judge, Campbell Circuit Court Division II, 330 York Street, Newport, KY 41071, Taunya Nolan Jack, Clerk, Campbell Circuit Court, Campbell County Courthouse, 330 York Street, Newport, KY 41071 and Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601.


COUNSEL FOR *AMICI CURIAE*

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PURPOSE AND INTERESTS OF THE *AMICI CURIAE*

Kentucky Association of Counties (KACo) is a trade association established in 1974 which collectively represents and serves the interests of all 120 counties within the Commonwealth. KACo has provided numerous *amicus curiae* briefs to Kentucky courts in the past 40 years. Kentucky County Judge Executives Association (KCJEA) and Kentucky Magistrates and Commissioners Association (KMCA) are trade associations representing elected leadership, county judge executives, magistrates and commissioners, in all Kentucky counties. Garrard County is a political subdivision of the Commonwealth and Garrard Fiscal Court is its elected governing body.

This appeal magnifies Kentucky counties' over-arching statutory obligation to provide for the health, safety and welfare of their citizens and citizens' property. That obligation is expressed in KRS 67.083, Additional Powers of Fiscal Court, which provides in relevant part:

- (1) It is the purpose of this section to provide counties as units of general purpose local government with the necessary latitude and flexibility to provide and finance various governmental services within functional areas specified in subsection (3) of this section while the General Assembly retains full authority to prescribe and limit by statute local governmental activities when it deems such action necessary.

The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county.

(d)...ambulance service

(u) Provision of police and fire protection

- (8) (a) The powers granted to counties by this section shall be in addition to all other powers granted to counties by other provisions of law.

To meet that imperative counties must provide an efficient and dependable means to promptly dispatch emergency responders. The Kentucky General Assembly

specifically tasked and allowed counties and cities to establish, operate and fund 911 emergency dispatch centers, PSAPs, first by the passage of KRS 65.760 in 1984 and later by user fee authorization under KRS 95A.510. In sum, Kentucky counties and cities have the primary obligation for 911 PSAPs and the General Assembly has not preempted them from this vital public safety and protection function. The General Assembly has made only one additional enactment within the field of 911 service, that being the establishment of the Wireless Enhanced Emergency 911 Systems, KRS 65.7621 *et seq*, under which the state has no authority over local PASPS and is responsible only to ensure wireless calls are delivered and handled properly and to distribute the wireless fee to certified PASPs.

Garrard County and Lincoln County created Bluegrass 911 Communications, a PSAP under an interlocal governmental agreement pursuant to KRS 65.760, with both counties being obligated to fund the operational costs. Garrard County fees are imposed upon telephone landline subscriptions, KRS 65.760(3), but were to have been supplanted by an ordinance fee upon water service subscriptions. That fee was challenged with the Garrard Circuit Court upholding the 911 Ordinance Fee concluding it was authorized under KRS 65.760 as a valid funding mechanism authorized to be imposed and collected under that statute. The Garrard Circuit did so without mention of or reliance on KRS 95A.510, the User Fee Statute. That opinion was appealed to the Kentucky Court of Appeals which determined the ordinance fee was an invalid user fee under KRS 95A.510, without regard or reference to the circuit court's conclusion or the General Assembly's fee granting authority under KRS 65.760, *City of Lancaster v. Garrard County*,

___ S.W.3d ___ 2014 WL 2978474 (Ky. App. 2014). A motion for Discretionary Review to this Court is pending, Case #: 2014-SC-000738.

The Campbell Circuit's opinion, now before this Court, in contrast to the Garrard Circuit's, held that KRS 65.760 was not an independent grant of authority for the imposition of 911 fees and found that statute does not enlarge the scope of local government revenue-raising power. In the Campbell Circuit's view Campbell County could validly exact funds from its residents under KRS 65.760 for funding PSAPs by implanting a user fee under KRS 95A.510. That variance in circuit opinions should be considered by this Court.

In addition to Garrard/Lincoln PSAP, there are 85 county PSAPs in Kentucky, answering calls from anywhere in their county, two operated by county governments answer only calls made outside city limits and three of the PSAPs are consolidated with another county.¹ A 2012 survey reported all PSAPs received a total of 3,682,257 calls and requests for service and local 911 budgets totaled \$91 million.²

With the task to establish and operate PSAPs also comes the necessity to fund. Funding for 911 PSAPs was described as a "crisis" by the Kentucky Commercial Mobile Radio Service Board, the board that collects the wireless fees for the PSAPs.³ That was in 2012 and it has not gotten better. One hundred fourteen counties typically chose the imposition of landline telephone subscription fees, KRS 65.760(3), as the funding mechanism and source.⁴ However, that funding source is not sustainable due the dramatic decline in landline usage: 25 percent reduction in the last decade and as of 2012

¹ 911 Services and Funding: Accountability and Financial Information Should be Improved, Kentucky Legislative Research Commission Report No. 383 (2011) at 5.

² See CMRS FY 2012 Annual Report, Commercial Radio Service Board (2012) at 12,10.

³ Id at 4.

⁴ Id. at 11.

a loss of an estimated 12 million in local landline funds since 2006.⁵ Other alternative funding means have had to be used to supplement or replace landline fees.

Seventy-five certified PSAPs also draw from general funds of counties and cities.⁶ Twenty-five PSAPs charged the cable companies for service through a cable provider (fixed voice over internet protocol, VoIP) even though such is not a telephone landline rather transmission of voice communications over the internet.⁷ The VoIP market has grown more than 35 percent since 2006 (as of 2011 report) and continued high growth rates are expected.⁸ Nomadic internet, a form of VoIP, where the customer uses a device which attaches to any internet connection, an example is Vonage, has been a limited funding source.⁹ All Certified PSPAs receive wireless fees, determined, collected and distributed by the state under KRS 65.7629.¹⁰ Wireless requests for service exceed the landline calls and the fees are reported to be insufficient to cover costs associated with wireless.¹¹

There are other means of access which have not been a source of funding: telematics such as OnStar send request for emergency service (most telematics systems do not have the capability to call PSASs direct). Email, texting and social networking do not yet reach emergency services, but those access methods are expected.¹²

In addition to Campbell County's user fee and Garrard County's challenged water subscription fee, some counties have enacted other miscellaneous fees: Cumberland

⁵ Id at 9, 11.

⁶ Id at 11.

⁷ 911 Services and Funding: Accountability and Financial Information Should be Improved, Kentucky Legislative Research Commission Report No. 383 (2011) at 30.

⁸ Id at 30.

⁹ Id at 30.

¹⁰ See CMRS FY 2012 Annual Report, Commercial Radio Service Board (2012) at 13.

¹¹ 911 Services and Funding: Accountability and Financial Information Should be Improved, Kentucky Legislative Research Commission Report No. 383 (2011) at 31.

¹² Id at 3, 4.

County enacted a fee on ambulance and hospital fees, Shelby County has an addressing fee, and Boyd and Laurel alarm panel monitoring fees. Dispatch fees from responder agencies are used by Carter, Greenup and Todd Counties. Oldham County charges a fee to the responder agencies to offset some equipment costs.¹³

While the sources of 911 PSAPs funding are varied, funding is consistent in use and purpose, providing for reliable, accurate and speedy emergency response. It is also consistent with the General Assembly's implicit and clear language in KRS 65.760 and KRS 95A.510 giving counties discretion choosing and imposing fees other than telephone landline subscription fees. The General Assembly was not myopic, when it past KRS 65.760 and KRS 95A.510. It provided for changing conditions, means of access and certainly envisioned traditional funding sources could diminish and alternative funding fees would be sought and imposed.

The Campbell Circuit correctly ruled that Campbell County's Ordinance, enacted pursuant to KRS 65.760(3), a statute providing for establishing, operating and funding local 911 centers, PSAPs, imposes a constitutionally sound and statutorily valid fee, more particularly a user fee, "a fee or charge imposed by a local government on the user of a public service for the use of any public service not available from a nongovernmental provider," under KRS 95A.510.

KACo, KCJEA, KMCA, Garrard County and Garrard Fiscal Court, therefore, respectfully submits this brief of *Amici Curiae* in support of Appellees' position in this appeal and urges this Court to affirm the Campbell Circuit Court and in doing so, render a definitive decision that imposition of fees for funding county 911 emergency services are permissible, under KRS 65.760 and under 95A.510 and such are valid, constitutional,

¹³ Id at 38.

and statutorily proper means by which any Kentucky county may continue funding 911 emergency services.

STATEMENT OF THE CASE

The Greater Cincinnati/Northern Kentucky Apartment Association, Inc., Appellant, filed suit to challenge the constitutional and statutory validity of Ordinance O-04-13 enacted by the Campbell County Fiscal Court on August 7, 2013. That Ordinance charged a service fee annually of \$45 onto each occupied residential and commercial unit within the county to fund the county's 911 emergency center.

The Campbell Circuit Court issued its Order on June 6, 2014 determining that the fee for 911 service was a valid user fee imposed under KRS 95A.510 and pursuant to KRS 65.760. The Circuit Court determined the user fee valid because of the availability and benefit 911 service confers upon the payer of the fee.

The Appellants appealed to the Kentucky Court of Appeal and Appellees filed a Motion to Transfer on July 14, 2014 with this Court which was granted on September 18, 2014.

ARGUMENT

- A. General Assembly, through KRS 65.760, has empowered Campbell County and all Kentucky counties to establish, operate and fund 911 emergency response centers, PSAPs, and to impose fees from sources other than telephone landlines, including the imposition of User Fees under KRS 95A.510.**

KRS 65.760 *et seq* does not require an esoteric interpretation of the law and statutory construction or convoluted rationale, it only requires a straight forward reading of its plain, unambiguous language.

Counties and cities have the primary obligation for the establishment, operation and funding of 911 emergency response centers, PSAPs, under KRS 65.760(2):

Any city, county, or urban-county government, or any combination thereof, may with the approval of their governing bodies enter into an interlocal cooperation agreement creating a joint 911 emergency telephone service.

Operational fees may be imposed upon telephone landlines and other funding sources under KRS 65.760(3):

The funds required by a city, county, or urban government to establish and operate 911 emergency telephone service or to participate in joint service with other local governments may be obtained through the levy of any special tax, license, or fee not in conflict with the Constitution and the statutes of this state. The special tax, license, or fee may include a subscriber charge for 911 emergency telephone services ... (Emphasis added).

That is to say the landline fee is not the exclusive fee, rather one of which can be imposed and collected by the county. The General Assembly, in KRS 65.760(5), reiterated its intention that landlines are not the only source of funding:

Nothing in this section shall preclude other means of establishing or funding a 911 emergency telephone service within any local area or exchange

Clearly other funding sources can be used within a local area, not just within a telephone exchange.

As landline fees decreased with discontinued usage, counties have been driven to use supplemental funds from general funds, fees on internet voice transmissions and other miscellaneous fees. These fees are now in question, whether imposed independently under KRS 65.760 without reference to KRS 95A.510; imposed independently as a user fee under KRS 95A.510. or under both statutes in concert.

As pointed out by the Appellants, “county government in Kentucky is based on the premise that all power exercised by the fiscal court must be expressly delegated to it by statute”, *Fiscal Court of Jefferson County v. City of Louisville*, 559 S.W.2d 478, 481(Ky. 1977). While not exactly on point under recent case law it identifies what the General Assembly did with the passage of KRS 65.760 and KRS 95A.510 expressly giving the establishment, operation and funding of PSAPs to counties and cities. That express language opened the way for other funding mechanisms, provided they do not conflict with the Constitution or statutes.

A. General Assembly, through KRS 91A.510-530, authorizes Campbell County and other Kentucky counties to impose a User Fee for public services not provided by a nongovernmental provider.

1. The Campbell County 911 Ordinance fee conforms to the Statutory Definition of User Fee.

The General Assembly in KRS 91A.510 defined user fee as “the fee or charge imposed by a local government on the user of a public service for the use of any particular service not also available from a nongovernmental provider.”¹⁴ Pursuant to the plain, unambiguous language of the statute, the Campbell County 911 Ordinance imposes

¹⁴ Local government is defined within the chapter to mean a county. KRS 91A.802(1).

a legitimate User Fee: *the fee or charge imposed by a local government (Campbell County) on the user (households who may seek emergency services in Campbell County) of a public service (911 PSAP) for the use (availability of the 24-hour a day, seven days a week emergency response) of any particular service (911 contact and dispatch service) not also available from a nongovernmental provider (only governments provide 911 services).*

The User Fee statute does not constrict the grant of funding authority for the 911 services previously provided to counties under KRS 65.760, rather the later enacted statute enlarges counties' authority to impose and collect fees on non-specified governmental services not available from nongovernmental providers.

Not only does the 911 Ordinance fee conform to the statutory definition, it meets the analysis of user fees found in *Kentucky River Authority v. City of Danville*, 932 S.W.2d 374, 376 (Ky. App. 1996),

the validity of special assessments and users fees depends on an analysis of the charge and the benefit received. Assessments and fees charged without a relationship to a benefit received by the payor are arbitrary and capricious and violate due process and the constitutional prohibition against the taking of private property with just compensation (internal citations omitted).

There is a benefit to someone who needs emergency services and can reach out by a number of ways to a public service answering point. The twenty-four hour a day, year-round dispatch of fire, police and ambulance is worth the payment of a fee. There a relationship of the fee to the benefit received by the payor/user. It goes without saying.

It has been suggested that the fee can be only for those who use landline devices. This suggestion is without merit. The traditional phone is just the device to gain access to the service, as is a cell phone, internet voice transmission, and soon to be, texting and

email. The fee is upon the user: for landlines the user is identified by the telephone landline box on the house, for the VoIP user the identifier is the computer location and for Campbell County the identifier is the property that receives the service for the occupants.

That suggestion is further skewed when it is stretched to say that telephone landline service for the benefit of 911 telephone service are classic user fees. A classic user fee is “this for that”. The classic user fee is a request, however made (call, computer voice transmission, text or handwritten note) and in return a response, a service, for which the requestor pays. In the instance of 911 service a user fee has nothing to do with the device, means of access or the subscription other than the subscription being the identifier of who pays. This simplistic approach does not square with fees charged that have a relationship to benefits received.

Quid pro Quo is not the only means to determine a user fee. By example, the 911 Emergency Service User Fee is akin to a garbage collection charge authorized under KRS 109.056. Garbage collection is also a service that protects the health and safety of Kentucky communities. Just as with those using 911 services, the household upon which the charge is imposed is obligated to pay regardless of whether that household avails itself of the service at any time by choosing or not choosing to take the garbage can to the road or sidewalk. In short, the charge is for the availability of the service. Furthermore, just as with 911 user fee, the charge is not on the device, the garbage can (the telephone/VoPI) that provides access to the service, rather on the user of the service of disposing of waste (dispatching emergency services).

2. The Campbell County 911 Ordinance also conforms to the Statutory proscription in the User Fee Statute.

The General Assembly's only proscription upon the user fee is that it "shall not generate revenues or profits in excess of the reasonable costs associated with a public service", KRS 91A.520. The Campbell Circuit found "(t)he County is not collecting more fees than is required to fund the 911 service."¹⁵

3. The Campbell County 911 User Fee is not a tax, special assessment or regulatory fee.

The Campbell County 911 fee is not a tax. It is not attached to property and is not a license tax or imposed on the right to exercise a business privilege. An *ad valorem* tax is assessed based upon the value of either real or personal property. *City of Bromley v. Smith*, 149 S.W.3d 403, 405 (Ky. 2004). When a fee is imposed upon a user identified by property location there is no real or personal property upon which an *ad valorem* tax would be assessed. An occupational tax is assessed on "salaries, wages, commissions and other compensation earned". KRS 68.520(3).

Furthermore, the fee is not a special assessment fixed on property to finance an improvement. It is not a fee that regulates a business or persons who conduct the business subject to the regulation.

The Campbell County 911 fee is not a tax in disguise. "The words in the constitution should be given their ordinary meaning. The plain meaning of the word 'tax' is a charge upon property for the purpose of raising revenue to defray the cost of government. " *Gillis v. Yount*, 748 S.W.2d 357, 365 (Ky. 1988). In *Kentucky River Authority v. City of Danville*, at 376, this Court said:

¹⁵Campbell Circuit Opinion p. 8, record on appeal, p. 254.


A tax is universally defined as an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular service. Taxes are a means for the government to raise general revenue without regard to direct benefits which may inure to the payor or the property taxed. The fee imposed by the Authority for the purpose of fulfilling the statutory mandates cannot be equated with taxes.

The Campbell County 911 Ordinance Fee is not tax in violation of the Kentucky Constitution or existing statutes and cannot be characterized as such.

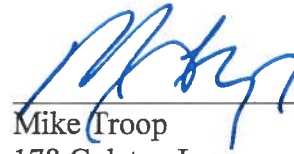
CONCLUSION

Simply stated, KRS 65.760, and 91A.510, et seq, read together or standing alone, grant Campbell County and all Kentucky counties the power to fund 911 emergency service centers by imposing a user fee upon those citizens who benefit both directly and indirectly from the vital service not performed by nongovernmental providers.

Respectfully submitted,



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