

TAX DIVISION

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FILED

CLARZELL GREEN, et al.,
Petitioners

v. Docket No. 2213

DISTRICT OF COLUMBIA, et al.,
Respondents

Opinion No: 1106-B.

OPINION AND ORDER

This matter comes before the Court pursuant to Petitioners' Prayer for Costs and Reasonable Counsel Fees incurred in the successful prosecution of a taxpayers' suit for injunctive relief and a later related action to compel Respondents to correct and reissue real property tax bills for Fiscal Year 1974, or in the alternative for refunds. As a result of Petitioners' original action, the District of Columbia was enjoined from using, for purposes of taxation, unequal levels of assessment (debasement factor) of estimated market value in determining the assessment for single family residential properties, and from placing any assessment on such properties which had been determined by a level of assessment (debasement factor) other than 55% of estimated market value of such property, until and unless a level of assessment had been established after full compliance with the provisions of the District of Columbia Administrative Procedure Act. The trial court was affirmed, District of Columbia v. Green, D.C. App., 310 A.2d 848 (1973). The later litigation, necessitated by the Respondents' assessment of 66,861 properties at a level of assessment other than 55% of estimated market value, in violation of this Court's Order in the original action, resulted in the correction of the tax roll, and the refunding, or supplemental billing, of those who had paid taxes at a level other

than 55%. This correction had been ordered by the Court on August 6, 1974, after extensive hearings and subsequent procrastinations by the Respondents who eventually, and at additional expense, complied with the Order four months later, on December 9, 1974. This was affirmed by the District of Columbia Court of Appeals in 1975, District of Columbia, et al. v. Green, et al., 348 A.2d 305.

Under all circumstances is an award of counsel fees and costs allowable to Petitioners' attorneys in these matters, is it warranted; if so, what would be a fair and appropriate award?

Respondents posit that there should be no award at all to Petitioners' counsel for either attorneys' fees or expenses, asserting that both legislative and equitable fiat prevent this entitlement because the District of Columbia is exempted by statute from both the expenses and attorneys' fees now sought.

D.C. Code §15-705, relied on by Respondents provides:

(a) The District of Columbia or any officer thereof acting therefor may not be required to pay court costs or fees in any court in and for the District of Columbia.

(b) The District of Columbia may not be required to pay fees to the clerk of the United States Court of Appeals for the District of Columbia, or to the marshal of the District, and is entitled to the services of the marshal in the service of all civil process.

(c) The United States and the District of Columbia may not be required to pay fees and costs for services rendered by the clerk of the United States District Court for the District of Columbia and the Register of Wills.

(d) Neither the United States nor the District of Columbia, nor any officer of either acting in his official capacity, may be required to give bond or enter into undertaking to perfect an appeal or to obtain an injunction or other writ, process, or order in or of any court in the District of Columbia for which a bond or undertaking is required by law or rule of court. (Emphasis added by Respondents)

Readily conceding that §15-705(a) does not specifically address attorneys' fees as such, and noting that an argument "with some force"^{1/} might be evoked that the District of Columbia and its officials have immunity only from those fees and costs for institution of suits representing payments to the Clerk of the Court and United States marshal for service of process, Respondents then claim that §15-705(a) totally insulates them. They argue the omission of legislative history on the matter equals the proposition that Congress was "unfavorably disposed to such an exemption..."^{2/}

Were it not clear solely from a careful reading of this Section that it is wholly inapplicable to the fees and Court costs requested in the instant case, then all doubt about the intent and scope of the statute should be dispelled by the venerated Brown v. McFarland, 22 App.D.C. 412 (1903), where the Court concerned itself with a substantially similar precursor to §15-705 [Act of July 7, 1898, Ch. 751, 30 Stat. 666] and which the Court found to be:

...a case in which the appellants have been compelled to incur costs to defend their rights against erroneous action by the appellees in the court below, and they are justly entitled to be reimbursed for such costs," at p. 418,

This immunity of the District of Columbia from the payment of fees to the clerk of the supreme court of the District, and to the clerk of this court, and to the marshal of the District... plain(ly)...extends only to suits instituted by the District of by the commissioners of the District in its behalf,...

But there is nothing in these statutes that exempts the District of Columbia, or its commissioners as such, from liability for costs in suits instituted by individuals against them. The defendant or defendants in such cases are not clothed with any rights of sovereignty. They stand precisely as other litigants do,...and successful plaintiffs in such suits are as much entitled to be reimbursed for their costs incurred in the maintenance of their lawful rights as though the defendants were merely private individuals. There is no ground in reason or in the law for the allowance of immunity from costs in such cases.

^{1/} Opposition of Respondents to Petitioners' Motion for Costs and Attorneys' Fees, at pp. 3, 5.

This interpretation that the statute applies only to costs or fees paid by the Government directly to the Court and not to the reimbursement of a party for costs incurred by that party is further strengthened by the case of Watkins v. Washington (153 U.S.App.D.C. 298, 511 F.2d 404, and No. 73-1880), [the latter unreported] affirming on September 11, 1974 Judge Gesell's Order as to fees and costs). In Watkins discriminatory hiring practices of the District of Columbia's Department of Licenses and Inspections had been successfully challenged. The District of Columbia had opposed an award of costs to plaintiff's counsel on the basis of §15-705. In a per curiam opinion on March 8, 1973, the United States Court of Appeals assessed the District with the \$579.70 costs claimed, and later the trial court awarded substantial counsel fees (\$32,500) against the District of Columbia in June 1973.

A petition for writ in nature of mandamus was filed by recipients of Aid to Families with Dependent Children to compel implementation of a retroactive payment order issued by officers of the District of Columbia Department of Human Resources. The Court of Appeals in Dillard v. Yeldell, 334 A.2d 578 (1975) held that applying "equitable principles" to the facts of that case petitioner should be awarded \$25.00 costs to cover the filing fee. The District of Columbia had argued in Dillard, as in the instant case, that they were exempt from paying costs under §15-705(a). After tracing the history of the statute and comparing state jurisdiction experience with the matter, the Court determined that §15-705(a) evolved "without substantial change" from an earlier statute, D.C.Code 1901, Ch. 854, §177, 31 Stat. 1219 and that the purpose of the statute in 1901 and as amended in 1961 remained the same.^{3/}

^{3/} "To relieve the District of an unnecessary bookkeeping operation." S.Rep. No. 1511, 86 Cong., 2d Sess. 2 (1960), and H.R. Rep. No. 1204, 87th Cong., 1st Sess. 2 (1961).

Not only does the ability to grant costs exist but it becomes particularly appropriate to make such an award when the costs incurred

...were so clearly the result of respondents' non-actions.

...governmental agencies today directly affect the lives and property of private citizens more than at any time in the past. This trend has given rise to increased litigation as individuals contest the demands of government. When, through litigation, these demands are determined to be unlawful, the government, like any other party, should be compelled to pay the costs of the litigation," (Dillard, supra, pp. 583-584, Simpson v. Merrill, 234 So.2d 350 (Fla. Supt. Ct. 1970)).

The question of whether the District of Columbia was exempted by an Act of Congress [§15-705] from the payment of all court costs and further whether it was insulated from liability for the payment of the attorney's fees [of \$2,000] awarded against it by the District Court was briefed^{4/} in Roberts, et al. v. Wilson, et al., No. 72-2184, United States Court of Appeals for the District of Columbia Circuit. This case, awarding costs and attorneys' fees, was pending decision at time of Respondents' Opposition to Petitioners' Motion for Costs and Attorneys' Fee.^{5/} It has subsequently been affirmed per curiam, and without opinion.^{6/}

^{4/} The language in the Roberts brief on this point and the Respondents' Opposition in Green is virtually identical.

^{5/} Footnote 1 (at p.2) of Respondents' Opposition.

^{6/} Roberts', supra, presented four essential issues for review of which two involved the concerned costs and attorneys' fees. Cf. D.C. Federation of Civil Association, et al. v. Volpe, et al., U.S. Court of Appeals for the District of Columbia Circuit, No. 74-1974, October 6, 1975, in which an order of the District Court denying motion for attorneys' fees against District of Columbia defendants was ordered vacated, with a directive to enter a new order on the motion specifying reasons for denial [if denied] insofar as it relied on the "substantial benefit [to] members of an ascertainable class theory of Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970)".

The traditional "American Rule" which prohibits an award of counsel fees to the prevailing litigant from the loser, as either damages or costs, in the absence of a statute or enforceable contract specifically so providing, has been frequently noted, nationally and locally.^{7/}

The courts of England have been statutorily authorized since 1278 to award counsel fees to successful plaintiff litigants^{8/} and to award counsel fees to successful defendant litigants since 1607.^{9/}

Nevertheless, the American Rule governing the award of attorneys' fees in litigation in the federal courts first announced in Arcambel v. Wiseman, 3 Dall. 306, 1 L.Ed. 613 (1796), has been followed subsequently^{10/} with far-reaching results. It has also come under substantial and increasing criticism during the more recent^{11/} years.

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- ^{7/} 1901 Wyoming Avenue Cooperative Association v. Lee, D.C.App., 345 A.2d 456,464(1975); F.W. Beren Sales Co., Inc. v. McKinney, D.C.App., 310 A.2d 601,602(1973); Continental Ins. Co. v. Lynham, D.C.App., 293 A.2d 481(1972).
- ^{8/} Statute of Gloucester, 1278, 6 Edw. 1, c.1. Although the statute only mentions "costs" this has always been determined to include counsel fees as well.
- ^{9/} Statute of Westminster, 1607, 4 Ja. 1, c.3.
- ^{10/} Day v. Woodworth, 54 U.S. (13 How.) 363, 14 L.Ed.181(1852); Oelrichs v. Spain, 82 U.S.(15 Wall.) 211, 21 L.Ed. 43 (1872); Flanders v. Tweed, 82 U.S.(15 Wall.) 450, 21 L.Ed.203(1872); Stewart v. Sonneborn, 98 U.S. 187, 25 L.Ed.116, 40 L.Ed.2d 703(1878); Hauenstein v. Lynham, 100 U.S. 483, 25 L.Ed.628 (1880); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S.714, 717-718, 87 S.Ct.1404, 13 L.Ed.2d 475(1967); F.D. Rich Co., Inc. v. Industrial Lumber Co., Inc. 417 U.S. 116, 126-131, 94 S.Ct. 2157, 2163-2166(1974).
- ^{11/} Many noted commentators have urged liberalization of the Rule. See McLaughlin, The Recovery of Attorneys' Fees: A New Method of Financing Legal Services, 40 Ford L.Rev. 761 (1972); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L.Rev. 792 (1966); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U.Colo.L.Rev. 202 (1966); Kuenzle, The Attorney's Fee: Why Not a Cost of Litigation? 49 Iowa L.Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn.L.Rev. 619 (1931); Comment, Court Awarded Attorney's Fees and Equal Access to the Courts, 122 U.Pa.L.Rev.636, 648-655 (1974).

The American Rule evolved to correct inconsistent practices in the courts and to prevent the frequent abuses perpetrated as exorbitant fees were assessed for the successful attorney against the loser. The Act of 1853 [10 Stat. 161] controlled the attorneys' fees recoverable by the prevailing party from the unsuccessful litigant by specifying specific sums for the services of counsel "...to correct the evils and remedy the defects of the present system". The attorney, of course, could charge his own client for his services.^{12/}

The Revised Statutes of 1874 and the Judicial Code of 1911 carried forward the 1853 Act, with the substance of the Act maintained in the revised Code of 1948, §§1920 and 1923(a). The courts have borne the legislative intent following the Rule first expressed more than one hundred years ago. Fleischmann Distilling Corp., supra, 386 U.S., at 717, 87 S.Ct., at 1407. See F.D. Rich Co., supra, 417 U.S., at 128-131, 94 S.Ct., at 2164-2166; Hall v. Cole, 412 U.S. 1, 4, 94 S.Ct. 1943, 1945, 36 L.Ed.2d 702 (1973); Alyeska Pipeline Service Co. v. Wilderness Society, infra. Lacking statute or enforceable contract, litigants must pay their own attorneys' fees.

^{12/} "Fees and costs allowed to officers therein named are now regulated by the act of Congress passed for that purpose, which provides in its first section, that, in lieu of the compensation previously allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed. Attorneys, solicitors and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed or recovered as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. They may tax a docket fee of twenty dollars in a trial before a jury, but they are restricted to a charge of ten dollars in cases at law, where judgment is rendered without a jury," Flanders v. Tweed, supra, 82 U.S. (15 Wall.) 45, 452-453 21 L.Ed. 203 (1872) where a counsel fee of \$6,000 included by the jury in the damages award was voided. See, also, The Baltimore, 75 U.S. (8 Wall.) 377, 1 L.Ed. 613 (1869) where the court set aside a \$500 counsel fee.

The United States Court of Appeals for the District of Columbia Circuit in The Wilderness Society et al. v. Morton, et al., 495 F.2d 1026 (1974) had adopted the "private attorney general" exception to the general rule barring recovery of fees and held the defendant pipeline company liable for one-half the reasonable value of services rendered. It reasoned that the interests of justice required fee-shifting where the plaintiffs acted as a "'private attorney general', vindicating a policy that Congress considered of the highest priority.", Id., 1029, citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968), and the court went on to say, Id., at 1030:

When violation of a congressional enactment has caused little injury to any one individual, but great harm to important public interests when viewed from the perspective of the broad class intended to be protected by that statute, not to award counsel fees can seriously frustrate the purposes of Congress. See Hall v. Cole, supra, 412 U.S. at 13-14. 93 S.Ct. 1943. Where the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorneys' fees are often necessary to ensure that private litigants will initiate such suits. See Lee v. Southern Home Sites Corp. [5 Cir., 444 F.2d [143] at 145 [1971]]. Substantial benefits to the general public should not depend upon the financial status of the individual volunteering to serve as plaintiff or upon the charity of public-minded lawyers. See Donahue v. Staunton [7 Cir.], 471 F.2d [475] at 483 [cert.den., 410 U.S. 955, 93 S.Ct. 1419, 35 L.Ed.2d 687 (1973)]; LaRaza Unida v. Volpe, 57 F.R.D. [94] at 101 & n.10 [1972].

The Supreme Court, however, in a decision of great moment, recently adhered firmly to the "American Rule" in a case where environmental groups which prevailed in the Court of Appeals in barring construction of the trans-Alaska pipeline were denied attorneys' fees from the petitioner based on the "private attorney general" approach. The court acknowledged other exceptions to the Rule but held that only Congress, not the courts, can authorize expanding exceptions to the Rule:

We do not purport to assess the merits or demerits of the "American Rule" with respect to the allowance of attorneys' fees. It has been criticized in recent years, and courts have been urged to find exceptions to it. It is also apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances. But the rule followed in our courts with respect to attorneys' fees has survived. It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 1628, 44 L.Ed.2d 141 (1975).

Alyeska, Id., at 1624-1625, reversed the private attorney general theory and held that:

...congressional utilization of the private attorney general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

Congress itself presumably has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some but not others. But it would be difficult, indeed, for the courts without legislative guidance to consider some statutes important and others unimportant and to allow attorneys' fees only in connection with the former...

There are, however, express exceptions to the American Rule which have been approved by the Supreme Court when "over-riding considerations of justice served to compel such a result"^{13/} and the power to award such fees is "part of the original authority of the chancellor to do equity in a particular situation."^{14/}

^{13/} Toledo Scale Co. v. Competing Scale Co., 261 U.S. 399, 426-428, 43 S.Ct. 458, 466, 67 L.Ed.719 (1923), Vaughn v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962); Mills v. Electric-Auto-Lite Co., 396 U.S. 375, 391-392 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., *supra*, 386 U.S. at 718, 87 S.Ct. at 1407.

^{14/} Sprague v. Ticonic National Bank, 307 U.S. 161, 166, 59 S.Ct. 777, 83 L.Ed. 1184 (1939).

In Hall v. Cole, supra, suit was brought under the Labor-Management Reporting and Disclosure Act of 1959. Fees were awarded the successful plaintiff from the defendant union on the ground the suit benefitted all union members and reimbursement of attorneys' fees out of the union treasury would shift the costs of litigation to these beneficiaries. The Court reiterated that "...in the exercise of their equitable powers, [courts] may award attorneys' fees when the interests of justice so require".

When a litigant has vindicated his own rights of free speech guaranteed under a statute (Labor-Management Reporting and Disclosure Act), as in Hall v. Cole, supra, he also furthers the interests of the union and its members. When a person is deprived, through discipline, of the exercise of his rights protected under the statute, then the rights of all members of his union are threatened.

Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.", Hall v. Cole, citing Yablonski v. United Mine Workers of America, 150 U.S.App.D.C. 253, 260, 466 F.2d 424, 431 (1972).

Costs, including attorneys' fees, have been awarded from the fund or property itself or directly from others enjoying its benefits in instances where the action of the successful plaintiff has created or discovered a "common fund" in which all members of the class share the economic benefit.^{15/} In this circumstance shifting of the liability for plaintiffs' attorneys' fees to the defendant spreads the cost fairly and proportionately among the members of the class so benefitted^{16/} and is appropriate because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense". Mills v. Electric Auto-Lite, supra, at 392; see also Fleischmann Distilling Corp. v. Maier Brewing Co., supra, at 719; Trustees v. Greenough, supra, at 532.

The original "fund" case, Trustees v. Greenough, supra,^{17/} (1882) concerned a bondholder's claims of waste and mismanagement of a trust fund by the trustees of said fund. He brought the action on behalf of himself and other bondholders, and was successful in defending the fund. The court there held:

^{15/} Central Railroad & Braking Co. v. Pettus, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885); Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1881); Sprague v. Ticonic National Bank, supra; Mills v. Electric Auto-Lite Co., supra; Hall v. Cole, supra; Alyeska Pipeline Service Co. v. Wilderness Society, supra.

^{16/} F.D. Rich Co. v. Industrial Lumber Co., supra. See, also, Pete v. United Mine Wkrs. of Am. Welf. v. R.F. of 1950, D.C.Cir., 517 F.2d 1275, 1292 (1975).

^{17/} 105 U.S. 527, 26 L.Ed. 1157 (1882).

...that where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportional contribution from those who accept the benefit of his efforts. Trustees, supra, 532, 533.

The basic rationale behind this decision in this type of case is one of unjust enrichment,

...[I]t would not only be unjust to him, but it would give to the other parties entitled to participate in the benefit of the fund an unfair advantage, 532.

Since Trustees v. Greenough the courts have permitted "a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit".^{18/} This exception to the "American Rule" was to prevent injustice of permitting third parties to profit from the work actions of others without sharing proportionately in the expenses incurred in securing or guaranteeing the benefit.

Sprague v. Ticonic Nat. Bank, supra, 307 U.S. 161 (1939) emphasized the fact that the Court was not willing to allow the equity power of courts to award attorneys' fees to be constrained within tight boundaries. The Court in Sprague upheld indisputably a District Court's allowance of litigation expenses to a successful plaintiff even though suit had been brought only on her behalf and not as a class action to benefit herself and others. For the plaintiff's success would have a stare decisis effect entitling others to also recover from the defendant. Said the Court:

...when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation...hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation, 167.

^{18/} Alyeska Pipeline Service Co. v. Wilderness Society, supra.

The Court clearly felt that in a court's equity jurisdiction,

...individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility, 167.

The rationale of these cases extends beyond litigation which confers a monetary benefit on others but also to litigation "which corrects or prevents an abuse which would be prejudicial to the rights and interests of those others". Mills v. Electric Auto-Lite, supra, at 396.

This latter case, a minority stockholders' action to set aside a corporate merger, the Supreme Court described this exception as applicable "where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself", (at 392).

Another established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them', Mills v. Auto-Lite, supra, at 393-394.

"Fee shifting" is justified in these cases, not because of any "bad faith" of the defendant but rather because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.

The Court explained and expanded the fund theory by eliminating the need for a pecuniary benefit--

The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale, 392.

Justice Harlan went on to say:

Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses. (also at 392).

In short, control over funds is not a necessary requirement for application of the "common fund", "common benefit" doctrine.

Therefore, in Mills v. Auto-Lite, supra, reimbursement of the litigant's attorneys' fees from the union treasury just shifts the cost of litigation "to the class that has benefitted from them and that would have had to pay them had it brought the suit", at 397. See also, Yablonski v. United Mine Wks. of Am., supra.

Where a class action or corporate derivative action results in the conferral of substantial benefits, whether of a pecuniary or non-pecuniary nature, upon the defendant in such an action, that defendant may, in the exercise of the court's equitable discretion, be required to yield some of those benefits in the form of an award of attorneys' fees. (See, e.g., Knoff v. City, etc. of San Francisco (1969), 1 Cal. App. 3d 184, 203-204, 81 Cal. Rptr. 683.

It is considered to be just and fair that the one "who created or conserves a common fund or property should be reimbursed for his reasonable expenses, including attorney's fees, for protecting the common fund for others having a similar interest with him in that fund (citations omitted).^{19/} The

^{19/} 3 Barron & Holtzoff, Federal Practice & Procedure (Rev. Ed. 1958) p.67, states the rationale thus:

"The allowance of extraordinary costs as between solicitor and client rests upon recognized equitable principles and may be made whenever the burden of litigation assumed by the prevailing party substantially benefits others who should in equity contribute to the expense."

doctrine extends not only to cases in which a fund is either created or protected but also where the effect of the suit is the same as though a fund were created", Brewer v. School Board of City of Norfolk, Virginia, (4th Cir.), 456 F.2d 943 (1972), cert. den., 92 S.Ct. 1778, where attorneys' fees were awarded under a "quasi-application" of the common fund doctrine. Petitioners obtained free transportation for all students assigned to schools outside their neighborhoods. From this "right of direct pecuniary benefits for all students assigned to schools without their neighborhood" (emphasis supplied), worth approximately \$60.00 per year to each student, something akin to a common fund arose.

Although there was no actual "common fund", nor any monetary recovery from which attorneys' fees might be assessed, insofar as the students affected were concerned, "the effect*** is the same as though a fund were created." 6 Moore's Federal Practice, supra; Sprague v. Ticonic Bank, supra. Under normal circumstances the court agreed that the students could be assessed for their proportionate share for attorneys' fees. But since the "basic purpose of the relief provided by the amendment in the decree...was to secure for the student concerned transportation without cost or deductions...", the only solution was to tax the school district for the payment of the attorneys' fees. (Brewer, at 951, 952.)

The Brewer court found "dominating reasons" under the "exceptional circumstances" of the case to award attorney's fees to plaintiffs' counsel for securing this pecuniary benefit.

In Paine v. District of Columbia, No. 72-1997, 72-2014, (1974), 494 F.2d 1156, the local circuit court affirmed District Judge Hart's award of attorneys' fees (\$7,500) and costs (\$432) for services rendered at the trial level and awarded an additional \$7,500 fee and additional \$580 costs for services rendered at the

appellate proceedings. These fees and costs, represented approximately 28.5% of the escrow account ("fund")^{20/} ordered established for the purpose of refunding monies illegally collected by the District of Columbia when the District of Columbia required the class plaintiffs to pay a \$10.00 annual fee to renew special personalized license plates, this fee in addition to all other required fees.

In a case where a federal employees' union successfully pursued a claim on behalf of its members that former President Nixon denied a 5.14% pay increase contrary to applicable law, National Treasury Employees Union v. Nixon, (D.C.Cir.) 521 F.2d 317 (1975) and by which action pay rates were favorably adjusted not only for members of the union but for all federal employees subject to the appropriate statute, some 3-1/2 million employees received retroactive salary payments ranging from \$69 to \$450. The "common benefit" exception was held applicable to the request for attorneys' fees and costs, even though, literally, there was no "common fund" (the payments having been made from several different appropriations of funds) and the Court had no control over the "common fund".

Millions of federal employees tangibly benefited directly because plaintiff persevered in this litigation. Where the members of a distinct class of persons, such as these federal employees, derive a significant sum of money from the efforts of a few, it is only just to permit the few to spread their reasonable expenses to all members of the class., at 321.

Another exception to the general rule is in extraordinary cases where the behavior of a litigant has reflected a wilful and persistent defiance of the law'^{21/}

^{20/} The "fund" was created by the District Judge when he ordered it be comprised of special charges collected by the District of Columbia Government after the date of the court order [11/22/72] and until conclusion of the appeal [May 1974].

^{21/} Kahan v. Rosenstiel (3d Cir. 1970), 424 F.2d 161, 167, cert. den. Glen Alden Corp. v. Kahan, 398 U.S. 950, 90 S.Ct. 1870 26 L.Ed.2d 290.

or where "an unfounded action or defense is brought or maintained in bad faith, vexatiously, wantonly, or for oppressive reasons."^{22/}

The obvious purpose of this award, paid by the loser, is punitive and it is essential that "bad faith" exist on the part of the unsuccessful litigant. Allowances have been made when there is a finding of persistent "defiance of law" or "unreasonable, obdurate obstinacy".

School desegregation cases have long found fruitful results in applying this exception to persistent, continued patterns of evasion and obstruction or "unreasonable, obdurate obstinacy", and based on these findings, made awards of counsel fees.

In light of the foregoing let us consider the instant claim for attorneys' fees and costs.

District of Columbia v. Green^{23/} was no ordinary case, nor was its progeny, also District of Columbia v. Green^{24/} (sometimes referred to hereafter as Green I and Green II, respectively).

As to Green I:

Only weeks prior to an immutable deadline, July 1,^{25/} did the suit commence, with extensive discovery by deposition, exhaustive pre-trial compilation of documentation and several

^{22/} 6 J. Moore, Federal Practice, §54.77[2], p.1709 (2nd ed. 1972); Hall v. Cole, supra, at p.5.

^{23/} D.C.App., 310 A.2d 848 (1973).

^{24/} D.C.App., 348 A.2d 305 (1975).

^{25/} D.C.Code 1972 Supp., §47-709:

...the valuation of said real property made and equalized as aforesaid shall be approved by the Commissioners not later than July 1, annually, and when approved by the Commissioners shall constitute the basis of taxation for the next succeeding year and until another valuation is made according to law,...

substantial motions argued pre-trial. Further discovery became mandatory and was therefore accomplished during the actual lengthy trial the days of which on several occasions terminated at 9:00 p.m. and 11:00 p.m. after 12-14 hours of continuous hearing.^{26/} This was a last-minute extraordinary crisis litigation involving millions of dollars, complex questions of fact and law, fundamental concepts of municipal government operation and its special relationships and responsibilities to the citizenry it serves, and constitutional questions of magnitude.

The case was forcefully contested and stipulations were unusually few. Since the District had elected intentionally and arbitrarily to apply different debasement factors (55% and 60%) to the same class of property in the same year, it perpetrated unconscionable, arbitrary, and invidious discrimination among residential taxpayers who were denied equal protection of the laws.

Discrimination of any kind and on any level is abhorrent; it is especially reprehensible when local government is the offender. To unequally discriminate between representatives of the same class of citizens is an activity trenching upon protected constitutional rights of equal protection under the laws (District of Columbia v. Green, I, supra). The effect of these actions in practical terms and in economic rebound was extensive.

The Petitioners were exerting their constitutional rights, through litigation, and by essential counsel, to prevent decomposition of these rights basic to the integrity of a democratic society. Only by result of Petitioners' timely actions were these rights vigorously and successfully asserted in difficult confrontation of blatantly improper action at high levels of government.

^{26/} As an aside, the trial was in June literally during its warmest days in a non air-conditioned courtroom ringed by numerous file cabinets brought to the courtroom under order for the purpose of having immediate accessibility to information, as required, in this cause involving literally tens of thousands of potential exhibits in the exclusive possession of the Respondents.

The Petitioners not only succeeded in enjoining the Respondents from applying a higher (60%) debasement factor against their real properties unless and until the same level of assessment was applied to all single-family residential real properties within the District but also caused the Respondents to first comply with the pertinent provisions of the District of Columbia Administrative Procedure Act.^{27/} By the successful contention that fixing of a level of assessment for real property is rule-making within the meaning of the DCAPA, Petitioners assured that henceforth citizens would receive notice and an opportunity to be heard before such significant changes [or any changes] could be made in the level of assessment of their real properties.

As the Court of Appeals said:

Both the tax rate and the debasement factor are fixed values in the assessment equation. The setting of the tax rate by the City Council is admittedly a rule which must be published, with an opportunity for a public hearing provided for by the DCAPA. Setting or changing the debasement factor affects the final tax bill in exactly the same manner as does the setting of the rate, and to allow the debasement factor to be secretly established or changed would completely frustrate the purpose of being able to review the tax rate later when it is set each year; District of Columbia v. Green, (I), at p. 854.

This matter, as developed through Petitioners' counsels' boundless energy, industry, diligence and devotion, was considered by the Court to be so exceptional and extraordinary as to merit equitable relief; clearly, the cause had been "surrounded by unfairness, secrecy and lack of candor".^{28/} Petitioners' actions within the legitimacy of the litigation brought the ultimate benefit to the public and public interest in the District of Columbia.

^{27/} D.C. Code 1972 Supp., §1-1507(c).

^{28/} District of Columbia v. Green (I), supra, at p. 853.

In District of Columbia v. Green (II), supra, the Court of Appeals affirmed the Petitioners' contention, and the trial court's Order, directing the District of Columbia to use a method of calculation designed to reach greater, and fairer, mathematical exactitude in the computation of real property taxes. Although ordered to make the corrections, the District refused to do such for months. Confronted with this obdurate, obstinate, astounding fact and hopeful of avoiding the issuance of a contempt citation, this Court again ordered compliance by the District. One day prior to that deadline the District finally complied and sent out supplementary tax bills or refunds, as appropriate, based on this Court's method of computation.^{29/}

Clearly, these ordered measures were necessary to avoid alterations in both the actual market value and assessed value of the properties involved in the permanent records of the Department of Finance and Revenue. If not corrected at that time, the errors caused by the improper method used by the District of Columbia, would have been compounded in subsequent years, some taxpayers receiving a continuing benefit from these errors, and others, continually being penalized by them.

Even "little exactions" from the people by the Government should not be tolerated for the "constant drip of water will erode even the strongest and most powerful" District of Columbia (II), supra.

To have greater mathematical exactitude was a matter of "potential significance"^{30/} and "we are of the view...that what is presented is [not a question of trial court discretion but] a question of the legality of a less precise method of tax computation."^{31/} There was "a dearth of adequate foundations for the excuses proffered by the District and [considering] the

^{29/} Had these bills been sent timely, as first directed by the Court, they could simply have been part of the tax bill sent to the taxpayers in September, with accompanying adjustments. The delay by the District necessitated an additional mailing and therefore additional expenses to the public treasury, all of which could have been readily avoided.

^{30/} District of Columbia v. Green (II), supra, p. 308.

^{31/} Id.

availability to the District of other more accurate methods of computation",^{32/} the appellate court agreed that the District failed to substantially comply with the original order.

Citing Lumsden v. Erstine, 205 Ark. 1004, 172 S.W.2d 409, 412 (1943), the Green II appellate court stated:

If a citizen's rights and property are to be safe, then they must be kept safe against little exactions as well as against large encroachments. The constant drip of water will wear away the largest stone; and if the sovereign by constant inroads in small things is allowed to take the citizen's property, then the rights of private ownership are gone to the realm of Limbo. Courts are to protect the rights of citizens-- that is one of the reasons for the existence of judicial tribunals.

Cognizant of the American Rule recited at length earlier in this Opinion and Order, this Court nevertheless acknowledges the applicability of its confirmed exceptions to the instant cause. The interests of justice require exercise of the Court's inherent equitable powers to do equity in a particular situation whenever 'overriding considerations indicate the need for such a recovery'. Sprague v. Ticonic Nat. Bank, supra; Mills v. Electric Auto-Lite Co., supra; Hall v. Cole, supra; see Fleischmann Distillery Corp. v. Maier Brewing Co., supra; Yablonski v. United Mine Workers of America, supra. Petitioners' successful litigation conferred 'a substantial benefit on the members of an ascertainable class,' and this litigation corrected and prevented abuses which would be prejudicial to the rights and interests of others. Mills v. Electric Auto-Lite, supra, at 392-394. In Green II, approximately 77,485 taxpayers received a pecuniary benefit with a level of assessment at 55% rather than 60%. The reduction in the total tax bill was, concluding the trial, estimated to be in excess of three and three-fourths million. This can be construed as the creation of a beneficial

^{32/} Id., at p.309.

"fund" just as if there were refunds made to an actual depository. See, Brewer v. School Board of City of Norfolk, Virginia, supra, where counsel fees were ordered under "pecuniary benefit", "dominating reasons", "exceptional circumstances" theories, equally appropriate in the instant case where the method of tax assessment was found unconstitutional as a result of counsels' skill, dogged perserverance, intuition, patience, determination and public-spirited concern.

Analogize Hall v. Cole, supra, where respondent was expelled from his union for condemning management's alleged undemocratic actions and short-sighted policies. He regained his union membership through this litigation and was awarded \$5,500 in legal fees.

When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened.

And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs.

In Green I and II the taxpayers, each of them, reaped extraordinary benefits from "preserving...democracy, not only in the immediate impact of results achieved here but in their implications for the future conduct of the [Respondents'] affairs" in taxing policies and in "open-disclosure" forums.

As to District of Columbia v. Green(I), supra, and District of Columbia v. Green II, supra, it is not necessary, other than briefly, for the Court to address itself to whether the Respondents acted in bad faith, vexatiously, wantonly or for oppressive reasons. Note that a recognized rationale for awarding counsel fees is the obstinancy or bad faith^{33/} of the defendants,

^{33/} F.D. Rich Co., supra, 417 U.S. at 129, 94 S.Ct. at 2165 (citing Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 497, 8 L.Ed.2d 88 (1962)).

upon which Petitioners rely in part. Certainly there were suggestions of obstinacy and bad faith in the Respondents' "unconscionable, arbitrary and invidious discrimination" among citizens and in Respondents' intractable attitude, most particularly during the hearings in Green II and when stubbornly failing to respond to the Court's Order in almost contumacious behavior. However, since the award of fees is justified by prior theories discussed, it is unnecessary to make a final determination of the presence of bad faith here, and the Court declines to do so.

Nevertheless, the time and effort and expense incurred as a result of these actions must be considered a factor in award of counsel fees. Over a period of months (the Court consonant with her other responsibilities could only donate 1-2 hours daily to Green II hearings, the course of which far exceeded anyone's predictions), what should have been a simple matter of recomputing Fiscal Year 1974 real property tax bills became a complicated maze of computerization jargon and analyses. In an attempt to excuse its unjustifiable actions, subsequently rejected by the Court of Appeals as "vague, conclusory and unsupported by concrete evidence or testimony",^{33a/} Respondents produced an expensive expert witness from out of the jurisdiction and required Petitioners to also engage an expert witness and to conduct numerous evidentiary hearings to establish those proper tax billings which could have been so readily accomplished by expeditious and smooth use of a simple mathematical formula.

It was conceded by the District, at the appellate level, "that its method of computation, when compared [to Petitioners' proposals], resulted in undercharges to some taxpayers of as much as \$35.98 and overcharges to others of as much as \$72.14",^{34/} an

^{33a/} District of Columbia v. Green (II), supra, p. 308.

^{34/} District of Columbia v. Green (II), supra, at p. 309.

error compounded and perpetuated over the years. The amount by which the assessment exceeded the ordered 55% was \$13,468.18 which could be construed the "fund" in this case. Certainly equity here, as in District of Columbia v. Green I, supra, cries out for support in justifying a reasonable counsel fee award when the ultimate effect on the District of Columbia taxing system is considered.

Unquestionably, both suits were legitimate and non-frivolous. A shroud of secrecy and technical complexity surrounded the case. Even the most sophisticated taxpayer remained unaware, or unclear, as to what was happening to him and his values. The persistent demands and zealous dedication of counsel, found in Petitioners' unswervingly committed attorneys, was essential to counteract the strong (sometimes fierce) adversary resistance. Exhibiting substantial legal skills this novel litigation sliced through miasma to achieve a successful conclusion of benefit to all citizen taxpayers. Vindication of a constitutional right to equal protection of the laws is, of course, priceless, but to not award compensable and reasonable counsel fees in such a situation, as Respondents pray, would not only be unjust but would affront the dignity of justice itself.

It is fitting to now consider determinations relevant to the amount of the award.

In two cases where plaintiff classes consisted of members whose applications for retirement benefits were denied,^{35/} the Court, en banc, thoroughly considered the appropriateness and amount of counsel fee awarded for each class action (Kiser and Pete). The District Court's decision to assess plaintiffs' counsel fees to defendants was approved in the Kiser action, the appellate court finding that plaintiffs' attorneys' fees should have been the

^{35/} Pete v. United Miner Wkrs. of Am. Welf. & R.F. of 1950 (D.C. Cir.), 517 F.2d 1275 (1975); Kaiser v. Lugo.

responsibility of the defendants under established exceptions to the general "American Rule".

We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefitted class. (footnote omitted), citing F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129-30, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974).

The Kiser cause, nevertheless, was remanded for a determination for value of the services rendered since time of the lower court's basic award of \$59,048 and the termination of that litigation^{36/} in 1974. [The District Court had awarded a flat payment of \$3,000 for such work, which the appellate court found to be, "at best an approximation of the value of counsel's services."^{37/} The approved formula utilized the number of hours reportedly logged by the Kiser class counsel, discounted^{38/} them by a factor of thirty-five percent, and multiplied by an hourly rate of \$40.00 to reach a basic compensation figure. The court then added a premium equal to ten percent of the hourly compensation. In addition over \$2,700.00 in expenses were awarded Kiser class counsel.

It is noteworthy that this substantial sum was awarded even though, unlike Green I and Green II, the Kiser case was decided as a matter of law on a motion for summary judgment and the "principal issues were neither novel nor complex. The court minimized the net benefit conferred to members of the plaintiff class through counsel's efforts"^{39/}, since similar benefits could

^{36/} 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974).

^{37/} Pete, supra, at 1292.

^{38/} The discounting by the District Court was not because of disagreement with counsel's estimate of the time used but allowed for the numerous telephone calls and attorneys' conferences, the time spent on the fee question and discrepancies among the lawyers as to the time spent in court on hearings of motions, Pete, supra, at 1290, Ftnt. 74.

^{39/} Pete, supra, at 1290.

have been obtained by members of the class settling the cause. Counsel assumed very little risk in asserting the plaintiff's claims because essential legal principles that controlled this case had been noted a year before the suit was certified as a class action, and most of the material facts were incontrovertible.

Therefore, despite the diligence of counsel and the success their efforts yielded, the court discounted the hours logged by the attorneys and ordered compensation on an hourly basis plus a premium. We think that the District Court's evaluation of the relevant factors was reasonable. (footnote omitted)

In Pete, the District Court relied on the basic criteria for an appropriate fee-setting formula as those elements are delineated in the Manual for Complex Litigation^{40/} and the Code of Professional Responsibility.^{41/}

...while any fee allowed in the case of a settlement or recovery through litigation may constitute a percentage of the total amount recovered, the reasonableness of the fee arrived at should not rest primarily on the selection of a percentage of the total recovery. Although the results obtained in representing the class should be given consideration as provided in the Code of Professional Responsibility, there should also be an emphasis upon the time and labor required and the effect of the allowance on the public interest and the reputation of the courts... Manual, at 50.

The factor of public service should be recognized as well as the degree of public benefit. The factor "relied on most heavily by the courts is the benefit the lawsuit has produced."

7 A. Wright & Miller, Federal Practice and Procedure, §1803.

Consider also those provisions in the Code of Professional Responsibility which concern the charging and collecting of fees for legal services.

^{40/} §1.47 (3d ed.), supplement to C. Wright and A. Miller, Federal Practice and Procedure (1973) [hereinafter Manual].

^{41/} DR §2-106.

DR 2-106 Fees for Legal Services.

- (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
- (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
 - (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
 - (3) The fee customarily charged in the locality for similar legal services.
 - (4) The amount involved and the results obtained.
 - (5) The time limitations imposed by the client or by the circumstances.
 - (6) The nature and length of the professional relationship with the client.
 - (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
 - (8) Whether the fee is fixed or contingent.

Class litigation certainly involves an element of risk. Counsel may receive inadequate or no fees at all if the class plaintiffs do not prevail. What is the magnitude of the risk? The Court in Pete, supra, held it "sound policy to grant class counsel some premium for their efforts as an incentive for other attorneys to undertake the risk of prosecuting class actions..."

Just as in Pete, supra, this Court finds that justice requires that the defendants pay the costs and attorneys' fees incurred in this dual litigation (Green I and Green II) necessitated to compel the defendants, through judicial resolution, to discontinue their protracted discriminatory conduct. It is appropriate for the fee to be paid from the public treasury into

which real property taxes have been paid by single family residential taxpayers, since all taxpayers benefit from the removal of secrecy and gain from the open forum and citizen participation in which such proposed increases must henceforth be debated.

In Pete, supra, the second class action referred to above, it was held that the District Court improperly awarded as counsel fees an excessive percentage (5%) of the total class recovery, in consideration of the factors, neither novel nor complex issues, decided by summary judgment without extensive pretrial discovery and without substantial risk. The cause was remanded for recalculation of the premium with a recommendation that an appropriate basis would be a fee based on a percentage of the total hourly compensation.

Recognizing that cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000-e-5(K) have a statutory basis for a "reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person", it is yet noteworthy to review the recent D.C. Circuit cases of Evans v. Sheraton Park Hotel, et al., 164 U.S.App.D.C. 86, 96-97, 503 F.2d 177, 186-188 (1974), and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717, 718, 719 (1974) for guidelines established in Johnson to allow courts to arrive at just compensation.

1. Time and labor required.
2. The novelty and difficulty of the questions.
3. The skill requisite to perform the legal service properly.
4. The preclusion of other employment by the attorney due to acceptance of the case.
5. The customary fee.
6. Whether the fee is fixed or contingent.

7. Time limitations imposed by the client or the circumstances.
8. The amount involved and the results obtained.
9. The experience, reputation and ability of the attorneys.
10. The "undesirability" of the case.
11. The nature and length of the professional relationship with the client.
12. Awards in similar cases.

In order to determine appropriate compensation for counsel the Court will first analyze the type of work involved in the case and the number of hours expended by counsel. Thereafter, a reasonable hourly fee will be fixed. When that hourly figure is calculated to show the total recovery solely on hourly consideration the Court will determine what sum, if any, should be added to counsel's compensation. Factors involved herein are the nature of this litigation, time limitations imposed by the circumstances, the benefits conferred on Petitioners' class, the service rendered to the public, the contingent nature of this litigation, the complexity and novelty of the issues, counsel's skill, experience, reputation and ability. Also considered will be all other factors enunciated in Evans v. Sheraton Park Hotel, supra, The Canons of Professional Ethics, supra, and the Manual, supra.

It shall be then apparent that the Court is justified to exercise its equitable powers in this exceptional case and award a compensable fee to Petitioners' attorneys. Green I and Green II must be considered together for the purpose of a fair and appropriate counsel fee since one case derives directly from the other and although resulting in two separate appeals and two separate appellate affirmances are, in actuality, the same case in different stages.

Detailed logs of counsels' time, taken from their time records and diaries reflected in Petitioners' Memorandum in Support of Attorneys' Fees, show the total time in hours spent by counsel in the firm (partners and associates) whose hourly rates varied from \$100.00 for some partners to \$40.00 for associates). They spent 1,217 hours on these cases from April 1973 through December 1974, valued by the firm at \$101,005. Additionally, supplemental filings estimate "conservatively" an additional 200 hours for the "substantial amount of work [which] remains to be done by counsel for taxpayers in order to give full effect to this court's orders" [since accomplished].

These additional 200 hours were to be for both Green II (the District had appealed the order) and for insuring that refunds in Keyes (another tax cause, the fee request for which will be treated in a separate order) be accurately and promptly distributed. There was no breakdown between Keyes and Green II in this request. Accordingly, based on the Court's knowledge of these cases, a fair evaluation would be to allocate one-half each of the 200 hours to each case based on an average of the counsels' hourly rates (\$70.00 per hour). Accordingly, \$7,000 more should be added to the \$101,005 value placed by the firm for services in Green I and Green II, making a total of \$108,005 based on computed hourly rates.

Respondents have not disputed the amounts of time claimed by Petitioners to have been expended in this case nor do Respondents question the billing rates. 'The amount of \$101,055.00[sic] requested for all attorneys' time in Green I and II ...appear to be proper valuations of the efforts of the attorneys who took part in the preparation and litigation of these matters.^{42/}

^{42/} Response to Petitioners' Memorandum in Support of Attorneys' Fees, p.1.

The Respondents also did not contest the prayer of Petitioners for a percentage fee of 4.4% to 7.5% based on estimated taxpayers' savings of \$3,775,298.16 in Green I which fee would amount to \$166,113.12 - \$283,147.36 for Green I alone. There was no claim that these figures were either excessive or unreasonable and the costs of \$4,672.85 were undisputed.^{43/}

Respondents contend only that §15-705, D.C. Code, discussed at length earlier in this Opinion, insulates them from any award of costs or counsel fees and "that relief like that sought by Petitioners can come only from Congress, not from the courts".^{44/}

It is clear that an attorney's time is generally reflected in his office billing rate, and, of course, his legal reputation and status (partner or associate) must be considered. Often it is necessary for the Court to allocate several different rates to different attorneys and frequently the Court is unable to equitably fix counsel fees solely by multiplying the hourly rate for each attorney times the number of hours he worked on the case. But our case is different since Respondents themselves do not contest the fairness of the dollars and cents proffered by Petitioners; on the contrary, they affirmatively state that not only do they not dispute the figures but that the amount requested (\$101,055) [sic] appears to be "proper valuations". The Court agrees.

Given the amount to which the counsel are entitled on the basis of an hourly rate of compensation applied to the hours worked, it is recognized that this figure provides "The only reasonably objective basis for valuing an attorney's services", Lindy Bros. Builders, Inc. of Phila., et. al. v. American R. & S. San. Corp., et al., (3d Cir.) 487 F.2d 161, 167 (1973).

^{43/} Opposition of Respondents to Petitioners' Motion for Costs and Attorneys' Fees.

^{44/} Id., Opposition of Respondents.

No one expects a lawyer to give his services at bargain rates in a civil matter on behalf of a client who is not impecunious. No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended. Yet unless time spent and skill displayed be used as a constant check on applications for fees there is a grave danger that the bar and bench will be brought into disrepute, and that there will be prejudice to those whose substantive interests are at stake and who are unrepresented except by the very lawyers who are seeking compensation. Cherner v. Transitron Electronic Corp., 221 F. Supp.55,61(D.Mass.1963).

Additional costs, including \$16,492.30 paraprofessional services not previously noted and miscellaneous expenses of \$190.35, were added to the initial \$4,672.85 undisputed costs, bringing the Green I case costs to a total of \$21,355.50 for which Petitioners seek reimbursement. Respondents did not contest these additional figures either, merely noting that all paraprofessional expenses appear in a lump sum figure, to which comment Petitioners countered with the pertinent information that the paraprofessional expenses were actual disbursements. The enormous volume of records to be viewed, shifted, tallied and analyzed completely validates the generous use of paraprofessionals; their hourly fee of under \$15.00 per hour proved far less costly than would even an associate counsel's hourly rate.

In Green II Petitioners have claimed the incurrence of costs in the total of \$1,325.19 mainly comprised of paraprofessional services.

The nature of this litigation has been detailed earlier and suffice it to say now that it was conducted with intense preparation and exacting time constraints, in an atmosphere of unusual crisis pressure and enormous difficulties which finally unravelled the truth.

It is also clear that this litigation was so time-consuming that counsel were precluded, during the period of approximately 22 months spanned by these cases, from being retained to handle other matters which may have been more financially rewarding. Obviously, as counsel for Petitioners have mentioned, they were precluded from prosecuting the Calvin-Humphrey^{45/} action, brought by commercial taxpayers, because of the inherent conflict between the commercial and residential classes, and additionally, because of the evident workload imposed by the rigors of these Green cases.

With regard to other factors, such as the difficulty of the question involved, the skill necessary to perform the service and the reputation and ability of the attorneys, the Court can only reiterate that, in its opinion, counsel have, throughout the entire case, displayed the utmost expertise, competence and impressive diligence on behalf of their clients in this highly technical and complex matter. This was not, by any means, a routine case, one which might be taken on eagerly by other attorneys, and handled perfunctorily! This action was a novel and undesirable one, in terms of its maze of technical complexities. The Court highly commends Petitioners' counsel for their admirable and, in the end, successful struggle to equalize an unconstitutional tax system, on behalf of the citizenry, and additionally for their altruism in undertaking this litigation with little hope of compensation. (No contingent fee arrangement was made.) Finally, in assessing the overall results accomplished by this litigation, we find that the injunctive relief obtained has had an extremely significant effect, not only on those taxpayers who had been taxed improperly at the rate of 60%,^{46/} but also on the

^{45/} Calvin-Humphrey v. District of Columbia, supra.

^{46/} Petitioners estimated that the injunction resulted in a saving of \$3,775,298.16 for 77,485 taxpayers for Fiscal Year 1974.

integrity of the whole governmental system of our District. Additionally, this original suit substantially paved the way for other related actions such as Keyes v. D.C., supra, and Calvin-Humphrey v. District of Columbia, supra. Clearly, an action having such pervasive effect on the tax system warrants a substantial award for the services of counsel.

After considering all these factors, let us next examine other cases, particularly in the District of Columbia, and the amount of the fee awards ordered in them. Similar to the instant case are consumer actions to set aside rate increases granted by the Public Utilities Commission in the District of Columbia. In Washington Gas Light Co. v. Baker, 90 U.S.App.D.C. 98, 195 F.2d 29 (App.D.C.1951), and Bebchick v. Public Utilities Commission, 318 F.2d 187 (1963), cert.den. 83 S.Ct.1304, the United States Court of Appeals, (D.C.Cir.) en banc ordered attorneys' fees and expenses paid out of funds of money collected improperly under the rate increases. In Washington Gas Light, supra, the attorneys' fees amounted to \$55,000 representing 4.4% of a fund of \$1,250,000 to be refunded to 175,000 consumers, while in Bebchick, supra, the District Court fixed a fee of \$176,250 of the reserve created of \$2,350,000, approximately 7.5%. Three other District of Columbia cases involving attorneys' fees warrant mention. In Blankenship v. Boyle, 337 F.Supp. 296 (D.C.D.C. 1972), a derivative class action brought by miners for mismanagement of a union welfare fund, an award of fees of \$825,000 (about 7.2% of damages assessed at 11.5 million) was ordered. However, in Freeman v. Ryan, 408 F.2d 1204 (D.C.Cir. 1968) in which a discriminatory federal milk order was set aside, the court ordered an even more substantial percentage counsel fee, i.e., \$300,000 representing 60% of the total recovery of

\$500,000; this award was later reduced by the Court of Appeals to \$185,000, a still substantial 36%. Most of these cases, unlike our injunctive action, involved refunds being distributed from a fund; however, the case of Watkins v. Washington, supra, is more similar and highly relevant to our case. In that successful challenge to discriminatory hiring practices in the Department of Licenses and Inspections, and although there was no fund, District Judge Gesell taxed the District with attorney's fees of \$32,500 plus costs because of the compelling circumstances in the case.

While many of these awards (with the exception of the award in Paine v. D.C., supra, and in Freeman v. Ryan, supra), constitute between 4% and 8% of the fund, if there were one involved, to be distributed, the percentage recovery in tax assessment cases has often been much higher. In Knoff v. City and County of San Francisco, supra, a taxpayers' suit to correct erroneous tax assessments resulting from preferential treatment by the San Francisco assessor, the Court ordered the government to pay to petitioners' attorneys a sum equal to 20% of the first \$1 million in property taxes saved for the taxpayers, 10% of the second \$1 million and 5% of the third \$1 million. And in an even earlier taxpayers' class action to cancel invalid tax assessment liens on certain properties, the Supreme Court of Florida affirmed the trial court's order that one-third of the \$152,000 fund recovered be awarded to the petitioners' attorneys. (Tenney v. City of Miami Beach, 11 So.2d 188, Fla. Sup. Ct., en banc, 1942).

As heretofore recited litigation in Green I was necessitated by unconstitutional discrimination against taxpayers of the same class. Litigation in Green II was necessitated by the District of Columbia's failure to fully comply with the Court orders in Green I.

The Court has also considered the extent to which the quality of the counsels' services suggest increasing or decreasing the aggregate hourly compensation to which the Court has found the attorney reasonably entitled. The complexities of this case and its novel issues have already been noted. A great deal of demonstrated skill and dogged determination perservered to successfully conclude this case. The benefit conferred upon the public must be considered, including, but not limited to, present and future access to open forums concerning any proposed debasement factors and alterations in residential real property assessments (which in the ultimate alter the dollar and cents tax bill) and unquestionably a government enlightened more responsively and sensitively to the taxpayers' rights. It was a complicated litigation which produced a very substantial recovery both in regulated rights, past and future, and in actual savings of millions of dollars which do not have to be paid because of the timely injunction preventing the increases which had no avenue for challenge save through this successful litigation.

The Court has only gone into a brief summary of the actions of Petitioners, related in more detail in the two Opinions and Orders for Green I and Green II, respectively, and in the numerous pleadings and exhibits of this case.

Counsel should, indeed, receive a substantial incentive fee, or bonus, in addition to the reasonable hourly compensation.

There are cases approving incentive bonuses of as much as 100 percent of the hourly fee^{47/} and in National Association of Regional Medical Programs, Inc. v. Weinberger, Dist. Ct. D.C., Civil No. 1807-73, J. Flannery awarded sole counsel a total \$105,500 including a 100 percent incentive bonus on the merits of the case.

^{47/} Lindy Bros. Builders, Inc. of Philadelphia, et al. v. American R. & S. San. C., on remand, 382 F.Supp. 999 E.D.Pa. (1974).

All factors considered, the following appears to be equitable, yet reasonable, compensation for counsel for legal services performed in Green I and Green II:

\$101,005	unopposed by Respondents as to hours and dollar amount
7,000	100 reasonably estimated hours for <u>Green II</u> appeal and correlative matters in <u>Green II</u> , at average counsel's rate of \$70 per hour
<hr/>	
\$108,005	
37,802	incentive bonus of 35%
<hr/>	
\$145,807	Total Compensation

In addition, counsel are entitled to reimbursement of reasonable costs expended (\$22,680.69), of which \$20,285.14 is allocated to reimbursement of paraprofessional expenses disbursed, and an additional \$1,230.81 to transcripts from depositions, subpoenas, service fees and transcript from Court reporter; the balance of \$1,164.74 is for miscellaneous expenses.

Green I	\$21,355.50
Green II	<u>1,325.19</u>
	\$22,680.69

There are 77,485 members of the ascertainable class of single family residential property owners who have benefitted directly from Petitioners' successful suit in that their real property tax bills were based, for Fiscal Year 1974, at a level of assessment of 55% instead of 60%, the latter the percentage that would have quietly gone into effect by July 1, 1973 had it not been for Petitioners' action. The reduction in the projected assessed value as a result of services by Petitioners' counsel was estimated by Petitioners to be \$113,713,800. The tax rate being \$3.32 per \$100 of assessed value, the estimated reduction in the total tax bill for these 77,485 directly benefiting taxpayers was \$3,775,298.16. This sum can be viewed as analogous with creation of a "fund" for the benefit of these 77,485.

Here, the ascertainable class benefitted a distinct sub-class of a larger class, but in actuality, all taxpayers of the District of Columbia benefitted in significant ways. As before noted, among the ¹more substantial impacts of Petitioners' successful litigation is the now recognized principle that the fixing of a level of assessment for real property is rule-making within the provisions of the District of Columbia Administrative Procedure Act. This forcefully requires notice to be given to the public of any proposed change of the level of assessment and an opportunity by the public to be heard.

Knoff v. City and County of San Francisco, supra, was an action for mandamus alleging unfair assessments among taxpayers where it was ordered, among other things, that property on the city be assessed uniformly. Although, as a result, certain taxpayers previously favored unfairly by the assessor would now be forced to pay larger taxes, the court found that all taxpayers would be benefitted by the action:

The taxpayers previously favored...among all San Francisco taxpayers, will share in the public benefits to be realized from that objective...

Accordingly, the award of attorneys' fees by the trial court was upheld as a

...proper exercise of the trial courts' broad equitable powers...of which the existence of an actual fund of money is not a condition precedent, Knoff, p. 696. See, also, Brewer v. School Board of City of Norfolk, supra.

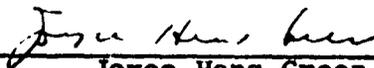
It is, therefore, by the Court, this 30th day of April, 1976, in accordance with the above Opinion,

ORDERED:

1) that Respondents, in their official capacity, and from the public funds of the District of Columbia, shall pay Gilbert Hahn, Jr., Esquire, for professional services rendered herein, the sum of One Hundred Forty-Five Thousand Eight Hundred Seven Dollars (\$145,807.00), with interest at the rate of six percent per annum from the date of this Order until paid;

2) that Respondents, in their official capacity, and from the public funds of the District of Columbia, shall reimburse Gilbert Hahn, Jr., Esquire, for costs expended herein, the sum of Twenty-Two Thousand Six Hundred Eighty Dollars and 69/100 (\$22,680.69), with interest at the rate of six percent per annum from the date of this Order until paid.

3) If Respondents appeal this matter, payment of the aforesaid awards in (1) and (2) above shall be stayed pending final disposition of said appeal.



Joyce Hens Green
Judge

Copies to counsel of record.