In the Missouri Court of Appeals
Eastern District

DIVISION IV

STATE OF MISSOURI, ex rel. SLAH, L.L.C.,	)	No. ED94904
Respondent,	)	Appeal from the Circuit Court of St. Louis County
v.	)	
CITY OF WOODSON TERRACE, MISSOURI, A MUNICIPAL CORPORATION,	)	Honorable Larry L. Kendrick
Appellant.	)	Filed: March 29, 2011

Introduction

May a taxpayer lawfully challenge the validity of a municipal tax scheme through an action for declaratory judgment? This question is presented by the City of Woodson Terrace (the City) in its appeal from the trial court's judgment finding that Sections 94.270.3, RSMo 2004, and 94.270.6, RSMo 2005, prohibit the City from imposing a hotel license tax rate in excess of $13.50 per night on SLAH, LLC (SLAH), a limited liability company operating the St. Louis Airport Hilton Hotel located within the City. The City contends Section 139.031, RSMo 2004, provides the exclusive remedy for SLAH to challenge the City's tax rates and precludes SLAH from seeking equitable relief in this matter. The City further submits that the statutory restrictions imposed by the legislature on the City's ability to set its hotel license tax rate violates provisions of the Missouri Constitution. Finding that SLAH is not limited to the remedy

provided under Section 139.031 and may seek declaratory relief with regard to the City's hotel license tax rate, and further holding that neither Section 94.270.3 nor Section 94.270.6 violate the Missouri Constitution, we affirm the trial court's judgment.

Background

On January 22, 2004, the City's Board of Alderman enacted Ordinance 1606, which amended the City's Ordinance 543 and set the hotel/motel license tax rate at "Eighty-five cents ($0.85) per day per room occupied for a fee by Transient Guests" beginning on July 1, 2004, subject to voter approval. Voter approval was obtained at the April 14, 2004 election. Ordinance 543 previously set the City's license tax rate at $10.00 per unit per year.

During the Missouri State General Assembly's 2004 session, state lawmakers enacted a new statute, codified at Section 94.270.3, which precluded fourth-class cities with a population of between 4100 and 4200 inhabitants and located within a charter county with one million or more inhabitants from levying or collecting a license fee on hotels or motels in excess of thirteen dollars and fifty cents ($13.50) per room. The statute further specified that the tax rate of any city within its scope that exceeded such tax rate was deemed to have been rolled back to $13.50. Specifically, the statute reads:

> 3. Notwithstanding any other law to the contrary, no city of the fourth classification with more than four thousand one hundred but less than four thousand two hundred inhabitants and located in any county with a charter form of government and with more than one million inhabitants shall levy or collect a license fee on hotels or motels in an amount in excess of thirteen dollars and fifty cents per room per year. No hotel or motel in such city shall be required to pay a license fee in excess of such amount, and any license fee in such city that exceeds the limitation of this subsection shall be automatically reduced to comply with this subsection.

Section 94.270.3, RSMo 2004.[1]

[1] All subsequent statutory citations to Section 94.270.3 are to RSMo 2004, unless otherwise indicated.

According to the 2000 Census, St. Louis County was the only Missouri county with one million inhabitants. Census data showed that the City had 4189 residents and was the only fourth-class city located in St. Louis County having between 4100 and 4200 inhabitants.

During the fiscal year beginning July 1, 2004, the City charged hotels located within its boundaries a license tax of $13.50 per room. The City, however, sent SLAH a general business license tax form, basing its license tax on gross revenue. In reliance on this form, SLAH paid a business license tax based on the rate of one dollar per one thousand dollars ($1000) of gross receipts. SLAH was issued a business license based upon this payment.

During the Missouri State General Assembly's 2005 session, the legislature enacted another statute affecting a municipal hotel tax. This statute, codified at Section 94.270.6, provides that no fourth-class city may increase its hotel license fee by more than 5% per year, and that the total license tax levied on a hotel could not exceed the greater of either: (1) one-eighth of 1% of such hotel's gross revenue, or (2) the business license tax rate for such hotel on May 1, 2005. Specifically, the relevant statute reads:

> 6. Any city under subsections 1, 2, and 3 of this section may increase a hotel and motel license tax by five percent per year but the total tax levied under this section shall not exceed the greater of:
>
> (1) One-eighth of one percent of such hotels' or motels' gross revenue; or
>
> (2) The business license tax rate for such hotel or motel on May 1, 2005.

Section 94.270.6, RSMo 2005.[2]

For fiscal years 2006 and 2007, the City sent SLAH a blank business license application form, which provided for calculation of the hotel business license tax based on payment of $13.50 per room. The City's forms were consistent with the provisions of Section 94.270.3. In both such years, SLAH used these forms to submit its application for a hotel business license for the Airport Hilton, and submitted with the application a check for payment of the amount due,

[2] All subsequent statutory citations to Section 94.270.6 are to RSMo 2005, unless otherwise indicated.

calculated at the rate of $13.50 per room. The total annual hotel license tax paid by SLAH in each of fiscal years 2006 and 2007 was $5,305.50. SLAH was issued a business license by the City in each of these years. Similarly, other hotels located in the City paid a hotel license tax calculated at $13.50 per room in each of these years for which they, too, received business licenses from the City.

On or about May 17, 2007, Margaret Getz (Collector), in her official capacity as the City Collector, sent SLAH a blank business license application form that provided for the calculation of the hotel business license tax at the rate of $13.50 per room for fiscal year 2008. As in fiscal years 2006 and 2007, SLAH completed the application and returned it along with its payment.

After receiving SLAH's 2008 application and payment, Collector informed SLAH by letter that the application form mailed to SLAH by Collector in May had been sent in error and should be disregarded. Collector enclosed a new application form setting the tax rate for a hotel business license at $0.85 per day per room occupied by transient guest, in conformance with Ordinance 1606. Collector also returned the check previously sent by SLAH as payment for its fiscal year 2008 hotel license tax obligation.

In correspondence dated July 9, 2007, the City, through its attorney, explained the increase of its hotel license tax rate to $0.85 per day per occupied room by claiming that the statutory restrictions imposed on the City's hotel tax by Sections 94.270.3 and 94.270.6 were invalid because both statutes constituted special laws in violation of Article III, Section 40 of the Missouri Constitution. The City relied on the Missouri Supreme Court's decision in Jefferson County Fire Protection Districts Association v. Blunt, Nixon, et al., 205 S.W.3d 866 (Mo. banc 2006), as support for its claim.

In August 2007, SLAH filed a Petition for Declaratory Judgment, Injunction, Mandamus, and/or Prohibition in which it contested the legality of the City's increase of the hotel license tax to $0.85 per day per room occupied for a fee by transient guests beginning on July 1, 2004, under the City's Ordinance 1606.

On December 20, 2007, the City enacted Ordinance 1719, which reduced the hotel/motel business license tax rate to $0.32 per occupied room per day.

Following a bench trial, the trial court ruled that under either Section 94.270.3 or Section 94.270.6, the City could not lawfully charge a tax rate in excess of $13.50 per room per year for fiscal years 2008 and 2009. The court found that the rate charged by the City on May 1, 2005, was $13.50 per room per night and that the City had not authorized an increase from that rate. The trial court further concluded that the City was prohibited by Section 94.270.6 from charging a tax rate exceeding $13.50 per room per night without further action of its city council, and that the City could not increase its tax rate by more than 5% per year, to a maximum of one-eighth of 1% of gross revenue. Specifically, the court's Order and Judgment stated:

> This Court hereby issues its writ of prohibition prohibiting [the City] from charging SLAH more than $13.50 per room per year for fiscal years 2008 (July 1, 2007 – June 30, 2008) and 2009 (July 1, 2008 – June 30, 2009) and, further, issues its writ of mandamus mandating that SLAH shall be issued a business license for each of said years upon payment of a license tax calculated at such rate. [The City] is further prohibited from collecting any penalty or interest from SLAH for late payment of said taxes, provided they are paid within 10 business days of the date on which this Order and Judgment become final, in that [the City] previously rejected SLAH's proffered payment of license taxes calculated at $13.50 per room per year.

Following the trial court's denial of its post-trial motion for a new trial, the City sought a direct appeal to the Missouri Supreme Court, arguing that Sections 94.270.3 and 94.270.6 are "special laws" as applied to the City, and are prohibited under Article III, Section 40 and Article VI, Section 15 of the Missouri Constitution.

The Missouri Supreme Court subsequently ordered the City's appeal transferred to this Court, where jurisdiction is vested under Article V, Section 11. This appeal follows.

Points on Appeal

The City raises three points on appeal. In its first point, the City contends the trial court erred in entering judgment for SLAH because SLAH was not entitled to seek declaratory relief. More specifically, the City argues that (A) SLAH had an adequate remedy at law pursuant to Section 139.031, RSMo 2004[3], which sets forth the procedure for payment of a tax under protest; (B) SLAH failed to pay the tax under protest as mandated by Section 139.031; (C) the trial court lacked subject matter jurisdiction to award declaratory relief; and (D) SLAH acted with unclean hands by not paying the tax under protest, thereby barring SLAH's claim for declaratory relief.

In its second point, the City alleges the trial court erred in finding that the hotel tax rate in effect on May 1, 2005, was limited to $13.50 per room per year by operation of Section 94.270.3 because Section 94.270.3 is unconstitutional. The City argues that City Ordinance 1606 lawfully established the hotel tax rate at $0.85 per occupied room per day as of May 1, 2005, because Ordinance 1606 was duly passed and adopted by the registered voters of the City and was in effect as of May 1, 2005. The City contends that Section 94.270.3 violates Article III, Section 40 of the Missouri Constitution and is therefore void because it is a "special law" that relates only to the City, and because Section 94.270 violates the uniformity requirement of Article VI, Section 15 of the Missouri Constitution by creating subclasses among the fourth-class cities. Because of the infirmity of the state statutes, the City contends that the trial court's writs of prohibition and mandamus should be quashed because the City properly calculated the tax rate to be $0.85 per occupied room per day as of May 1, 2005.

[3] All subsequent statutory citations to Section 139.031 are to RSMo 2004, unless otherwise indicated.

In its final point on appeal, the City contends that the trial court erred in declaring City Ordinance 1719, which reduced the hotel license tax rate prescribed by Ordinance 1606 to $0.32 per occupied room per day, to be null and void by operation of Section 94.270.6, which limits the increase of any hotel license tax rate to no more than one-eighth of 1% of a hotel's gross revenue and an annual increase of no more than 5%. The City argues Section 94.270 is unconstitutional because it violates the uniformity requirement of Article VI, Section 15 of the Missouri Constitution by creating subclasses among the fourth-class cities having disparate taxing powers. Moreover, notwithstanding the alleged unconstitutionality of Section 94.270, the City avers that because the City Ordinance 1719 in fact reduced the hotel tax rate, the ordinance does not violate Section 94.270.6.

Standard of Review

Where, as here, the trial court is charged with applying statutory requirements, any such application is a question of law rather than fact. Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005). The constitutional validity of a statute is a question of law to be reviewed *de novo*. City of Arnold v. Tourkakis, 249 S.W.3d 202, 204 (Mo. banc 2008). Moreover, we note that the facts relevant to the City's claim that SLAH is restricted to the statutory remedy provided under Section 139.031 are uncontested. Accordingly, the appropriate standard of review is *de novo*. Ford Motor Co., 155 S.W.3d at 798.

Discussion

A. Section 139.031 does not restrict SLAH's right to pursue an equitable remedy.

The City first argues on appeal that SLAH was precluded from seeking declaratory relief from the trial court because SLAH had an adequate remedy at law under Section 139.031. The City contends that SLAH's relief was limited to paying the hotel tax under protest as required by

the statute, and then filing suit to obtain a refund of the tax payment. While acknowledging that Section 139.031 provides a remedy for taxpayers challenging the assessment of taxes by municipal governments, we reject the City's arguments that Section 139.031 is the exclusive remedy through which SLAH may challenge the City's hotel license tax rate.

When SLAH filed its lawsuit, the relevant portion of Section 139.031 provided as follows:

> 1. Any taxpayer may protest all or any part of any current taxes assessed against the taxpayer, except taxes collected by the director of revenue of Missouri. Any such taxpayer desiring to pay any current taxes under protest shall, at the time of paying such taxes, file with the collector a written statement setting forth the grounds on which the protest is based. The statement shall include the true value in money claimed by the taxpayer if disputed.

Section 139.031.1 (2004).[4]

The City argues that SLAH's sole legal remedy was to file its taxes under protest pursuant to Section 139.031.1 and then proceed with a non-jury trial on the merits. Because SLAH did not pay the tax under protest, the City contends SLAH is precluded from seeking any relief from the trial court. The City offers Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795 (Mo. App. E.D. 2005), as support for the proposition that Section 139.031.1 provides the exclusive remedy for taxpayers challenging tax assessments, and that SLAH's failure to "strictly comply" with the statute bars recovery of controverted taxes. Id. at 798.

In Ford Motor Co., this Court concluded that a tax payment and protest must be made concurrently to comply with Section 139.031 and potentially allow the taxpayer a refund of the taxes paid. Id. at 802. We fully agree with the ruling in Ford Motor Co., but find the holding inapposite given the factual distinction between Ford Motor Co. and this case. The only issue addressed by this Court in Ford Motor Co. was the timeliness of payment and protest letter, not

[4] Section 139.031 has been amended since the time this lawsuit was filed, but the amendment is irrelevant to this appeal.

the legality of the underlying tax. We first note that, unlike here, in Ford Motor Co. the taxpayer chose to pursue the statutory remedy provided by Section 139.031. The underlying question raised was whether Ford could avail itself to the remedy provided by Section 139.031 when in fact Ford did not file a written notice of protest at the time it paid the taxes, but sometime later. As noted by the Court in Ford Motor Co., because Ford did not file a written protest at the time it paid its taxes, the funds were not escrowed, separated or treated as unavailable in connection with the preparation of Hazelwood's budget. Id. at 796-97. Because Hazelwood was unaware that the tax payment was disputed, it did not hold any portion of the payment. Id. at 799. Given these facts, the Court correctly held that Ford's failure to comply with the requirements of Section 139.031 precluded the award of any tax refund and the award of injunctive relief.

Unlike the facts of Ford Motor Co., SLAH did not seek the relief provided to taxpayers under Section 139.031. While such statutory relief was available to SLAH, and was the only relief available to SLAH had it sought a refund of taxes paid, SLAH does not seek a refund of taxes, but merely a declaration that the taxes sought by the City conflicts with state law and that its liability for the hotel tax is limited to $13.50 per room. The City argues that because Section 139.031 provides an avenue of relief at law to taxpayers, SLAH is limited to that avenue and is precluded from seeking any form of equitable relief. We reject the City's argument.

In holding that SLAH may challenge the City's hotel license tax through an equitable action, we are guided by the Missouri Supreme Court's decision in John Calvin Manor, Inc. v. Aylward, 517 S.W.2d 59 (Mo. banc 1974), as well as the Western District's more recent decision in Ingels v. Noel, 804 S.W.2d 808 (Mo. App. W.D. 1991). In John Calvin Manor, a taxpayer sought to enjoin the assessor and collector of revenue from collecting real estate taxes that the taxpayer alleged were based upon an improper increase in the assessed valuation of the

taxpayer's property. The assessor and collector of revenue argued that the taxpayer did not seek the relief provided under Section 139.031, and therefore, could not seek injunctive relief because the taxpayer had an adequate remedy at law. 517 S.W.2d at 61. Noting the inadequacy of the statutory remedy when the taxpayer lacks an appropriate administrative procedure to address the assessment of taxes, the Supreme Court held that the protest scheme set forth in Section 139.031.1 was not the exclusive remedy available to a taxpayer contesting the legality of his tax assessment. Id. at 63. While the facts here vary somewhat from those in John Calvin Manor, we find the variance inconsequential to our analysis because SLAH similarly lacks an appropriate administrative procedure to address the assessment of the City's hotel tax, as did the property owner in John Calvin Manor.

In John Calvin Manor, the assessor did not give the taxpayer the required notice of the increased assessment, thereby depriving the taxpayer of his administrative remedies to challenge the assessment and corresponding real estate tax before the Board of Equalization. Id. at 64. The Supreme Court recognized that where the taxpayer lacked an administrative remedy to challenge the assessment, the taxpayer's only recourse would be to pay a very substantial sum in order to even question the legality of the assessment. Noting that a taxpayer was allowed to seek injunctive relief to challenge the assessment of taxes prior to the enactment of Section 139.031, the Supreme Court considered whether the enactment of Section 139.031 abrogated the remedy for injunctive relief and constituted a complete substitute therefore. Id. at 62. The Supreme Court declined to give Section 139.031 such a broad interpretation, and stated that "[i]t does not appear, however, that the legislature intended to abrogate those remedies existing prior to the enactment of sec. 139.031, nor to make the procedure set forth in sec. 139.031 the exclusive remedy available to a taxpayer." Id. at 63. Similar to the taxpayer in John Calvin Manor, SLAH

has no administrative forum available to it to challenge the legality of the hotel tax assessed by the City. If limited to the statutory remedy provided under Section 139.031, SLAH would have to pay a very substantial sum in order to even question the legality of the assessment, a scenario expressly rejected as inadequate by our Supreme Court in John Calvin Manor.

Applying the holding in John Calvin Manor, our brethren in the Western District held that taxpayers are not limited to the procedures of Section 139.031 in seeking judicial relief, but that equitable relief also is available to taxpayers in certain cases. Ingels v. Noel, 804 S.W.2d 808, 809-10 (Mo. App. W.D. 1991). In Ingels, a taxpayer sought an injunction to prevent the county collector from collecting real estate taxes, which were increased without prior statutory notice to the taxpayer. Id. at 809. Strikingly similar to the facts presented by the record in this case, the taxpayer in Ingels paid the taxes based on the prior year's assessment and taxes, but the county collector rejected the payment as deficient. Id. Citing John Calvin Manor, the Western District expressly held that taxpayers are not limited to the procedures of Section 139.031 and stated that two avenues of relief were available to the taxpayers, the statutory relief provided by Section 139.031 or an equitable cause of action. Id. at 809-10. Finding that the collector of revenue rejected the taxpayer's payment, the Ingels court held that injunctive relief was an appropriate remedy. Id. at 810. We find the analysis and holding in Ingels instructive here.

We firmly reject the City's argument that the Western District's decision in General Motors Corp. v. City of Kansas City, 985 S.W.2d 59 (Mo. App. W.D. 1995), somehow dilutes or lessens the guidance offered by John Calvin Manor and Ingels. To the contrary, the relief sought by the taxpayer in General Motors renders the decision in that case inapposite to the issues raised herein.

We acknowledge that in General Motors, the court noted the "exception to the rule that statutory remedies are exclusive" applied only in cases involving a taxpayer's contest of the legality of an increased assessed valuation of property where the taxpayer had been deprived of administrative remedies by the assessor's failure to give the required statutory notice. Id. at 63. However, the ruling in General Motors was that GM was not eligible for the tax refund it sought in its petition because GM had not complied with the statutory requirements of Section 139.031. Id. We agree that the holding in General Motors offers guidance had SLAH filed a petition seeking a refund of the hotel taxes paid. However, that remedy was held to be inadequate in John Calvin Manor and cannot be imposed on SLAH. Because SLAH does not seek a refund under the provisions of Section 139.031, we conclude the analysis and decision in Ingels, not General Motors, is instructive.

As in Ingels, SLAH's petition does not seek a tax refund. Instead, as in Ingels, the Collector rejected SLAH's hotel license tax payment. Because the City has not been paid, Section 139.031 is not at issue, and injunctive relief is appropriate. See Ingels, 804 S.W.2d at 810. Although the facts in this case do not involve property assessment, SLAH, similar to the taxpayers in John Calvin Manor and Ingels, has no administrative remedy to address its challenge to the assessment of the hotel tax. Moreover, we reject the City's argument that SLAH should be denied equitable relief because it has unclean hands. The record does not support this claim. SLAH attempted to pay the undisputed portion of the tax, but the City rejected the payment. The City was put on notice that SLAH was protesting the City's assessment of the hotel tax almost immediately when SLAH filed suit.

The City's posture would allow certain taxpayers deprived of an administrative remedy to challenge a tax by means of an equitable remedy, while denying that same relief to other

categories of taxpayers who are similarly denied an administrative remedy. We find no legal basis for any such distinction. SLAH faces the same dilemma as did the property taxpayers in John Calvin Minor and Ingels in that SLAH has no administrative forum available to challenge the amount of tax assessed. Unless equitable relief is available to SLAH, its challenge to the City's taxing scheme is limited to first paying substantial taxes, and then seeking a refund. As clearly stated by the Supreme Court in John Calvin Manor, such remedy is clearly inadequate. As in John Calvin Manor and Ingels, we hold that SLAH does not have an adequate remedy at law under Section 139.031 and is entitled to seek redress through equitable remedies.

The City's first point is denied.

B. The City has not sustained its burden that Sections 94.270.3 and 94.270.6 are unconstitutional.

In its second and third points, the City argues that its local law, Ordinance 1606, which set the hotel tax rate at $0.85 per occupied room per day, and Ordinance 1719, which later reduced the hotel business license tax to $0.32, prevail over Sections 94.270.3 and 94.270.6, because these statutes violate Article III, Section 40 and Article VI, Section 15 of the Missouri Constitution, respectively. As a preliminary matter, the Missouri Supreme Court has exclusive jurisdiction in cases involving the validity of a statute. Mo. Const. art V, §3. However, a party's mere assertion of unconstitutionality does not deprive this Court of jurisdiction. Ahern v. P & H, LLC, 254 S.W.3d 129, 134 (Mo. App. E.D. 2008). When a party's claim is not real and substantial but merely colorable, our review is proper. Id. As discussed below, we find the City's constitutional challenge raises no real or substantial issues and is without merit. Therefore, our jurisdiction lies. Id. Our review is *de novo*. Hodges v. City of St. Louis, 217 S.W.3d 278, 279 (Mo. banc 2007).

1. Sections 94.270.3 and 94.270.6 are not "special laws"

The City argues that Sections 94.270.3 and 94.270.6 are special legislation prohibited by Article III, Section 40 of the Missouri Constitution because the statutes apply only to the City of Woodson Terrace and interfere with the City's taxing powers. Article III, Section 40(21) prohibits the general assembly from passing any local or special law "creating offices, prescribing the powers and duties of officers in, or regulating the affairs of counties, cities, townships, election or school districts." Further, Article III, Section 40(30) prohibits the legislature from passing any local or special laws "where a general law can be made applicable." The City argues that Sections 94.270.3 and 94.270.6 are facially special laws subject to a presumption of unconstitutionality that has not been overcome. Additionally, the City argues that notwithstanding the presumption, the statute is an unconstitutional special law because there is no rational basis for the population range set forth in Section 94.270.3.

As support for its argument that Section 94.270.3 is facially a special law and presumed unconstitutional, the City relies on Jefferson County Fire Protection Districts Association v. Blunt, Nixon, et al., 205 S.W.3d 866, 870 (Mo. banc 2006). In Jefferson County, the Missouri Supreme Court reviewed Section 321.222, which removed the power of fire districts to adopt fire protection codes related to home construction in counties having a population between 198,000 and 199,120. Id. at 867. The Supreme Court reviewed this statute to determine if it was a facially special law presumed to be unconstitutional or not a facially special law entitled to a presumption of constitutionality. "A law is facially special if it is based on close-ended characteristics, such as historical facts, geography, or constitutional status," but "a law based on open-ended characteristics is not facially special and is presumed to be constitutional." Id. at 870. Population classifications generally are deemed open-ended, thus having a presumption of

constitutionality that must be overcome by the party challenging the constitutionality of the statutes. Id. But, in Jefferson County, the Supreme Court held "that the rationale for holding that population classifications are open-ended fails, however, where the classification is so narrow that as a practical matter others could not fall into the classification." Id. The Supreme Court then developed a multi-faceted test to assist the courts in determining whether a population classification will maintain its presumption of constitutionality. In applying this test to its analysis of Section 321.222, the Court held that the statute:

> targeted only Jefferson County when other counties of similar size were excluded. The section's population range was so narrow that the only apparent reason for it was to target Jefferson County and exclude all other counties. Section 321.222's narrow population range is presumably unconstitutional, and the state did not meet its burden in showing substantial justification for it. Thus, section 321.222 is a special law. A broader population range would have been a more natural and reasonable classification. As the General Assembly passed a special law where a general law could be made applicable, section 321.222 violates article III, section 40(30) of the Missouri Constitution.

Id. at 872.

Critical to our analysis of this case, the Supreme Court limited the application of the multi-faceted test announced by it in Jefferson County and expressly stated that "[b]ecause of the General Assembly's possible reliance on previous cases not articulating this presumption, only statutes passed after the date of this opinion are subject to this analysis." Id. at 871. Section 94.270 was passed prior to the Supreme Court opinion in Jefferson County, and falls within the limitation imposed by the Supreme Court. As such, we are guided in our analysis by the state of the law prior to Jefferson County, and presume the population classification set forth in Section 94.270 to be constitutional, thereby placing the burden on the City to prove that the statutory classification is arbitrary and without a rational relationship to a legislative purpose. Id. at 870.

The City posits that the limitation imposed by the Supreme Court in its Jefferson County decision does not apply to this case because Section 94.270 was enacted by the same bill that enacted the language in Section 321.222. We are not persuaded by this argument as we find no language in Jefferson County that narrows the limitation imposed as suggested by the City. The clear language and dictate of the Missouri Supreme Court is that the test announced in Jefferson County does not apply to statutes enacted prior to the date of the opinion. Because both Sections 94.270.3 and 94.270.6 were passed prior to the date of the Supreme Court's opinion in Jefferson County, we will not apply the Jefferson County test to determine if these statutes are special laws.

The City argues that even prior to the Jefferson County decision, the Supreme Court recognized that statutory provisions based upon population classifications could be found to be an unconstitutional special law, and that Section 94.270.6 effectively causes Section 94.270.3 to be an unconstitutional special law. The City contends that Section 94.270.6 forever limits Woodson Terrace to the tax rate in effect as of May 1, 2005, until a statutory amendment is passed, because Section 94.270.6 prohibits a fourth-class city from ever having a hotel/motel tax rate greater than one-eighth of 1% of such hotels' gross revenue, or the business license tax rate for such hotel on May 1, 2005. Thus, the City states that it will always be the only city bound to the upper limit on its hotel tax rate of $13.50 per room per year for those hotels where $13.50 per room per year exceeds 0.00125% of their gross revenue.

The City cites State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918 (Mo. banc 1993), for the proposition that statutory provisions based upon population classifications may be found an unconstitutional special law. While we agree with the holding in Blue Springs, this case provides no support for the City's argument because the legislation at issue in Blue Springs

created a classification that was based upon permanent population numbers tied to the 1980 census. Because it was impossible for other cities to fall within the classification with future population shifts, the classification within the legislation was deemed to be not "open-ended." Id. at 919-21. To the contrary, the population classification in Section 94.270.3 is clearly open-ended, mandating a presumption of constitutionality.

As SLAH notes, prior to its decision in Jefferson County, the Supreme Court held that a statute containing an open-ended population classification was presumed to be a general law, and therefore constitutional. See Treadway v. State, 988 S.W.2d 508, 510-11 (Mo. banc 1999). In Treadway, the Court stated:

> The issue of whether a statute is, on its face, a special law or local law depends on [] whether the classification is open-ended. Classifications based upon factors, such as population, that are subject to change may be considered open-ended. Classifications based on historical facts, geography, or constitutional status on a particular date focus on immutable characteristics and are, therefore, considered local or special laws.

Id. (internal citations omitted).

The population classification at issue in Sections 94.270.3 and 94.270.6 are not tied to a specific census and are therefore subject to change as another city's growth or decline may bring it into a new classification. Because the cities affected by these statutes may change with future population shifts, we hold Sections 94.270.3 and 94.270.6 to be open-ended, and accordingly, presumed to be general laws. Without evidence to the contrary, we must presume Sections 94.270.3 and 94.270.6 constitutional. See id.

The City further argues that even if Section 94.270.3 is presumed constitutional as a general law, it has overcome this presumption and proven Section 94.270.3 to be an unconstitutional special law because the narrow population range of the statute causes it to fail the rational basis test. The Missouri Supreme Court noted in School District of Riverview

Gardens, et al., v. St. Louis County, 816 S.W.2d 219, 222 (Mo. banc 1991), that "[o]nly where the statutory classification is arbitrary and without a rational relationship to a legislative purpose has this Court found a law founded on open-ended criteria unconstitutional." However, the legislature is afforded broad discretion in attacking societal problems, and the challenger bears the burden to show that the law is wholly irrational. Treadway, 988 S.W.2d at 511. The City suggests that it has met its burden of proof that the population classification bears no rational relationship to the statute's legislative purpose by demonstrating the absence of evidence supporting a rational basis. The City's position conflicts with the clear mandate expressed in Treadway and ignores the presumption of constitutionality accorded to these statutes. The City has the burden to show that the statutes are wholly irrational. We hold that the City has not met this burden simply by pointing to a lack of evidence which is not required given the presumption of constitutionality.

Because the City has not overcome the presumption of constitutionality, we hold that the City has not proven Sections 94.270.3 and 94.270.6 to be special laws.

2. Sections 94.270.3 and 94.270.6 do not create unconstitutional subclasses

Next, the City argues that Section 94.270 violates Article VI, Section 15 of the Missouri Constitution by creating subclasses of fourth-class cities and disparate powers of taxation among the fourth-class cities. Because the City has preserved this argument with respect to only subsections 3 and 6 of this section, we will review the City's argument here regarding only Sections 94.270.3 and 94.270.6. Article VI, Section 15 of Missouri's Constitution provides:

> The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any

> special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporation.

The City argues that Sections 94.270.3 and 94.270.6 violate this portion of the Missouri Constitution because different fourth-class cities will have different tax rates under the statute. The City cites one Missouri case, Riden v. City of Rolla, 348 S.W.2d 946 (Mo. 1961), in support of its claim. In Riden, the Court held that a discrepancy between powers of the third- and fourth-class cities in a statute levying license taxes on barber shops did not violate Article VI, Section 15 of the Missouri Constitution because the constitution only required that cities of the same class shall possess the same powers and be subject to the same restrictions. Id. at 951. The City argues here that, following the Supreme Court's opinion in Riden, Sections 94.270.3 and 94.270.6 have created different restrictions upon taxing powers of fourth-class cities, in contravention of the constitution's uniformity requirement.

However, Riden fails to support the City's argument because it considered the issue of whether Article VI, Section 15 was violated by permitting third-class cities to tax occupations that fourth-class cities were not permitted to tax. We find Riden inapposite here in that the issue it addressed was discrimination between two classes of cities, not among cities of the same class.

SLAH posits that the Missouri Constitution does not prohibit the legislature from passing laws that are applicable to fewer than all cities within the same classification. The Constitution does not state that a law applicable to any fourth-class city must apply to all cities in the class to which such city belongs. City of Ellisville v. St. Louis County Bd. of Election Comm'rs, 877 S.W.2d 620, 622-23 (Mo. banc 1994). In City of Ellisville, the Supreme Court distinguished between legislative authority regarding cities and counties, stating:

> The constitution limits the number of classes of cities to four, Mo. Const. art. VI, § 15, but does not say that a law applicable to any city shall apply to all cities in the class to which such city belongs. Article VI, section 8, clearly places such a

> limit on the legislature when it adopts laws relating to counties. Thus Leoffler [v. Kansas City, 485 S.W.2d 633, 634 (Mo. App. 1972)] implicitly relies on the absence of constitutional limiting language regarding cities to reach its decision. We do not believe the reasoning of Leoffler, which discusses constitutional charter cities, has any bearing on the interpretation of laws relating to counties where the constitution contains the explicit limitations on which the case turns.

877 S.W.2d at 622-23.[5]

Based on the Supreme Court's holding in the City of Ellisville, we agree with SLAH that the Missouri Constitution does not require that a law applicable to a particular city must also be applicable to all other cities of the same classification. Further, Section 94.270.6 is applicable to all fourth-class cities. Under Section 94.270.6, every fourth-class city in the state of Missouri is authorized to charge a rate of up to one-eighth of 1% of a hotel's gross revenue, or the rate it was charging on May 1, 2005, whichever is greater. If the city's rate was less than one-eighth of 1%, it is allowed to increase that license tax rate by up to 5% per year until it reaches that rate. Finding that Section 94.270.3 is open-ended and may contain other cities depending on changes in population, and further finding that Section 94.270.6 is applicable to all fourth-class cities, we hold that these laws do not violate Article VI, Section 15 of the Missouri Constitution.

In denying the City's second point on appeal, we hold that Section 94.270.3 and Section 94.270.6 do not violate the Missouri Constitution because the legislature may pass laws applicable to fewer than all cities in the same classification, and these statutes do not create unconstitutional subclasses.

Similarly, the City's third point on appeal argues that the trial court erred in finding the City's Ordinance 1719 was null and void by operation of Section 94.270.6 because the state statute is unconstitutional for the same reasons expressed in the City's second point.

---

[5] City of Ellisville was superseded by constitutional amendment, but the Supreme Court's analysis regarding the legislature's ability to distinguish between cities within the same classification remained unaffected. See Berry v. State, 908 S.W.2d 682 (Mo. banc 1995).

Additionally, the City argues that Ordinance 1719 reduced the hotel/motel business license tax prescribed by Ordinance 1606, and therefore, did not violate Section 94.270.6's purported limitation on the increase to the tax rate. We disagree. After finding above that Section 94.270.6 is constitutional, we find accordingly that even the "reduced" tax rate under Ordinance 1719 violates Section 94.270.6 because the total tax levied cannot exceed the greater of either one-eighth of 1% of the hotels' gross revenue or the business license tax rate for such hotel on May 1, 2005. The rate under Ordinance 1719 still exceeds the $13.50 rate assessed on May 1, 2005. Thus, the City's third point is denied.

Accordingly, the City's appeal fails. The trial court did not err finding that the license tax rate for hotels and motels in effect on May 1, 2005, the last year it collected a hotel license tax prior to the passage of Section 94.270.6, was $13.50 per unit per year. Further, the trial court did not err in ruling that, because the hotel/motel license tax rate charged by the City in fiscal year 2005 was $13.50 per room per year, the City's authority was limited to charging the same amount under Section 94.270.6.

Finding no error of law by the trial court, the City's second and third points on appeal are denied.

Conclusion

The judgment of the trial court is affirmed.

_____

Kurt S. Odenwald, Presiding Judge

Robert G. Dowd, Jr., J., Concurs
Lucy D. Rauch, Sp. J., Concurs