IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL., SLAH, L.L.C.	)	
Respondent/Plaintiff,	)	Appeal No. SC91802
v.	)	
CITY OF WOODSON TERRACE, MISSOURI, A Municipal Corporation, et al.	)	
Appellants/Defendants.	)	

Substitute Brief of Appellants

Appeal from the Circuit Court of St. Louis County
The Honorable Larry L. Kendrick, Circuit Judge

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JURISDICTIONAL STATEMENT

This case examines whether an award of declaratory relief is appropriate in circumstances where the petitioner has not complied with the procedure set forth in Section 139.031 RSMo for protesting an allegedly invalid tax. Further, this action involves a dispute as to whether Sections 94.270.3 and 94.270.6, RSMo are special laws as applied to Appellant City of Woodson Terrace, as prohibited under Article III, §40 of the Missouri Constitution. Finally, this case examines whether Section 94.270 RSMo violates the uniformity requirement of Article VI, §15 of the Missouri Constitution.

After the Eastern District of the Missouri Court of Appeals entered an Opinion on April 13, 2011, affirming the trial court's judgment, this Court sustained Appellants' Application for Transfer on August 30, 2011.

This Court has jurisdiction to hear appeals on transfer from the Missouri Court of Appeals pursuant to Article V, §10 of the Missouri Constitution.

STATEMENT OF FACTS

This case involves the validity of the hotel/motel license tax rate enacted by the Appellant City of Woodson Terrace, Missouri ("Woodson Terrace"). Woodson Terrace is a fourth class City located within St. Louis County, Missouri. (Legal File (L.F.), p. 163). Respondent, SLAH LLC ("SLAH") is a Missouri limited liability company which owns the St. Louis Airport Hilton Hotel, located within the corporate limits of Woodson Terrace, Missouri. (L.F. p. 162). Lodging Hospitality Management ("LHM") is the company which manages the St. Louis Airport Hilton Hotel. (Trial Transcript (Tr.) Vol. I, p. 35). The two principals of LHM, one of whom is Steve O'Loughlin, are also investors in SLAH. (Tr. Vol. I, p. 35). On January 22, 2004, the Board of Aldermen for Woodson Terrace enacted Ordinance No. 1606 which provided that, subject to voter approval, the business license tax for hotels and motels would be set at a rate of "Eighty-five cents (85¢) per day per room occupied for a fee by Transient guests." (L.F. pps 163-164). On April 14, 2004, the registered voters of Woodson Terrace approved the tax rate authorized by Ordinance No. 1606. (L.F. p. 164). That tax rate became applicable to business licenses during the City's July 1, 2004 to June 30, 2005 fiscal year. (Tr. Vol. I., p. 145). At the time Woodson Terrace adopted the tax rate set forth by Ordinance No. 1606, the City of Bridgeton, Missouri, also in St. Louis County, had already in effect a hotel/motel license tax rate of $0.85 per occupied room per day. (Defendant's Exhibit F, Appendix p. A34).

After Woodson Terrace adopted Ordinance 1606 SLAH, acting through lobbyist Jorgen Schlemeier, lobbied the Missouri legislature to enact a law that directly addressed

Woodson Terrace's adoption of the 85 cent hotel guest tax. (Tr. Vol. I, pps. 94-97). SLAH lobbied several members of the Missouri General Assembly including Catherine Hanaway, Tom Dempsey, Rod Jetton and John Lowden. (Tr. Vol. I, p. 95).

During the 2004 Legislative Session the language now codified in Section 94.270.3 RSMo was enacted through Senate Bill 758. (L.F. p. 164). Section 94.270.3 RSMo reads:

> 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[1] 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 limitations of this subsection shall be automatically reduced to comply with this subsection.

(L.F. p. 164).

The Bill Summary of Senate Bill 758, which enacted Section 94.270.3 RSMo stated in part:

> "The act prohibits the City of Edmundson from levying and collecting a license tax on hotels and motels in an amount in excess [of] $27 per room

[1] This applies only to St. Louis County.

per year and the City of Woodson Terrace an amount in excess of $13.50 per room per year."

(Defendant's Exhibit C, Appendix p. A26).

Woodson Terrace as of the 2000 census[2] had 4189 residents. (L.F. p. 164). Woodson Terrace is the only City that falls within the population range prescribed by Section 94.270.3 RSMo (Tr., Vol. I, pps. 123-124). The St. Louis County city of Pine Lawn, also a fourth class city, had a population of 4,204 as of the 2000 Census. (Tr. Vol. I, p. 124). The population of Pine Lawn was only 15 more than Woodson Terrace, and only 5 more than the upper limit of the population range of Section 94.270.3 RSMo. The City of Fenton, also a fourth class city in St. Louis County, had a population of 4,360 as of the 2000 census. (Defendant's Exhibit A, Appendix p. A21).

During the 2005 Legislative Session the Governor signed into law Senate Bill 210, which included the language codified in Section 94.270.6 RSMo which provides:

"Any city under subsections 1, 2, and 3[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."

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[2] The 2010 census numbers were recently released, although they are not part of the record on appeal.

[3] The provision applicable to Woodson Terrace

(L.F. p. 165).

On June 8, 2007,[4] the Collector for Woodson Terrace, Margaret Getz, sent correspondence to SLAH requesting that SLAH pay the business license fee at a rate of $0.85 "times the total number transient guest rooms occupied each day" pursuant to Woodson Terrace Ordinance 1606. (L.F. pps. 63-65). SLAH submitted a check for $5,332.50 for the business license fee, calculated at a rate of $13.50 per room per year. (L.F. p. 15). As this payment was not made in compliance with the tax rate set by Ordinance 1606, the City returned the check and requested that SLAH pay the license tax

[4] Ms. Getz incorrectly sent SLAH the business license tax application forms for the 2004 and 2005 fiscal years, based on gross revenue and not at the rate set by Ordinance 1606. (L.F. p. 165) As such, Woodson Terrace has never sought payment for the 2004 and 2005 fiscal years at the rate set by Ordinance 1606. Further, Ms. Getz sent a business license tax application to SLAH for the years 2006 and initially in 2007 (application sent on May 17, 2007) at the rate of $13.50 per room per year. (L.F. p. 165). Woodson Terrace has never sought payment for the 2006 fiscal year at the business license tax rate set by Ordinance 1606. For the 2007 fiscal year, Ms. Getz identified her error and sent a letter on June 8, 2007, stating the correct business license tax set by Ordinance 1606, and as such Woodson Terrace sought payment for the 2007 fiscal year at the rate of $0.85 per occupied room per day. (L.F. pps. 63-65).

at the rate of $0.85 per occupied room per day. (L.F. p. 15). SLAH failed to make a payment under protest, a fact stipulated to by the parties. (Tr. Vol. I, p. 121).[5]

On August 1, 2007, SLAH filed its Petition for Declaratory Judgment, Injunction, Mandamus and/or Prohibition against Woodson Terrace, and the City Collector, Margaret Getz. (L.F. p. 8). SLAH sought a judgment declaring that the maximum hotel/motel license tax that Woodson Terrace could levy is $13.50 per room per year, "or otherwise declaring the parties rights and obligations under subsections 94.270.3 and 94.270.6 R.S.Mo. and the relevant Woodson Terrace ordinances." (L.F. p. 16). SLAH also sought writs in mandamus and prohibition requesting that the court respectively: (1) compel Woodson Terrace to issue a business license to SLAH for the fiscal year beginning July 1, 2007; and (2) prohibit Woodson Terrace from levying a hotel/motel license tax in excess of $13.50 per room per year, for the same fiscal year. (L.F. pps. 17-19).

On December 20, 2007, Woodson Terrace enacted Ordinance 1719, which served to reduce the hotel/motel business license tax rate to $0.32 per occupied room per day. (L.F. p. 167).

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[5] "MR. BOHM: Your Honor, we'll -- we will stipulate that no payment was made under protest.

MR. O'KEEFE: Okay.

THE COURT: All right. Thank you. Proceed." (Tr. Vol. I, p. 121, lines 3-6).

On December 30, 2009, the Honorable Larry L. Kendrick entered his Findings of Fact Conclusions of Law, and Order and Judgment. (L.F. p. 162). The trial court ordered:

"It is therefore ordered, adjudged and decreed as follows:

1. This Court declares that:

a. the hotel/motel license tax rate imposed by Woodson Terrace Ordinance number 1606 of $.85 per occupied room per day was reduced to $13.50 per room per year by operation of §94.270.3 R.S.Mo.;

b. the hotel/motel license tax rate imposed by Woodson Terrace on May 1, 2005 was $13.50 per room per year;

c. pursuant to §94.270.6 R.S.Mo., and unless such statute is amended or repealed, Woodson Terrace may increase its hotel/motel license tax rate to no more than one-eighth of one percent of a hotel's gross revenue, and may only increase such rate by no more than 5% per year;

d. the hotel/motel license tax rate of $.32 per occupied room per day set forth in Woodson Terrace Ordinance number 1719 exceeds the rate which fourth-class cities are permitted to charge under §94.270.6, and is therefore declared null and void, and of no effect.

2. This Court hereby issues its writ of prohibition prohibiting Woodson Terrace 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. Woodson Terrace 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 Woodson Terrace previously rejected SLAH's proffered payment of license taxes calculated at $13.50 per room per year."

(L.F. p. 178-179).

On January 28, 2010, Woodson Terrace timely filed its Motion for a New Trial or Alternatively to Amend the Court's Order and Judgment. (L.F. p. 181). The Motion was filed on the grounds that the trial court had erred by: (1) granting equitable relief despite SLAH's failure to pay under protest and that SLAH had adequate remedies at law; (2) not finding Sections 94.270.3 and 94.270.6 RSMo unconstitutional as prohibited special laws; and (3) not holding Article VI, Section 15 of the Missouri Constitution applicable to the instant litigation in that Section 94.270 RSMo impermissibly creates subdivisions of fourth class cities. (L.F. p. 181-184).

On March 29, 2010, Woodson Terrace's post trial motion was denied. (L.F. p. 186). On April 8, 2010, Woodson Terrace timely filed its notice of Appeal to the Supreme Court of Missouri. (L.F. p. 188). Woodson Terrace sought direct appeal to the Missouri Supreme Court as the appeal involves the constitutionality of Section 94.270 and more particularly Sections 94.270.3 and 94.270.6 RSMo. (L.F. p. 190). However, this Court ordered the appeal transferred to the Eastern District of the Missouri Court of

Appeals. (Appendix, p. A20). On April 13, the Eastern District of the Missouri Court of Appeals entered its Opinion affirming the trial court's judgment. On August 30, 2011, this Court sustained Woodson Terrace's Application for Transfer.

POINTS RELIED ON

I. The trial court erred in finding in favor of SLAH and against Woodson Terrace as to the proper hotel/motel tax rate on its claim for declaratory judgment, because SLAH's claim for declaratory relief should have been precluded, in that: (A) SLAH had an adequate remedy at law, pursuant to Section 139.031 RSMo which sets forth the procedure for payment of a tax under protest; (B) SLAH failed to pay under protest as mandated by Section 139.031 RSMo; and (C) The trial court lacked subject-matter jurisdiction to award declaratory relief.

Section 139.031 RSMo

B&D Investment Company, Inc. v. Schneider, 646 S.W.2d 759 (Mo. banc 1983)

Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795 (Mo. App. E.D. 2005).

Lane v. Lensmeyer, 158 S.W.3d 218 222 (Mo. Banc. 2005)

Metts v. City of Pine Lawn, 84 S.W.3d 106 (Mo. App. E.D. 2002)

II. **The trial court erred in finding that the applicable hotel/motel tax rate in effect as of May 1, 2005, was $13.50 per room per year by operation of Section 94.270.3 RSMo, because Section 94.270.3 RSMo is unconstitutional and Woodson Terrace Ordinance 1606 set the hotel/motel tax rate at $0.85 per occupied room per day and was in effect as of May 1, 2005, in that: (A) Ordinance 1606 was duly passed and adopted by the registered voters of Woodson Terrace and was in effect as of May 1, 2005; (B) Section 94.270.3 RSMo violates Article III, Section 40 of the Missouri Constitution in that it is a "Special Law" that relates only to Woodson Terrace; (C) Section 94.270 RSMo violates the uniformity requirement of Article VI, Section 15 of the Missouri Constitution in that it creates subclasses among the fourth class cities; and (D) the trial court's writs of prohibition and mandamus should be quashed as the applicable tax rate as of May 1, 2005, was $0.85 per occupied room per day.**

Section 94.270 RSMo.

Article III, Section 40 of the Missouri Constitution

Article VI, Section 15 of the Missouri Constitution

Jefferson County Fire Protection Districts Association v. Blunt, 205 S.W.3d 866, (Mo. Banc 2006).

III. The trial court erred in finding that Woodson Terrace Ordinance 1719, which reduced the hotel/motel business license tax prescribed by Ordinance 1606 to $0.32 per occupied room per day, was null and void by operation of Section 94.270.6 RSMo which purports to limit any hotel/motel license tax rate increase to no more than one-eighth of one percent of a hotel's gross revenue and limits the annual increase in such tax rate to no more than 5%, because Section 94.270 RSMo is unconstitutional, in that (A) Section 94.270 RSMo violates the uniformity requirement of Article VI, Section 15 of the Missouri Constitution in that it creates subclasses among the fourth class cities having disparate taxing powers; and (B) notwithstanding the unconstitutionality of Section 94.270 RSMo Woodson Terrace Ordinance 1719 in fact reduced the hotel/motel tax rate and therefore did not violate Section 94.270.6 RSMo's purported limitation on the increase to the tax rate.

Section 94.270 RSMo

Article VI, Section 15 of the Missouri Constitution

Riden v. City of Rolla, 348 S.W.2d 946 (Mo. 1961)

ARGUMENT

I. The trial court erred in finding in favor of SLAH and against Woodson Terrace as to the proper hotel/motel tax rate on its claim for declaratory judgment, because SLAH's claim for declaratory relief should have been precluded, in that: (A) SLAH had an adequate remedy at law, pursuant to Section 139.031 RSMo which sets forth the procedure for payment of a tax under protest; (B) SLAH failed to pay under protest as mandated by Section 139.031 RSMo; and (C) The trial court lacked subject-matter jurisdiction to award declaratory relief.

The order and judgment of the trial court should be reversed as SLAH failed to follow the required procedure for challenging an allegedly invalid tax by paying under protest and, therefore, should have been precluded from obtaining the equitable relief sought.

A. Standard of Review

Where the facts relevant to a plaintiff's compliance with Section 139.031 RSMo are not in dispute, as in the instant appeal, the appropriate standard of review is *de novo.* Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005). Further, where the review implicates the trial court's subject-matter jurisdiction, the appropriate standard of review is *de novo*. Id.

B. SLAH had an adequate remedy at law

SLAH sought and was awarded equitable remedies in the form of declaratory and injunctive relief. It is well settled that "if there is an adequate remedy at law, injunction

[an equitable remedy] will not lie." State ex rel. Phillips v. Yeaman, 451 S.W.2d 115, 118 (Mo. banc 1970). "[T]he two streams of jurisdiction [law and equity], though they run in the same channel; run side by side, and do not mingle their waters." Jill E. Martin, Hanbury & Martin Modern Equity, p. 21, Thomson, Sweet & Maxwell, (17th Ed.) pub. 2005, orig pub. 1935 (internal quotations omitted).[6] "Thus, legal rights remain legal rights, and equitable rights remain equitable rights, though administered in the same court." Id.

In B&D Investment Company, Inc. v. Schneider, 646 S.W.2d 759 (Mo. banc 1983), this Court considered the purpose of having statutory provisions such as Section 139.031 RSMo, reasoning that:

> "The essential purposes of such statutes [as Section 139.031 RSMo] are to furnish an **adequate** and **sufficient remedy** to the taxpayer, and at the same time to provide an expeditious method by which the various branches of government affected can obtain the revenue necessary for their maintenance without protracted delay or the hazards incident to the former procedure, since it is in effect a procedure to review the decisions of taxing authorities."

B&D Investment at 792 (Emphasis added).

Consequently, this Court has already considered that the very purpose of Section 139.031 RSMo is to afford an adequate remedy. Section 139.031 RSMo not only affords

[6] Quoting Walter Ashburner's, Principles of Equity (2nd Ed), p.18

an adequate remedy, it arguable provides SLAH with a superior remedy than in equity as Section 139.031.4 RSMo allows the taxpayer to receive interest on any taxes that are refunded due to a successful tax protest.

SLAH alleged at the Court of Appeals, and will presumably again allege, that to pay the tax under protest would have caused it irreparable harm. SLAH estimated that the hotel/motel business license tax sought by Woodson Terrace would be approximately $110,000.00. (Tr. Vol. I pps. 60-61). However, Woodson Terrace Ordinance 1606 requires that the hotel/motel business license tax be paid in four quarterly payments, not one yearly lump sum as Respondent suggest. (Respondent's Exhibit 1). Therefore, in order to have complied with Section 139.031 RSMo, SLAH would only have been required to pay one quarter of the annual tax, not the full $110,000.00, at the time it wished to file the protest. For the fiscal year ending June 30, 2004, SLAH had gross receipts of over $10,500,000. (Respondent's Exhibit 8). Paying approximately $27,500.00 in conjunction with a tax protest would have provided SLAH with a "sufficient" and "adequate" legal remedy.

It is undeniable that the payment under protest procedure could be abused in the face of a truly egregious tax, however, this instant case is not such an instance. Further, the prohibition against confiscatory taxation will prevent such abuses when they do arise, as "[a] license fee for revenue purposes must be reasonable." Combined Communications Corp. v. City of Bridgeton, 939 S.W.2d 460, 464 (Mo. App. E.D. 1996).

"A business license tax is invalid on the basis of amount when the amount is confiscatory of a legitimate business." Id. In Combined Communications Corp, the court

determined that a license fee levied against a billboard owner of $5,000.00, with expected gross revenues of $40,000.00 to $50,000.00 did not amount to a confiscatory tax. SLAH would be faced with a business license tax rate of 1% of gross receipts, which is considerably less than the 10 to 12.5% business license tax found to be reasonable by the Court in Combined Communications Corp. Further, the evidence adduced at trial indicated that both Motel 6 and Quality Inn were paying the license tax rate of $0.85 per occupied room per night, which indicates that other taxpayers do not believe it to be confiscatory. (Tr. Vol. I, p. 170). Additionally, Bridgeton has adopted the same tax rate of $0.85 per occupied room per night, again indicating that Woodson Terrace's rate is not unreasonable. (Defendant's Exhibit F, Appendix, p. A34).

If Respondent had wished to claim that the hotel/motel business license tax is confiscatory it could have brought an equitable action to enforce its due process rights pursuant to Article I, Section 10 of the Missouri Constitution and the 5th and 14th Amendments to the U.S. Constitution. It did not do so. The holding in John Calvin Manor, Inc. v. Aylward, 517 S.W.2d 59 (Mo. 1974), discussed in great depth *infra* demonstrates that the provisions of Section 139.031 RSMo will not be enforced in those circumstances where due process rights have been violated. John Calvin Manor at 63. Respondent has never alleged that its due process rights have been violated, and in fact has vehemently opposed the notion that this case raises any "colorable" constitutional issues, as demonstrated by its opposition to this Court having original jurisdiction over this appeal.

In Lane v. Lensmeyer, 158 S.W.3d 218, 222 (Mo. banc 2005), which also involved a controversy over a purportedly invalid tax rate, this Court concluded that recovery under declaratory judgment was barred due to the existence of an adequate legal remedy, namely Section 139.031 RSMo:

> "Taxpayers failed to meet the requirements for declaratory judgment in that they had an adequate remedy at law for addressing the issue of excessive taxes paid because they could request a refund of the taxes they believed were collected in violation of section 67.110.2."

Lane at 222.

1. Section 139.031 RSMo provided SLAH with its exclusive remedy

Section 139.031.1 RSMo (2004)[7] provides that "**[a]ny taxpayer** may protest all or part of **any current taxes** assessed against the taxpayer…**Any such taxpayer** desiring to

[7] This was the version of Section 139.031 RSMo in effect when SLAH filed suit. It was subsequently amended in 2008, however no changes were made to Subsection 1. The language of Subsection 1 has been subsequently amended as of August 28, 2010 by House Bill 1316, 2010, which has amended the quoted section to read: "[a]ny taxpayer may protest all or any part of any current taxes assessed against the taxpayer…Any such tax payer desiring to pay any current taxes under protest **or while paying taxes based upon a disputed assessment** shall, at the time of paying such taxes, **make full payment of the current tax bill before the delinquency date and** file with the collector a written statement setting forth the grounds upon which the protest is based." (Additions in bold).

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." (Emphasis added). There is no dispute that SLAH made no such payment under protest or otherwise. Further, Section 139.031.4 RSMo (2004)[8] provides:

> "Trial of the action in the circuit court shall be in the manner prescribed for nonjury civil proceedings, and, after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the current taxes paid under protest, together with any interest earned thereon, or to authorize the collector to release and disburse all or any part of the impounded taxes, and any interest earned thereon, to the appropriate officials of the taxing authority…"

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[8] As of August 28, 2010, this subsection has been amended to read:

> "Trial of the action **for recovery of taxes protested under subsection 1 of this section** in the circuit court shall be in the manner prescribed for nonjury civil proceedings, and, after determination of the issues, the court shall make such orders as may be just and equitable to refund to the taxpayer all or any part of the current taxes paid under protest, together with any interest earned thereon, or to authorize the collector to release and disburse all or any part of the impounded taxes, and any interest earned thereon, to the appropriate officials of the taxing authority…" (Additions in bold).

SLAH's appropriate legal remedy was, therefore, to file a tax protest pursuant to Section 139.031.1 RSMo and then to have a nonjury civil trial on the merits, where if it prevailed it would be refunded the taxes paid under protest, with the accrued interest. The fact that SLAH failed to comply with the procedure for bringing a tax protest, does not entitle it to equitable relief. "An action for declaratory judgment is inappropriate if an issue can be raised by other means." S&P Properties, Inc. v. City of University City, 178 S.W.3d 579, 582 (Mo. App. E.D. 2005) (This Court affirmed the circuit court's dismissal of a claim for declaratory relief as the landowner seeking a tax refund had an adequate remedy at law).

In Metts v. City of Pine Lawn, 84 S.W.3d 106 (Mo. App. E.D. 2002), the Eastern District of Missouri Court of Appeals recognized that there are two methods through which a taxpayer can challenge a tax levied allegedly in violation of the Hancock Amendment:

> "First, taxpayers may seek an injunction to enjoin the collection of a tax until its constitutionality is finally determined. Second, if a political subdivision increases a tax in violation of article X, section 22(a), and collects the tax prior to a final, appellate, judicial opinion approving the collection of the increase without voter approval, the constitutional right established by article X, section 22(a), may be enforced **only** by a **timely** action to seek a refund of the amount of the constitutionally-imposed increase."

Id. at 108 (quoting, Ring v. Metropolitan St. Louis District, 969 S.W.2d 716, 718-19 (Mo. banc 1998) - emphasis in original).

The first avenue, injunctive relief, is derived from the Hancock Amendment and the second, timely action to seek a refund, hails from Section 139.031 RSMo. The instant case does not involve a Hancock Amendment challenge and thus Section 139.031 RSMo provides SLAH's exclusive remedy.

The Metts Court held that taxpayers who refuse to pay the disputed taxes and who owe delinquent taxes "cannot create an alternate method of challenging the charges by merely withholding payment and raising their challenge when enforcement is attempted." Id. at 109. Similarly, SLAH is withholding delinquent taxes in attempt to create an alternative method of challenging this tax.

2. The trial court erred in finding the decision of John Calvin Manor applicable in the instant case

This Court in John Calvin Manor, Inc. v. Aylward, 517 S.W.2d 59 (Mo. 1974), allowed a real property owner to seek equitable relief in lieu of a Section 139.031 RSMo tax protest, where the owner was disputing an increased property assessment (not an increased tax rate) and had been deprived of the required notice and hearing procedure mandated by Section 137.180 RSMo.

When considering this Court's decision in John Calvin Manor, one must first consider Section 137.180.1 RSMo which provides:

"Whenever any assessor shall increase the valuation of any real property he shall forthwith notify the record owner of such increase… [and] every such

> increase in assessed valuation made by the assessor shall be subject to review by the county board of equalization whereat the landowner shall be entitled to be heard…"

In John Calvin Manor, this Court determined that the property owner had not received the required notice under Section 137.180 RSMo prior to the assessor raising the valuation of the property. Id. at 60. The first notice the property owner had of the increased assessed valuation was upon receiving the real estate tax bill. Id. at 61. The Court stated that "[i]t is apparent that the failure to give the notice required by sec. 137.180 completely frustrates the statutory scheme at the very outset." Id. at 62. This Court further considered that "we would be confronted with a serious due process claim in cases such as the instant one, where the taxpayer, having been deprived of the statutory notice of the increased assessed valuation and thereby totally deprived of a hearing before the board of equalization and all of his administrative remedies, would have to pay a very substantial sum in order to even question the legality of the assessment." Id. at 63. Thus, with these constitutional concerns in mind, this Court determined that:

> "sec. 139.031 is not the exclusive remedy available to a taxpayer who desires to contest the legality of an increased assessed valuation placed upon his property where he has been totally deprived of his administrative remedies by the assessor's failure to give him the notice required by sec. 137.180. The traditional action in equity to enjoin collection of the tax has not been abrogated by sec. 139.031. This case clearly demonstrates the need for the retention of equitable jurisdiction and the availability of

> injunctive relief, for here the entire statutory scheme for the assessment of property for tax purposes was vitiated at the outset by the assessing authorities and resulted in an enormously increased tax statement being rendered to plaintiff."

John Calvin Manor at 64.

As such, this Court has recognized that equitable remedies remain in those circumstances where due process rights are abrogated by the failure to provide the requisite notice of an increased assessment. In other words, where legal remedies are abrogated (and, therefore, inherently rendered inadequate) due to the failure of the taxing body to adhere to procedural notice statutes, equitable remedies such as injunction will be available to the taxpayer instead.

The Western District of the Missouri Court of Appeals in General Motors Corp. v. City of Kansas City, 895 S.W.2d 59 (Mo. App. W.D. 1995), when also considering a dispute over a city business license tax, refused to extend the scope of the John Calvin Manor exception, holding that:

> "An exception to the rule that statutory remedies are exclusive has **only** been found in cases involving a taxpayer's contest of the legality of an increased assessed valuation placed upon the taxpayer's property where the taxpayer has been totally deprived of administrative remedies by the assessor's failure to give the required statutory notice."

General Motors, at 63 (emphasis added).

Unlike in John Calvin Manor, SLAH has not been deprived due process of law or a statutorily guaranteed administrative hearing. SLAH has never claimed that the City has infringed upon its protected interests; rather it alleged that the City levied a voter approved tax in excess of a statutory rate cap. The strong public policy goals served by allowing equitable relief in a case such as John Calvin Manor are not present in the instant case.

C. SLAH's failure to pay under protest precludes it from obtaining relief

"It is well-settled that Section 139.031 must be strictly construed and enforced." Ford Motor Co., *supra*, at 798. "The statutory sections providing the tax appeal procedure must be meticulously followed." Id. "Section 139.031 provides the taxpayer with an exclusive remedy, and therefore, failure to strictly comply with this section bars recovery of controverted taxes." Id. In the instant case SLAH has not only failed to file the requisite tax protest, it has failed to pay the tax at all. SLAH has not "meticulously" followed the statutory procedure for challenging the allegedly improper hotel/motel business license tax.

In Ford Motor Co., this Court held that Section 139.031 RSMo had not been adequately complied with where the payment was made a little over a month prior to the written protest, although both the payment and the protest were made prior to the tax becoming delinquent. Ford Motor Co. at 802. The court concluded that the payment and the protest had to be concurrent in order to comply with Section 139.031 RSMo. Similarly in State ex rel. National Investment Corp. v. Leachman, 613 S.W.2d 634 (Mo. banc 1981), a challenge was deemed not in compliance with Section 139.031 RSMo

where the written protest was made ten days after the payment, but both the payment and the protest were made before the delinquency date.

If tax protests can be brought without strict compliance with Section 139.031 RSMo it creates great uncertainty for cities when determining their annual budgets, as revenue projections would be subject to the whims of various taxpayers who may disagree with the way the tax burden is allocated. Additionally, cities would be unable to safely appropriate their tax revenues to provide municipal services, including police, fire, health, transportation services, and the like, for fear that their tax revenues may be subject to unforeseen repayment. Section 139.031 RSMo provides for the monies that might be subject to repayment, to be kept separately and, therefore, allows cities to spend the rest of their tax revenues on necessary municipal services. Judge Wolff, in his concurring opinion in Green v. Lebanon R-III School District, 13 S.W.3d 278, 289 (Mo. banc 2000), recognized that "[f]inality in taxation is essential to local government."

Again, Section 139.031.4 RSMo allows for the accrual of interest to be paid to the prevailing party to compensate either the taxpayer for the overpayment of taxes or the city for having its revenue escrowed during the pendency of the tax protest litigation. The payment of funds under protest allows for a clearly identifiable source of funds for proper distribution at the conclusion of the tax protest litigation. Section 139.031 RSMo allows for the protection of both the tax payer and the taxing authority.

The trial court's holding that Section 139.031 RSMo only applies in those circumstances where a refund is sought would entirely circumvent the payment under protest procedure, vitiating entirely its important public policy goals, as only those who

actually pay the tax are able to seek a refund. Such a holding would allow a taxpayer to simply refuse to pay the tax and wait to raise a challenge whenever it might suit the taxpayer or when and if enforcement is initiated by the City, which is the very approach the court rejected in Metts. Metts at 109. In reality this would render Section 139.031 RSMo obsolete as taxpayers would now have the choice of paying a tax under protest and complying with the statutory conditions, or instead bringing a claim for equitable relief which would allow them to retain the disputed tax payments until a final resolution of the litigation. No taxpayer would choose the former option. The holding of the trial court would allow a taxpayer to defer paying a tax simply by filing a claim for equitable relief. Further, the trial court's holding treats a taxpayer's total disregard for the Section 139.031 RSMo procedure preferably to attempted or partial compliance.

Not only would allowing taxpayers to freely seek such equitable relief lead to great uncertainty within the realm of tax revenue and government budgeting, it would also render Section 139.031 RSMo superfluous, though the statute was enacted to promote both the expedient resolution of tax protests and predictable funding for public service. This litigation demonstrates the need for the Section 139.031 RSMo procedure, as this suit has been on going for 3½ years, during which time Woodson Terrace has continued to provide SLAH with municipal services without SLAH having paid its business license tax. The holding of the trial court, if affirmed, will promote the use of protracted equitable proceedings, and a "catch me if you can" alternative to the statutory procedure set forth in Section 139.031 RSMo.

SLAH's position, which makes the taxpayer's unilateral and self-serving decision on seeking a refund the *sine qua non* for the applicability of Section 139.031 RSMo, is the tail wagging the dog and misses the essential character of the entire statutory scheme. Section 139.031 RSMo requires that to challenge the validity of a tax, a payment and a protest **must** be made.

D. The trial court lacked subject-matter jurisdiction over the case and should have dismissed SLAH's petition

"The only power a court without subject matter jurisdiction possesses is the power to dismiss the action." Phillips v. Bradshaw, 859 S.W.2d 232, 234 (Mo. App. 1993). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Rule 55.27(G)(3), of the Missouri Rules of Civil Procedure.

As a consequence of SLAH's adequate remedy at law, the trial court's award of declaratory judgment concerning the applicable hotel/motel license tax rate was inappropriate. As Section 139.031 RSMo provided the applicable legal remedy to redress SLAH's grievances, the Court lacked jurisdiction to enter a judgment on the claims for declaratory and injunctive relief. See Lane, *supra*, (The trial court lacked jurisdiction over a claim for declaratory judgment when relief could also be obtained through Section 139.031 RSMo).

II. The trial court erred in finding that the applicable hotel/motel tax rate in effect as of May 1, 2005, was $13.50 per room per year by operation of Section 94.270.3 RSMo, because Section 94.270.3 RSMo is unconstitutional and Woodson Terrace Ordinance 1606 set the hotel/motel tax rate at $0.85 per occupied room per day and was in effect as of May 1, 2005, in that: (A) Ordinance 1606 was duly passed and adopted by the registered voters of Woodson Terrace and was in effect as of May 1, 2005; (B) Section 94.270.3 RSMo violates Article III, Section 40 of the Missouri Constitution in that it is a "Special Law" that relates only to Woodson Terrace; (C) Section 94.270 RSMo violates the uniformity requirement of Article VI, Section 15 of the Missouri Constitution in that it creates subclasses among the fourth class cities; and (D) the trial court's writs of prohibition and mandamus should be quashed as the applicable tax rate as of May 1, 2005, was $0.85 per occupied room per day.

The judgment of the trial court should be reversed as Section 94.270.3 RSMo is unconstitutional, invalid, unlawful and void, in that it constitutes a "Special Law" in violation of Article III, Section 40, of the Missouri Constitution. Further, Section 94.270 RSMo violates the uniformity requirement of Article VI, Section 15, of the Missouri Constitution.

A. Standard of Review

The standard of review on appeal of an action for declaratory judgment is the same as in any other court tried case. Dohogne v. Counts, 307 S.W.3d 660, 665-666 (Mo. App.

E.D. 2010). The appellate court will reverse the trial court's judgment upon a finding that there was no substantial evidence supporting it, it was against the weight of the evidence, it erroneously declared the law, or it erroneously applied the law. Id.

B. Ordinance 1606 was duly enacted and approved by the registered voters of Woodson Terrace.

There is no dispute that Ordinance 1606 was properly passed, approved by the registered voters of Woodson Terrace and certified. (Tr. Vol. p. 145). However, the trial court erred in determining that the hotel/motel business license tax as set by Ordinance 1606 was reduced from $0.85 per room per day to the rate of $13.50 per room per year, by operation of Section 94.270.3 RSMo.

C. Section 94.270.3 RSMo is a prohibited "Special Law" in that it applies only to Woodson Terrace.

Article III, Section 40(21), of the Missouri Constitution prohibits the general assembly from passing any local or special law "creating offices, prescribing powers and duties of officers in, or **regulating the affairs of counties, cities, townships, election or school districts**." (Emphasis added). The state legislature through Section 94.270.1 RSMo has vested in fourth class cities the power to tax hotels and motels. However, in Section 94.270.3 RSMo the state legislature has created a special law that pertains only to Woodson Terrace and interferes with the City's taxing powers. Further, Article III, Section 40(30), of the Missouri Constitution, forbids the Legislature from passing any local or special law "where a general law can be made applicable."

A special law has been defined as "[a] law which includes less than all who are similarly situated…, but a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis. Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 831 (Mo. banc 1991). "The prohibition of local laws refers to legislative acts that single out a particular unit of local government in a certain location, such as a particular city, township or county." Id. (Internal quotations omitted). "In order to find such a statute invalid as a special law, it must be found that members of the stated class are omitted whose relationship to the subject matter cannot by reason be distinguished from that of those included." Id. (Internal quotations omitted). "In essence, the test for special legislation under article III, §40, of the Missouri Constitution, involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither a fundamental right nor a suspect class is involved, i.e., where a rational basis test applies." Id. at 832. (Internal quotations omitted).

The rational basis test applies only in those situations where the special legislation is based upon an open-ended classification. Jefferson County Fire Protection Districts Association v. Blunt, 205 S.W.3d 866, 870 (Mo. banc. 2006). Where the classification is based upon close-ended characteristics, such as historical facts, the law is facially special and is presumed to be unconstitutional. Id.

Woodson Terrace is the **only** City that fell within the criteria and population range of 4,100 to 4,200 set forth in Section 94.270.3 RSMo. (Defendants' Exhibit, A, Appendix p. A26). As such Woodson Terrace is the only City to which Section 94.270.3

RSMo applies. Further, Section 94.270.1 RSMo is a law of general applicability that would have applied to Woodson Terrace but for the enactment of Section 94.270.3 RSMo. The only fourth class cities that are not subject to Section 94.270.1 RSMo are Woodson Terrace, the City of Edmundson and the City of St. Peters. Section 94.270.1 RSMo places no limit upon the hotel/motel license tax that a fourth class city may levy. Section 94.270.3 RSMo restricts Woodson Terrace to levying a hotel/motel license tax of $13.50 per room per year. Section 94.270.2 RSMo restricts the City of Edmundson to levying a hotel/motel license tax of $27.00 per room per year. Section 94.270.4 RSMo limits the City of St. Peters to a hotel/motel license tax of $1,000 per annum.

Simply put, there exists no rational basis for the extremely narrow population range set forth in Section 94.270.3 RSMo. Further, as discussed *infra*, Section 94.270.3 RSMo is a facially special law subject to the presumption of unconstitutionality.

(1) There is no rational basis for the discrimination against Woodson Terrace

"It is, however, an essential adjunct of this rule [the presumption that a population based classification is valid] that the classification made by the legislature shall rest upon a reasonable basis, and not upon a mere arbitrary division made only for the purposes of legislation." State ex. Inf. Barker v. Southern, 177 S.W. 640, 643 (Mo. 1915). "When this is borne in mind, and a statute is enacted upon a basis justifying its classification, and is made to apply to all persons who may hereafter fall within its purview, it is not special legislation." Id.

Thus, absent a rational basis for the discrimination, any presumption of validity is overcome and the law is unconstitutional as a special law. Based upon the evidence adduced at trial it is clear that the purpose of Section 94.270.3 RSMo was to limit the license tax rate that the City of Woodson Terrace was authorized to levy and collect from hotels and motels. The population range of one hundred is arbitrary and made for the purpose of catching only Woodson Terrace. In fact, when this Court was confronted with a similarly arbitrary population classification in Jefferson County Fire District, it found the statute was invalid, and crafted the rule discussed below, which creates a presumption of unconstitutionality for particularly egregious population based classifications.

"Two tests are required to determine the constitutionality of the provision under scrutiny: First, is the law a special or local law? Second, if so, is the vice that is sought to be corrected, the duty imposed, or the permission granted by statute so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result?" School District of Riverview Gardens v. St. Louis County, 816 S.W.2d 219, 221 (Mo. banc 1991).

First, the law is undoubtedly a special law, as it applies only to Woodson Terrace. Second, it serves to correct no vice other than the specific grievances that SLAH had with the Woodson Terrace Hotel/Motel license tax rate. This special law is reminiscent of those common place in the early part of the 19th century, which were often used to "create local tax laws and special tax exemptions." Jefferson County Fire District, at 869.

"In order to find [] a statute invalid as a special law, it must be found that members of the stated class are omitted whose relationship to the subject-matter cannot by reason

be distinguished from that of those included." Blaske, *supra* at 831 (internal quotations omitted).

At the Court below, SLAH objected strenuously to the use of trial testimony from its own representatives that suggested there was no rational basis for treating Woodson Terrace differently from other similarly situated fourth class cities in St. Louis County, claiming that to do so was an attempt to shift the burden of proof to SLAH. The City has never attempted to shift the burden of proof, and acknowledges that "[w]hen the constitutionality of a statute is attacked, the burden of proof is upon the party claiming that the statute is unconstitutional." United C.O.D. v. State of Missouri, 150 S.W.3d 311, 313 (Mo. banc 2004).

Logically, the only way to prove a negative (i.e. no rational basis for discriminating against Woodson Terrace) is to disprove the positive. That is to say Woodson Terrace cannot demonstrate that there is no rational basis without pointing to the absence of evidence supporting a rational basis.

SLAH, through Steve O'Loughlin, the CEO of LHM, explicitly admitted that it lobbied for the legislative change brought about by Senate Bill 758:

"Q. (By. Mr. O'Keefe) Does the association engage a lobbyist?

A. Yes.

Q. And who is that?

A. Jorgen Schlemeier.

…

Q. What did he tell you?

A. That we needed to talk to somebody in the state legislature and have a conversation with them to see what they could do.

Q. And did you do that?

A. Correct.

Q. And who did you talk to?

A. I don't know specifically who we brought it up to, but in the past when we go to visit Jeff City, we talked to Catherine Hanaway, Tom Dempsey, Rod Jetton, and John Lowden.

…

Q. And you pressed to them your concern that the City of Woodson Terrace's tax was inappropriate in your view?

A. Correct.

Q. And you asked them for some sort of relief or remedy?

A. I asked them to intervene on our behalf, correct.

…

Q. So you lobbied the general assembly in 2004?

A. Correct."

(Tr. Vol. I. pps. 94-96).

The population range of 100 is so arbitrary and egregious that it can lead only to the conclusion that the State Legislature, in response to SLAH's legislative pressure, sought to treat Woodson Terrace differently under the law and in violation of the Missouri Constitution. Further, Mr. O'Loughlin, who held himself out as being aware of

other communities in the St. Louis area, conceded that he was not aware of any reason for distinguishing Woodson Terrace from the cities of Pine Lawn, Fenton and Frontenac. (Tr. Vol. I, p. 124). Another employee of LHM, Guy Doza, testified that he was not aware of any differences between the revenue sources and levels of service provided by Woodson Terrace compared with the cities of Pine Lawn, Fenton, Frontenac and Edmundson. (Tr. Vol. I, pps. 31-32). Further, the then City Attorney, the late Mr. Gray, testified at length that Woodson Terrace had a similar housing stock and tax base to neighboring fourth class City of Edmundson. (Tr. Vol I at 169), and the two cities offered similar services, including a park and police department. (Tr. Vol. I at 168).

The Bill Summary of Senate Bill 758, which enacted Section 94.270.3 RSMo underscores the intention to single out Woodson Terrace by expressly providing:

> "The act prohibits the City of Edmundson from levying and collecting a license tax on hotels and motels in an amount in excess [of] $27 per room per year and the City of Woodson Terrace an amount in excess of $13.50 per room per year."

(Defendant's Exhibit C, Appendix p. A26).

SLAH has objected continuously to Woodson Terrace's reliance upon the bill summary, however "[a] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." United C.O.D. at 313 (internal quotations omitted). As such bill summaries, and inferences drawn from the engagement of a lobbyist can be relied upon to lead to the reasonable

conclusion that Section 94.270.3 RSMo was enacted **only** to legislate SLAH's grievance with the tax rate, and that there is no rational basis for the statute.

The evidence before the trial court did not contain a single shred of evidence that would even suggest what the rational basis for the population classification is. Avoiding the issue, the trial court simply concluded:

> "Woodson Terrace failed to prove at trial that there was not a rational basis to support the population-based classification set forth in §94.270.3."

Appendix at 13.

Not SLAH, nor the trial court nor the Eastern District of the Missouri Court of Appeals has ever stated what the rational basis is for the population-based classification in Section 94.270.3 RSMo. Instead all have averred that Woodson Terrace has failed to prove a lack of a rational basis. The trial court erred in disregarding the substantial evidence supporting the clear fact that there is no rational basis for the population-based classification, and instead chose to hypothesize that there may be one, without stating what that basis might be.

While SLAH may not have been charged with proving the legitimacy of a proposed rational basis, it was required to at least suggest that one exists and what that rational basis is, so that the Court could assess the proffered rationale in light of the contrary evidence before it. No reported case could be found in Missouri in which a statue was found to have a valid rational basis where no one cared to state what that rational basis actually is or even might be.

In order to hold that a classification has a rational basis, some state of facts must reasonably be conceived to justify it. City of St. Louis v. Liberman, 547 S.W.2d 452, 458 (Mo. banc 1977). Even in Jefferson County Fire District, the state attempted to offer several grounds to support a rational basis for the population-based classification. However, SLAH rendered the substantial evidence before the trial court as to a lack of a rational basis entirely uncontroverted, by not even suggesting a single rational basis for the statute.

(2) Section 94.270.3 RSMo. is facially a special law.

In 2006 the Missouri Supreme Court decided the factually apposite Jefferson County Fire Protection District. The Missouri Legislature in 2005, through Senate Bill 210, enacted Section 321.222 RSMo which removed the power of fire districts in counties having a population between 198,000 and 199,120 to adopt fire protection codes related to home construction. Jefferson County Fire Protection District, at 867. The court held that Section 321.222 RSMo:

> "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.

Similarly, Section 94.270.3 RSMo prohibits fourth class cities in St. Louis County having a population between 4,100 and 4,200, from implementing a hotel/motel license tax of more than $13.50 per room per year. Woodson Terrace is the only City that falls within that incredibly narrow population range.

In Jefferson County Fire Protection District, Judge Russell set forth a specific test for determining whether "[t]he presumption that a population-based classification is constitutional is overcome." Id. at 870. However, this test comes with something of a caveat, in that the Court concluded 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 opinion."[9] Id. at 871.

The test articulated by Judge Russell in Jefferson County Fire Protection District provides that:

[9] It is of note that Section 321.222 RSMo, which was declared unconstitutional as a Special Law by Jefferson County Fire Protection District, was enacted by virtue of Senate Bill 210, which in fact was the same Bill that enacted the language subject to this appeal in Section 94.270.6 RSMo.

> "The presumption that a population-based classification is constitutional is overcome if: (1) a statute contains a population classification that includes only one political subdivision, (2) other political subdivisions are similar in size to the targeted political subdivision, yet are not included, and (3) the population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision and to exclude all others. If all three circumstances exist, the law is no longer presumed to be general, but is presumed to be a special law, requiring those defending it to show substantial justification for the classification."

Id. at 870-871.

In the instant case, the facts demonstrated conclusively that: (1) the population range of Section 94.270.3 RSMo contained only Woodson Terrace; (2) the City of Pine Lawn is a fourth class city in the same charter county as Woodson Terrace (St. Louis County), and had only 15 citizens more than Woodson Terrace, (Defendants' Exhibit A, Appendix p. A21), yet it is not included within the scope of Section 94.270.3 RSMo;[10] and (3) the difference in the 2000 population between Woodson Terrace and Pine Lawn

[10] As of the 2000 census, the City of Fenton was a fourth class city, in St. Louis County having only 171 more citizens than Woodson Terrace, and the City of Pagedale was also a fourth class city, in St. Louis County having only 650 citizens less than Woodson Terrace. (Defendants' Exhibit A, Appendix p. A. 21). Neither city is included within the scope of Section 94.270.3 RSMo.

was approximately 0.0036%, or in other terms if the population of Pine Lawn had been 5 less it too would have been subject to Section 94.270.3 RSMo. There is no other logical explanation for such a narrow population range, other than that the law is intended to single out Woodson Terrace. Further, the evidence adduced at trial, discussed *supra*, fails to even suggest a legislative purpose other than to expressly address SLAH's grievances with the Woodson Terrace hotel/motel business license tax rate.

This Court's rationale for the prospective application of the Jefferson County Fire District test was premised upon the "General Assembly's possible reliance on previous cases not articulating the presumption." Id. at 871. However, the General Assembly has not heeded this Court's warning as to the misuse of population-based classifications. In S.B. 644 (2010), the General Assembly enacted 8 new provisions containing similarly narrow population-based classifications.[11] This trend continued in 2011, with the amendments to Section 115.127.5 RSMo, through S.B. 282 (2011).

(3) As a result of the operation of Section 94.270.6(2) RSMo the population classification in 94.270.3 RSMo is not open-ended

Even before Jefferson County Fire Protection District, the Missouri Supreme Court recognized that statutory provisions based upon population classifications can

[11] For example, Section 67.1003.1(8) RSMo, enacted by SB 644 (2010) authorizes a hotel/motel transient guest room tax to be levied by "[a]ny city of the third classification with more than ten thousand eight hundred but fewer than ten thousand nine hundred inhabitants and located in more than one county."

result in the finding of an unconstitutional special law. In State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918 (Mo. banc 1993), the court held the following population based statutory provision, enacted in 1990, to be an unconstitutional special law:

> "any city of the fourth class having a population in the 1980 decennial census of more than twenty-five thousand but less than twenty-six thousand which is located in a county of the first class having a charter form of government and containing the larger portion of a city with a population of more than three hundred thousand."

Id. at 919 (Section 590.115.2 RSMo, subsequently repealed).

The legislation was enacted in 1990. Id. Blue Springs was the only city to fit within the population classification. Id. The court acknowledged that classifications based upon population "may be open-ended." Id. at 921. However, the court concluded that because the population was based upon the 1980 census, it was impossible for other cities to fall within the classification and as such the section was not open-ended. Id.

While, Section 94.270.3 RSMo does not overtly limit itself to the 2000 census, the application of Section 94.270.6(2) RSMo means that Woodson Terrace will be forever treated uniquely by virtue of Section 94.270.3 RSMo.

By operation of Section 94.270.3 RSMo the City of Woodson Terrace is deemed to have a hotel/motel license tax of $13.50 per room per year, as of May 1, 2005. It is true that if for instance, the City of Pine Lawn should find that its population has been reduced by between 5 and 103 at the time of the next census; it will fall into the ambit of

Section 94.270.3 RSMo due to the operation of Section 1.100.2 RSMo.[12] However, where Woodson Terrace will forever be treated differently is the limiting effect that Section 94.270.6(2) RSMo has upon the tax rate imposed by Woodson Terrace by virtue of Section 94.270.3 RSMo. Woodson Terrace is limited, until statutory amendment, to the tax rate in effect as of May 1, 2005, as Section 94.270.6 RSMo prohibits a fourth class city from ever having a hotel/motel tax rate greater than "(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."

Woodson Terrace was the **only** City that was subject to Section 94.270.3 RSMo as of May 1, 2005, and it was the **only** City that had its hotel/motel license tax reduced by operation of law to $13.50 per room per year. As such, Woodson Terrace is the only city that is subject to the perpetual limitation of its tax rate as prescribed by Section 94.270.3 RSMo. So while it is possible that Woodson Terrace may not fall within the population

[12] "Any law which is limited in its operation to counties, cities or other political subdivisions having a specified population or a specified assessed valuation **shall be deemed to include all counties, cities or political subdivisions which thereafter acquire such population** or assessed valuation as well as those in that category at the time the law passed." Section 1.100.2 RSMo. (Emphasis added).

bracket at the next census,[13] by virtue of Sections 1.100.2 and 94.270.6 RSMo the rate prescribed Section 94.270.3 RSMo will always be applicable to Woodson Terrace, and Woodson Terrace will always be the only city bound to the upper limit on its hotel/motel tax rate of $13.50 per room per year for those hotel and motels where $13.50 per room per year exceeds 0.00125% of their gross revenue.

By means of an example, if the City of Edmundson[14] should find that its population has grown to between 4,100 and 4,200 after the next census, if will become subject to the provisions of Section 94.270.3 RSMo in that its hotel/motel business license tax rate will be reduced to $13.50 per room per day. Section 94.270.6(2) RSMo will not serve to limit increases of the tax rate to $13.50 per room per year, rather it will be bound by the $27.00 hotel/motel business license tax rate the City of Edmundson had in effect as of May 1, 2005, pursuant to Sections 1.100.2 and 94.270.2 RSMo.

The judicial policy behind the presumption that population based classifications are constitutional is entirely frustrated in the instant matter. "[O]pen-endedness allows the legislature to address the unique problems of size with focused legislation; it also permits those political subdivisions whose growth or decline brings them into a new

[13] Although not part of the record in this case, Woodson Terrace's population was 4063 as of the 2010 census.

[14] The City of Edmundson, except for its smaller population, is very similar to Woodson Terrace, with respect to location (both are near Lambert International Airport), infrastructure, housing structure, tax base etc. (Tr. Vol. I, pps 167-168).

classification the advantage of the legislature's previous consideration of the issues facing similarly situated government entities." School District of Riverview Gardens at 222. No other city will be affected in the same manner as Woodson terrace under Section 94.270.3, RSMo even if another City should end up having the same population as Woodson Terrace currently has. The statute does not "address the unique problems of size." If it were an attempt to serve a legitimate problem created by the size of Woodson Terrace, it is impossible to determine what that legitimate problem is. The City of Edmundson, which has a population of 840 (Defendant's Exhibit C, Appendix p. A26), is authorized to levy a hotel/motel license tax of $27.00 per room per year. Section 94.270.2, RSMo. The City of Bridgeton, which has a population of 15,550 (Defendant's Exhibit C, Appendix p. A26), is authorized to levy a hotel/motel license tax of $0.85 per occupied room per day. (Defendant's Exhibit F, Appendix p. A34). The City of Pine Lawn which has a population of 4,204 is free to levy whatever hotel/motel license tax it sees fit, within the confines of Section 94.270.6 RSMo. There is no conceivable evil or problem relating to hotel business licensure possessed only by a city having a population between 4,100 and 4,200 (Woodson Terrace), which it does not share with a city having a population of 4,204 (Pine lawn).

D. Section 94.270 RSMo 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.

Article VI, Section 15, of the Missouri 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 corporations."

Section 94.270 RSMo violates this Constitutional provision in that: (1) it has created a magnitude of subclasses among the fourth class cities; and (2) it has created unequal powers of taxation among the fourth class cities. This has resulted in the following subdivisions of fourth class cities, all having disparate powers of taxation:

1. The City of Woodson Terrace, which may levy a hotel/motel license tax not in excess of $13.50 per room per year. Section 94.270.3 RSMo. Woodson Terrace may increase that rate by 5% per year, Section 94.270.6 RSMo, until the tax rate generates the greater of 1/8th of 1/% of a hotel's or motel's gross revenue, Section 94.270.6(1) RSMo, or an amount equivalent to Woodson Terrace's tax rate as of May 1, 2005 (i.e. $13.50 per room per year), Section 94.270.6(2) RSMo.

2. The City of Edmundson, which may levy a hotel/motel license tax not in excess of $27.00 per room per year. Section 94.270.2 RSMo. The City of Edmundson may increase that rate by 5% per year, Section 94.270.6 RSMo, until the tax rate

generates the greater of 1/8th of 1/% of a hotel's or motel's gross revenue, Section 94.270.6(1) RSMo, or an amount equivalent to The City of Edmundson's tax rate as of May 1, 2005 (i.e. $27.50 per room per year), Section 94.270.6(2) RSMo.

3. The City of St. Peters, which may levy a hotel/motel license tax not in excess of $1,000 per year. The City of St. Peters may increase that rate by 5% per year, Section 94.270.6 RSMo, but the total tax levied shall not exceed 1/8th of 1% of a hotel's or motel's gross revenue. Section 94.270.5 RSMo.

4. Fourth class cities other than Woodson Terrace, the City of Edmundson and the City of St. Peters, which **did not levy** a hotel/motel license tax, the revenue from which is restricted for use to a project from which bonds were outstanding as of May 1, 2005, which are authorized to levy any form or amount of hotel/motel tax. Section 94.270.1 RSMo. Any such city may increase that rate by 5% per year, Section 94.270.6 RSMo, until the tax rate generates the greater of 1/8th of 1/% of a hotel's or motel's gross revenue, Section 94.270.6(1) RSMo, or an amount equivalent to such a city's tax rate as of May 1, 2005, Section 94.270.6(2) RSMo.

5. Fourth class cities other than Woodson Terrace, the City of Edmundson and the City of St. Peters, which **did levy** a hotel/motel license tax, the revenue from which is restricted for use to a project from which bonds were outstanding as of May 1, 2005, which are authorized to levy any form or amount of hotel/motel license tax without regard to any revenue limitation and without regard to any tax rate as of May 1, 2005, and without limitation on annual increase. Section 94.270.7 RSMo.

Theoretically the divisive effect of Section 94.270.6(2) RSMo might be considerably more profound as each City is subject to the tax rate it had in effect as of May 1, 2005, so potentially each fourth class city of the state could be bound by a different limitation on its hotel/motel license tax by operation of Section 94.270.6(2) RSMo.

The effect of Section 94.270 RSMo is to impermissibly and unconstitutionally subdivide fourth class cities, and create uneven taxing powers amongst them. As such, Section 94.270 RSMo is unconstitutional to the extent that it has impermissibly created sub-classes of fourth class cities having unequal powers of taxation.

E. The trial court's writs in mandamus and prohibition should be quashed

As the trial court erred in declaring $13.50 per room per year the tax rate in effect as of May 1, 2005, instead of the tax rate set by Ordinance 1606 of $0.85 per occupied room per night, the trial court's writ in prohibition should be quashed. The writ of prohibition was entered on the basis that Ordinance 1606 was invalid in light of Section 94.270.3 RSMo. However, as that statutory provision in unconstitutional and invalid, Ordinance 1606 set the correct tax rate until it was amended by Woodson Terrace Ordinance 1719.

Further, to date SLAH has failed to pay the tax rate prescribed by Ordinance 1606, therefore, the trial court erred in entering its writ in Mandamus compelling Woodson Terrace to issue a business license to SLAH.

III. The trial court erred in finding that Woodson Terrace Ordinance 1719, which reduced the hotel/motel business license tax prescribed by Ordinance 1606 to $0.32 per occupied room per day, was null and void by operation of Section 94.270.6 RSMo which purports to limit any hotel/motel license tax rate increase to no more than one-eighth of one percent of a hotel's gross revenue and limits the annual increase in such tax rate to no more than 5%, because Section 94.270 RSMo is unconstitutional, in that (A) Section 94.270 RSMo violates the uniformity requirement of Article VI, Section 15 of the Missouri Constitution in that it creates subclasses among the fourth class cities having disparate taxing powers; and (B) notwithstanding the unconstitutionality of Section 94.270 RSMo Woodson Terrace Ordinance 1719 in fact reduced the hotel/motel tax rate and therefore did not violate Section 94.270.6 RSMo's purported limitation on the increase to the tax rate.

The judgment of the trial court should be reversed as Section 94.270 RSMo, and more specifically Section 94.270.6 RSMo, is unconstitutional, invalid, unlawful and void, in that it violates the uniformity requirement of Article VI, Section 15, of the Missouri Constitution.

A. Standard of Review

The standard of review on appeal of an action for declaratory judgment is the same as in any other court tried case. Dohogne v. Counts, *supra*, at 665-666. The appellate court will reverse the trial court's judgment upon a finding that there was no substantial

evidence supporting it, it was against the weight of the evidence, it erroneously declared the law, or it erroneously applied the law." Id.

B. Section 94.270 RSMo violates Article VI, Section 15 of the Missouri Constitution by creating subclasses of fourth class cities and creating non-uniform powers and limitations amongst the fourth class cities

As discussed at length *supra*, Section 94.270 RSMo is unconstitutional in so much as it has created at least five subclasses among the fourth class cities generally, and multiple diverse classifications of taxing powers among fourth class cities in St. Louis County. Article VI, Section 15, of the Missouri Constitution expressly prohibits such sub-classifications and requires that each city within one of the four allowed classifications of city have uniform powers and be subject to uniform restrictions. Woodson Terrace is unconstitutionally subject to a restriction that applies only to it.

In Riden v. City of Rolla, 348 S.W.2d 946 (Mo. 1961), this Court *sua sponte*, considered Article VI, Section 15, of the Missouri Constitution, in conjunction with the appellants' claim that Section 94.110 RSMo unfairly discriminated between citizens of the third and fourth classes in that it allows third class cities to levy a license tax on barber shops, which is not authorized for fourth class cities pursuant to Section 94.270 RSMo. Riden at 951. This Court held that such a discrepancy between the powers of third and fourth classes did not violate Article VI, Section 15, of the Missouri Constitution as the constitution "only required that cities **of the same class** shall possess the same powers and be subject to the same restrictions." Riden at 951. (Emphasis in original). In the instant proceeding, we are confronted with a statute that has

unequivocally created different restrictions upon the taxing powers of the same class of city, in contravention of the Constitutional prohibition. It is inescapable that Woodson Terrace, the City of St. Peters and the City of Edmundson are subject to different hotel/motel taxing restrictions and powers from other cities of the fourth class. The Riden court discussed the reasoning behind the uniformity requirement not applying to cities of different classes by concluding that "[i]t should be apparent that if it were required that all cities be subject to the same laws there would appear to be little occasion for having different classes of cities." Id. at 951.

This conclusion applies equally to the reasoning for having uniform powers and limitations amongst fourth class cities. If the fourth class cities are subject to special legislation, creating unique powers and subjecting them to unique restrictions, the different classifications of cities serve no apparent purpose.

A decision of the Kansas Supreme Court, Clark v. City of Overland Park, 226 Kan 602 (Ks.1979), is instructive on the requirement for cities of the same class to have uniform taxing powers. The Kansas State Constitution provides that "[c]ities are hereby empowered to determine their local affairs and government including the levying of taxes, exercises, fees, charges and exactions except when and as the levying of any tax, exercise, fee, charge or other exaction is limited or prohibited by enactment of the legislature **applicable uniformly to all cities of the same class**." Id. at 609-610 (Emphasis added) (citing Article 12, Section 5, of the Kansas State Constitution). The Kansas State Legislature enacted legislation (K.S.A.1977 Sup. 12-172A) which prohibited cities from enacting a retailers' sale tax unless more than one-half of the city is

located within a county in which a proposition to enact a statewide retailers' sales tax was rejected by the electorate and without obtaining subsequent voter approval from the city's electorate. Clark at 613. The court concluded this legislation violated the Constitution's uniformity requirement as:

> "A plain reading of K.S.A. 1977 Supp. 12-172(A) indicates that only a city having a specific relationship to its county may enact a sales tax… Clearly K.S.A.1977 Supp. 12-172 brings all cities within its scope, since all cities must examine their relationship with their county to determine their ability under the statute to impose a sales tax, **but cities are not uniformly subject to the legislative restrictions**. Some cities all of the same class are permitted to continue imposing and collecting sales taxes; some now collecting them may not be permitted to do so in the future, depending upon county action; still others may or may not be permitted to levy and collect sales taxes, depending upon the action of the board of county commissioners in submitting or failing to submit the issue of a county-wide sales tax (of one-half of one per cent or of one per cent) to referendum, and depending further upon the success or defeat of the county-wide measure at the polls. **If the legislature wishes to limit or prohibit some cities from imposing sales taxes, and to permit others to do so, it must explicitly follow the constitutional mandate**. **Explicit classification and uniform applicability to all cities of the same class are required, where complete uniformity is not desired**.

Clark at 616. (Emphasis added).

Similarly, the Missouri Legislature, in wishing to create disparate taxing powers amongst the fourth class cities, has failed to follow the constitutional mandate requiring uniformity of the taxing powers for cities of the same class. If the Missouri Legislature wished to limit Woodson Terrace to the $13.50 per room per year, it should have made the legislation equally applicable to all fourth class cities. Once the General Assembly has determined to give taxing power to a class of City, it cannot thereafter limit that power for a single member of the class based upon population.

The restrictions set forth in Section 94.270.6 RSMo are an integral part of the improper creation of subclasses of fourth class cities. As such, its limitations as to the permissible increases to the hotel/motel tax rate are invalid and unconstitutional.

C. Woodson Terrace Ordinance 1719 reduced the hotel/motel license tax

For the reasons discussed *supra*, Section 94.270.3 RSMo is invalid and unconstitutional and, therefore, the hotel/motel license tax rate was not reduced to $13.50 per room per year by virtue of that section. As such, the hotel/motel business license tax rate in effect in Woodson Terrace at the time Ordinance 1719 was adopted was $0.85 per room per day. Therefore, Ordinance 1719 in fact reduced the hotel/motel business license tax rate from $0.85 to $0.32 per occupied room per day and does not violate the purported limitations set forth in Section 94.270.6 RSMo even if said section is to be deemed valid and constitutional.

CONCLUSION

It is a stipulated fact that SLAH failed to comply with the mandatory provisions of Section 139.031 RSMo for filing a tax protest and for payment under protest. Section 139.031 RSMo provided SLAH with an adequate legal remedy and as such equitable relief should have been precluded. The existence of an adequate legal remedy deprived the trial court of subject-matter jurisdiction and as such its judgment is invalid for want of subject-matter jurisdiction. Further, Section 94.270.3 RSMo constitutes special legislation that targets only Woodson Terrace and as such violates Article III, Section 40, of the Missouri Constitution. Further, Section 94.270 RSMo violates the uniformity requirement of Article VI, Section 15, of the Missouri Constitution.

For the foregoing reasons, Woodson Terrace respectfully requests that this Court reverse and remand the instant matter to the trial court with instructions to dismiss the case for lack of subject-matter jurisdiction. Further, Woodson Terrace respectfully requests that this Court quash the writs of Mandamus and Prohibition entered in error by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served on Respondent/Plaintiff this 19th day of September, 2011, through the Court's electronic filing system:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 12,795, excluding the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

The undersigned further certifies that the disk filed with this brief was scanned for viruses and was found virus-free through the Symantec anti-virus program.

/s/ Kevin M. O'Keefe