IN THE SUPREME COURT OF MISSOURI

MISSOURI COALITION FOR THE ENVIRONMENT	)	
	)	
and THOMAS J. SAGER,	)	
	)	
Appellants,	)	
	)	
vs.	)	No. SC97913
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

On Appeal from the Circuit Court of Cole County
Nineteenth Judicial Circuit, Division IV
The Hon. Patricia Joyce
No. 18AC-CC00188

APPELLANTS' SUPPLEMENTAL BRIEF

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REVISED POINT RELIED ON

V

The trial court erred in granting summary judgment to the State because SB 35 is invalid under the Missouri Constitution, Article III, § 40(30) as a special law where a general law could be made applicable in that it fails to apply to all entities similarly situated but instead applies new requirements on purchases of land to all state agencies except, without rational basis, the Department of Conservation and Highway and Transportation Commission, which are in the same class as DNR as departments empowered to purchase land themselves. A general law applicable to all agencies could have been made applicable.

ARGUMENT

The parties briefed and argued the special law issue two weeks before December 24, 2019, when the Court handed down its decisions in *City of Aurora v. Spectra Communications Group,* No. SC96276, and *City of Chesterfield v. State of Missouri,* No. SC96862. Those cases radically reformed the law on this subject and rendered the parties' analysis obsolete. On January 3, 2020, the Court granted the parties leave to file supplemental briefs to conform their arguments to the new, simplified test.

Standard of Review

City of Aurora did away with accretions of criteria over the years which, the Court decided, had added confusion and an unnecessarily heightened level of scrutiny (slip op. at 20–21). These include the criteria of open- and closed-ended classifications,

classifications based on immutable characteristics, substantial justification, and the shifting of the burden of proof to make such a justification (pp. 15–20).

The opinion in *Chesterfield* (pp. 6–7) summarizes *Aurora:*

> In *City of Aurora*, this Court recognized the proper test for identifying a local or special law is a rational basis test: "[I]f the criteria for a class in a statute was [sic] supported by a reasonable basis, then the statute is not a local or special law and the analysis should stop there." *Id.* at *12. "Under rational basis review, this Court will uphold a statute if it finds a reasonably conceivable state of facts that provide a rational basis for the classifications. Identifying a rational basis is an objective inquiry that does not require unearthing the general assembly's subjective intent in making the classification." *Id.* at *21-22 (internal citation and quotations omitted).

Because the statute is presumed constitutional, the challenger bears the burden of persuasion, which includes showing that there is *not* a rational basis, *i.e.* that the classification is "essentially arbitrary and unreasonable." *Aurora,* pp. 18–19.

Identifying the classification.

Section 34.030, RSMo gives the commissioner of administration the duty to "purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state." (This is now § 34.030.1, RSMo.; App 12.) Senate Bill 35 as introduced imposed new duties of giving public notice and holding public hearings in counties where the Office of Administration proposed to purchase land (L.F. D8; App 12). At this point the classification was complete in itself, and it would not have been open to objection that the new requirements did not apply to the three agencies that have

constitutional authority to purchase land, since they were beyond the scope of § 34.030. At the end of the legislative session the Department of Natural Resources was added, but not the Conservation and Highway Departments. As passed in this form, SB 35 was now a special law.

The Coalition and Mr. Sager are not reverting to the now-discredited "immutable characteristic of constitutional status" as they argued in their earlier briefs. This is simply the classification made by SB 35 itself. "A law which includes less than all who are similarly situated is special, 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." *Aurora* at 12–13, quoting *Ross v. Kan. City Gen. Hosp. & Med. Ctr.*, 608 S.W.2d 397, 400 (Mo. banc 1980). As many cases say (though not *Aurora*), the test of a special law is not what it includes but what it excludes. *McKaig v. Kansas City,* 256 S.W.2d 815, 817 (Mo. banc 1953).

SB 35 as passed includes all state agencies except the Conservation and Highway Departments. That is the classification that, if not made on a rational basis, makes it a special law. The classification derives from the constitution but, according to *Aurora,* that gives it no privileged status. The question in all cases is whether the excluded members of the class stand in a relationship to the subject matter of the bill that cannot by reason be distinguished from that of the members included. *State v. Gilley,* 785 S.W.2d 538, 540 (Mo. banc 1990); *Ryder v. St. Charles County,* 552 S.W.2d 705, 708 (Mo. banc 1977).

Respondent's argument that the law has statewide coverage fares no better under A*urora* (Resp. Br. at 33–7). "[W]hether an act be local or special must be determined by the generality with which it affects the people as a whole, rather than the extent of the

territory over which it operates." *State ex rel. Mueller Baking Co. v. Calvird,* 338 Mo. 601, 92 S.W.2d 184, 187 (1936). If a law treats all persons within the state alike, then there is no classification as far as the Missouri legislature is concerned. The classification that SB 35 made is one of agencies, but it does not treat all similarly situated agencies alike when it comes to purchases of land. It will affect Missourians differently in the event they receive or don't receive public notice of land purchases by different agencies.

The classification has no rational basis.

The exclusion of two agencies from SB 35 does not alone make it a special law. *Aurora* at 11, 18–19 fn. 11. It must also lack a rational basis. The Coalition and Mr. Sager, as movants for summary judgment, bear the burden of proving this negative. *Aurora* at 21. Obviously the Court will not look to them to justify the statute but to demonstrate its irrationality and to undermine the justification put forth by the state.

The Court does not defer to the legislature since Article III, § 40 expressly says that "whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." The Court "will uphold a statute if it finds a reasonably conceivable state of facts that provide a rational basis for the classifications." *Aurora* at 21–2. In the absence of legislative history, the Court may resort to conjectures of possible motivations such that a "rational legislature could have based its decision on such considerations." *Ross v. Kansas City Gen. Hosp.,* 608 S.W.2d 397, 399 (Mo. banc 1980).

To quote Respondent's brief (p. 41), "SB 35 requires **most** Missouri state agencies to provide public notice before purchasing land larger than 60 acres or exceeding

$250,000" (emphasis added). That fails to answer the question of why two agencies were excluded. The new public notice requirements apply only to large purchases, but the Highway Department and the Department of Conservation certainly make such transactions. The Conservation Department is funded to buy land for its purposes under Article IV, §§ 43(a) and (b) of the Constitution, including large tracts as authorized by § 252.045, RSMo (wildlife refuges, state forests, natural areas, etc.).

The state's main rationalization is that the bill promotes "public awareness of state agency land purchases" (Resp. Br. at 31, 40). We may paraphrase *McKaig,* 256 S.W.2d at 818: Do not the citizens of Missouri need the same degree of public awareness when the Conservation and Highway Departments purchase land? As the Court said, "[such] questions answer themselves." *Id.* There is no plausibly rational basis.

No further argument should be necessary. "Identifying a rational basis is an objective inquiry that does not require unearthing the general assembly's subjective intent in making the classification." *Aurora* at 22. Nevertheless, Appellants' reply brief (p. 5) cited judicially noticeable evidence of other bills suggestive of a legislative animus against DNR that accounts for the effort to single out that agency at the end of the session when it was too late to introduce and pass a separate bill applicable to it. These bills suggest that adding DNR to SB 35 was a form of retaliation and explain why the legislature did not consider making the law applicable to all state agencies.

A general law could be made applicable.

The last step under *Aurora* is to demonstrate that a general law could be made applicable (slip op. p. 11), *i.e.* "either that the law offends one of the specific subject

matter prohibitions in subdivisions (1) through (29) of section 40, or that the law is one 'where a general law can be made applicable' under subdivision (30)," *id.* at 18.

Article III, § 40(28) against granting corporations special or exclusive privileges does not apply, both because DNR is a public corporation, *Casualty Reciprocal Exchange v. Missouri Employers Mutual Insurance Co.,* 956 S.W.2d 249, 253 (Mo. banc 1997), and because SB 35 imposes a burden on DNR rather than a privilege.

However, SB 35 violates the catch-all prohibition of Art. III, § 40(30), against a special law where a general law can be made applicable. The way to make a general law is to pass a statute that "includes all who are similarly situated and omits none whose relationship to the subject matter cannot reasonably be distinguished from those included." *Ryder v. St. Charles County,* 552 S.W.2d 705, 708, quoting *Gem Stores, Inc. v. O'Brien,* 374 S.W.2d 109, 118 (Mo. banc 1963).

If it had truly been the legislature's intent to make a general law regulating purchases of land by state agencies, it could have accomplished this in one of several ways. It could have passed a single bill embracing all agencies. Or it could have passed the original SB 35 covering agencies for which purchasing is done by the Office of Administration and then passed a separate bill (or two or three bills) applicable to the three agencies with their own constitutional power to buy land.

For that matter, the legislature could have passed the original SB 35 alone. Purchasing by OA would have been a perfectly valid classification. It was only the addition of DNR without the Conservation and Highway Departments that made the bill a special law.

CONCLUSION

WHEREFORE, Missouri Coalition for the Environment and Mr. Sager pray the Court to reverse the decision of the trial court and remand the case for entry of judgment in their favor.

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CERTIFICATION

This brief complies with the limitations of Rule 84.06(b), containing 2,189 words.

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Certificate of Service

Counsel for Appellants has made service of this brief on all other counsel of record by way of electronic filing on this 13th day of January, 2020.

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