IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI EX REL., SLAH, L.L.C.,	)	
Respondent/Plaintiff,	)	
	)	**Appeal No. SC 91802**
v.	)	
CITY OF WOODSON TERRACE, MISSOURI, A Municipal Corporation, et al.,	)	
Appellants/Defendants.	)	

RESPONDENT'S SUBSTITUTE BRIEF

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

DANNA MCKITRICK, P.C.

David R. Bohm, #35166
Laura Gerdes Long, #40331
7701 Forsyth Blvd., Suite 800
St. Louis, MO 63105-3907
(314) 726-1000/(314) 725-6592 fax
E-mail: dbohm@dmfirm.com
E-Mail: llong@dmfirm.com

ATTORNEYS FOR RESPONDENTS

Table of Contents

Table of Authorities

Missouri Constitution

Statutes

STATEMENT OF FACTS

Appellants' Statement of Facts is incomplete and contains incorrect and irrelevant information and argument, in violation of Mo. S. Ct. Rule 84.04. For these reasons, Respondent will set forth its Statement of Facts here.

Appellants in this case are the City of Woodson Terrace ("Woodson Terrace") and Margaret Getz, in her official capacity as the City Collector of Woodson Terrace ("Getz"). Respondent, SLAH, LLC ("SLAH") operates the St. Louis Airport Hilton Hotel, which is located within the municipal boundaries of Woodson Terrace. (L.F. 162). The St. Louis Airport Hilton Hotel is one of five hotels or motels located in Woodson Terrace. (L.F. 162).

SLAH filed this lawsuit seeking a writ of prohibition and/or mandamus, injunctive relief, and declaratory relief seeking to prohibit the City of Woodson Terrace from imposing a hotel license tax rate of "Eighty-five cents (85¢) per day per room occupied for a fee by Transient guests" beginning on July 1, 2007, purportedly in reliance on Woodson Terrace Ordinance 1606. (L.F. 163-164).

The trial court held that the City of Woodson Terrace is prohibited from enforcing its Ordinance by the provisions of §94.270, RSMo, and specifically subsections 3 and 6 thereof. (L.F. 149-160). Section 94.270.1 provides that cities of the fourth class may "levy and collect a license tax on...hotels..." Sections 94.270.3 and 94.270.6 provide, in relevant part, that:

> 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 limitations of this subsection shall be automatically reduced to comply with this subsection.
>
> *****
>
> 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.

On January 22, 2004, Woodson Terrace's Board of Aldermen enacted Ordinance 1606 which amended Ordinance 543 and set the license tax rate for hotels at "Eighty-five cents (.85¢) per day per room occupied for a fee by Transient Guests" beginning on July 1, 2004, subject to voter approval, which was obtained at the election held on April 14, 2004. (L.F. 163-164). Such Ordinance would have effectively increase the tax rate on SLAH nearly 2000% higher than the hotel business license tax previously imposed under Ordinance 543, which had set the hotel license tax in Woodson Terrace at $10.00 per unit per year. (L.F. 163-164; Tr. 66, 68; see also SLAH's Exhibit 27; Appendix A27).

During its 2004 session, the General Assembly enacted a new statute, codified at §97.240.3 R.S.Mo., which, as mentioned above, provides that fourth class cities with a population of between 4100 and 4200 inhabitants and located within a charter county with one million or more inhabitants, may not levy or collect a license fee on hotels or motels in excess of Thirteen Dollars and Fifty Cents ($13.50) per room. (L.F. 164). The statute further specified that the tax rate of any city within its scope which exceeded that rate was deemed to have been rolled back to $13.50. (L.F. 164). Woodson Terrace had 4189 residents per the 2000 census. (L.F. 164). At that time, no other city in St. Louis County (which at the 2000 census was the only county in Missouri with one million inhabitants), had between 4100 and 4200 inhabitants, (Tr. 123, Defendant's Exhibit A) although several had populations close to this range. For instance, Pine Lawn, Fenton and Pagedale had only 15 more, 171 more and 650 less inhabitants, respectively, than the population of Woodson Terrace. (Tr. 123-124, Defendant's Exhibit A).

For the fiscal year beginning July 1, 2004 (FY '05), Woodson Terrace charged hotels located within its boundaries a license tax of $13.50 per room. See, Plaintiff's Exhibits 22 and 23 showing returns and license fees paid by various hotels. (Tr. 10-11, 37-39, 59). However, Woodson Terrace sent SLAH a general business license tax form. In reliance on this form, SLAH paid a business license tax based upon the rate of one dollar ($1.00) per one-thousand dollars ($1,000.00) of gross receipts (L.F. 165), and it was issued a business license based upon this payment, even though Woodson Terrace has, at all times relevant hereto, had a special business license tax rate for hotels and motels. (L.F. 165; see Tr. 45 and Plaintiff's Exhibit 8).

During its 2005 session, the General Assembly enacted another new statute, codified at §94.270.6, which provides that no fourth class city may increase its hotel license fee by more than five percent (5%) per year, and, further, that the total license tax that could be levied on a hotel could not exceed the greater of either: (1) one-eighth (1/8) of one (1) percent of such hotel's or motel's gross revenue, or (b) the business license tax rate for such hotel on May 1, 2005. (L.F. 164-165).

For the fiscal years beginning July 1, 2005 and July 1, 2006 (fiscal years 2006 and 2007), the City of Woodson Terrace 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, in compliance with the provisions of §94.270.3 R.S.Mo. (L.F. 165). In both such years, SLAH used these forms to submit its application for a hotel business license for the Airport Hilton, together with a check for payment of the amount due calculated at the rate of $13.50 per room. (L.F. 165-166; Tr. 46-48). The total annual hotel license tax paid by SLAH in each of fiscal years ‘06 and ‘07 was $5,305.50. (LF 166; Tr. 46-48; see also, Plaintiff's Exhibits 7 and 6, respectively). It was issued a business license by Woodson Terrace in each of these years. Similarly, the other hotels located in Woodson Terrace paid a hotel license tax calculated at $13.50 per room in each of these years for which they too received business licenses from Woodson Terrace. (See, Plaintiff's Exhibits 3, 4, 5, 22 and 23; L.F. 165; Tr. 49, 49).

On or about May 17, 2007, Getz again sent SLAH a blank business license application form which provided for calculation of the hotel business license tax at the rate of $13.50 per room for fiscal year ‘08. (L.F. 166; Tr. 11, 13-16; see also, Plaintiff's

Exhibits 14, 15 and 18). Again, SLAH filled out and returned this application, together with its payment. (L.F. 60-61, 166).

Then, on or about June 8, 2007, Getz sent another letter to SLAH indicating that the application form sent in May had been sent in error and should be disregarded, and enclosing a new application form setting the rate for a hotel business license at $.85 per day per room occupied by transient guest, in reliance on the provisions of Ordinance 1606. (L.F. 63-65,166; Tr. 17, 19; see also, Plaintiff's Exhibit 16). Getz also returned the check sent by SLAH to Woodson Terrace as and for its fiscal year 2008 hotel license tax. (L.F. 166; Tr. 21, 50). Calculated at $0.85 per occupied room, per night the hotel license tax for SLAH for fiscal year '07 would have been $110,685 and the hotel license tax paid by it for fiscal year '08 would have been $86,867. (Tr. 20, 60, 66 and 68; see, Plaintiff's Exhibit 27; Appendix A27).

In subsequent correspondence dated July 9, 2007, John Gray, the City Attorney for Woodson Terrace, sought to justify Woodson Terrace charging the tax rate of $.85 per day per occupied room by claiming that both §§94.270.3 and 94.270.6 are special laws, in violation of Article III, Section 40, of the Missouri Constitution, in reliance on this Court's decision in ***Jefferson County Fire Protection Districts Association v. Blunt, Nixon, et al.***, 205 S.W.3d 866 (Mo. banc 2006). (L.F. 74, 167; Appendix A24).

On a number of occasions, SLAH offered to pay the undisputed portion of the business license tax to Woodson Terrace, without prejudice to its rights to attempt to collect the additional amount of license tax claimed by it. However, Woodson Terrace rebuffed these offers. (Tr. 50, 57-58).

Immediately thereafter, on August 1, 2007, SLAH filed this lawsuit to obtain the court's ruling on the legality of Woodson Terrace's actions. During the bench trial of the lawsuit, Woodson Terrace repeatedly sought to introduce testimony about the effect of SLAH's lobbying efforts on the passage of §§94.270.3 and .6, to which SLAH objected. (Tr. 95-110). SLAH's initial and running objection that any such testimony was irrelevant, was overruled by the trial court. (Tr. 92-94). SLAH's later objections, however, were sustained on the basis that since Missouri has no legislative history, no one is permitted to testify about the motivations behind particular legislation. (Tr. 96-101).

The trial court ultimately held, in the alternative, that either under §94.270.3 or §94.270.6, Woodson Terrace cannot charge a tax rate in excess of $13.50 per room per year for fiscal years 2008 and 2009. (L.F. 169). It found that the rate that the City was charging on May 1, 2005 was $13.50 per room per night, and that it had not authorized an increase from that rate, that it was prohibited by §94.270.6 from charging a higher rate, without further action of its City Council, and that it could not increase its tax rate by more than 5% per year, to a maximum of 1/8 of 1% of gross revenue. (L.F. 169, 175).

Specifically, on December 30, 2009, the Honorable Larry Kendrick entered the following Order and Judgment:

> 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 the City of 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. 178-179).

Following the denial of Woodson Terrace's post trial motions, it filed its Notice of Appeal to the Supreme Court of Missouri. (L.F. 188). The Missouri Supreme Court ordered the appeal transferred to the Eastern District of the Missouri Court of Appeals. The Eastern District of the Missouri Court of Appeals entered an Opinion on April 13, 2011, affirming the trial court's Judgment. On August 30, 2011, this Court granted Appellant's Application for Transfer.

ARGUMENT

Standard of Review

Respondent SLAH agrees that the appropriate standard of review with regard to Woodson Terrace's argument that SLAH is barred from seeking relief because it failed to comply with §139.031 RSMo., is de novo, in that there are no facts in dispute with regard to this issue, so that the appeal as to this issue presents a pure question of law. ***Ford Motor Co. v. City of Hazelwood***, 155 S.W.3d 795, 798 (Mo. App. 2005). Moreover, as to Points II and III of Appellant's Brief, where as here, a trial court is charged with applying statutory requirements and any such application is a question of law rather than fact, the standard of review is de novo. ***Id.*** Therefore, SLAH disagrees with Woodson Terrace's contention, that the standard of review applicable to its Points II and III, is whether there is "no substantial evidence" to support the Judgment, the Judgment is against the weight of evidence, or it erroneously declares or applies the law.

I. THE TRIAL COURT DID NOT ERR IN FINDING IN FAVOR OF SLAH AND AGAINST WOODSON TERRACE AS TO THE PROPER HOTEL/MOTEL TAX RATE ON SLAH'S CLAIM FOR DECLARATORY JUDGMENT BECAUSE SLAH'S CLAIM FOR DECLARATORY RELIEF WAS PROPER IN THAT SLAH IS NOT REQUIRED TO MAKE A PAYMENT UNDER PROTEST OF THE CONTESTED TAXES PURSUANT TO §139.031 RSMO. IN ORDER TO BRING ITS CLAIMS FOR EQUITABLE RELIEF IN THE TRIAL COURT.

A. Section 139.031 RSMo did not provide SLAH with an exclusive remedy.

Woodson Terrace's argument that SLAH's claims for relief seek equitable remedies and therefore, it must not have an adequate remedy at law, which the statutory payment under protest process supplies, is overly simplistic and not applicable to the facts in the present case. The pertinent portion of the payment under protest statute provides 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) R.S.Mo.[1]

The cases cited by Woodson Terrace holding that if an adequate remedy at law exists, injunction will not lie, are inapposite. For example, in ***State ex rel. Phillips v. Yeaman***, 451 S.W.2d 115 (Mo. Banc 1970), the State Tax Commission had ordered an increase in total valuation of real property in Clinton County, but the County Board of Equalization had not yet ordered increases in the tax on any of Plaintiff's properties at the time suit was filed. The court found that an adequate remedy of law existed because by statute the county board of equalization was required to give notice to the owner if it raised the valuation of any property and hold a session thereafter (as a board of appeals) to hear reasons why such increase was improper. If unsuccessful in a protest there, a taxpayer could appeal to the state tax commission and then on to the circuit court and the appellate courts for review. 451 S.W.2d at 118. The court held that "[a]ll this was available to plaintiffs at the time they filed their injunction suit, had they chosen to avail themselves of their legal remedy, but which they elected not to pursue. It would have provided them with a full, adequate and complete means to contest on the facts and the merits any increase in valuation which proved to be assessed against their property." ***Id.*** at 119. No such administrative remedy was available to SLAH here.

[1] Appellants' recitation of the statute as amended as of August 28, 2010 (see footnotes 7 and 8) are irrelevant in that the statute in effect when SLAH filed its lawsuit is the only relevant provision.

Moreover, the cases relied upon by Woodson Terrace to argue §139.031 RS.Mo. provides the exclusive remedy to challenge the legality of a city's taxing scheme are all distinguishable on their facts. In almost all of the cases cited by Woodson Terrace, the taxpayer was seeking a refund of the taxes already paid by it. For instance, in ***B&D Investment Company, Inc. v. Schneider***, 646 S.W.2d 759 (Mo. Banc 1983), the taxpayer paid real estate taxes for four years, without protest. During those years, the assessor allegedly increased the valuation of the property without notice to the owners. The owners filed a petition to recover the increased amount of taxes resulting from the increased valuation. This Court held that the taxpayer's failure to follow the protest procedure set forth in §139.031 taxes barred the taxpayer from recovering. In explaining the policy reasons behind protest statutes such as §139.031, the Court, quoting from 84 C.J.S. Taxation Â§ 638 (1974), stated that:

> (T)he statutory requirement is intended not only to furnish proof that the payment was involuntarily made, but also to warn the tax collector that the tax is claimed to be illegal; and the filing of a protest has two purposes, to serve notice on the government of the dissatisfaction of the taxpayer, and to define the grounds on which the taxpayer stands.

Id. at 762.

Thus, the policy supporting the payment under protest statute is based in large part upon the fact that when a taxpayer has paid a tax and is seeking a refund, he must give notice at the time of payment that he is protesting the tax.

As noted by Woodson Terrace in its brief, a taxing body should be able to rely on payment of taxes without protest as acceptance by the taxpayer that the amount paid in as taxes was properly assessed, so that the taxing body may make budgeting decisions and expenditures without worrying about whether a previously unasserted claim will later be made against it for the refund of taxes. Here, Woodson Terrace refused SLAH's payment of the maximum amount of taxes it was permitted to collect under §94.270 R.S.Mo., and SLAH did not thereafter make any other payment to Woodson Terrace, and promptly thereafter filed this lawsuit. Thus, Woodson Terrace cannot make any claim that it relied upon a payment of SLAH without protest, as was true in most of the cases cited by it. Nor can Woodson Terrace claim that it otherwise had reason to rely upon payment by SLAH of the full amount of taxes that Woodson Terrace sought to impose.

Similarly, in ***S & P Properties, Inc. v. City of University City***, 178 S.W.3d 579 (Mo. App. E.D. 2005), the taxpayers had paid a portion of the taxes that they owed.[2] In the instant case, SLAH has not made any payment to the taxing authority because such payment under Woodson Terrace's scheme would cause irreparable harm to SLAH in that it is 2000% higher than any past business license tax and thus would deprive SLAH of capital it needs to invest in its hotel to remain competitive. In fact, although SLAH

[2] In ***Lane v. Lensmeyer***, 158 S.W.3d 218, 222 (Mo. banc 2005) (cited in passing by Appellants at p. 17), the taxpayers' petition had requested a partial refund, as such, they were in the process of seeking an adequate remedy at law, thereby defeating their petition for declaratory judgment.

attempted to pay its hotel tax in fiscal year 2008, based on the rate of $13.50 per room per year, by forwarding a payment of $5,305.50, calculated at the rate of $13.50 per room per year, to the Woodson Terrace Collector, Margaret Getz, with the hotel business license tax form that had been initially sent to it by Ms. Getz for FY '08, this payment was returned to SLAH by Woodson Terrace.[3]

Unlike the plaintiffs in ***S & P Properties*** and the other cases cited by Woodson Terrace, in this litigation, SLAH almost immediately sought relief by a writ, or, alternatively injunction, to prohibit Woodson Terrace's patent violation of state statue by its attempt to levy a business license tax on hotels and motels in excess of the amount permitted by statute. It certainly did not sit on its hands or wait for Woodson Terrace to file an enforcement action to challenge the illegal rate that Woodson Terrace claimed was due. Further, although Woodson Terrace has argued that SLAH only had to pay a quarter year's tax to file a protest against the tax rate, under Woodson Terrace's theory, it would have had to pay each subsequent quarter's tax when due, under protest, in order to preserve its rights. There is no reason to believe that a protest suit would have proceeded any further than the instant litigation.

[3] After this lawsuit was filed, SLAH made repeated offers to pay the undisputed portion of the license tax to Woodson Terrace, without prejudice to any right that Woodson Terrace might have to the full amount claimed by it. These offers were rejected by Woodson Terrace. (Tr. 49-51).

Woodson Terrace, after 3 years of imposing a license tax based on §94.270.3,[4] abruptly and unilaterally decided to cease complying with the limitations of this statute, based upon the determination by the late John Gray, its longstanding City Attorney, that §94.270.3 constituted special legislation (L.F. 74; Plaintiff's Exhibit 25; Appendix A24; Tr. 185-187), Woodson Terrace did not first seek a judicial declaration that the statute was an unconstitutional special law and therefore invalid.[5] Thus, Mr. Gray essentially usurped the judicial role for himself. Had the City not simply assumed that §94.270.3 was an unconstitutional law, and assessed a tax based on that assumption, and instead sought a judicial declaration to that effect before imposing a hotel license tax rate greater than permitted by that statute, SLAH could have participated in that litigation and would not have had to file this suit. These circumstances, together with the increase in the tax rate from $5305.50 to more than $110,000.00 (Tr. 46-48, 59-60, 66), justify SLAH's decision to seek extraordinary or injunctive relief. There is no reported case in Missouri that would

[4] Woodson Terrace never had an ordinance providing for a tax rate of $13.50 per room per year (Ordinance 543, the ordinance establishing the hotel tax rate in Woodson Terrace prior to passage of Ordinance 1606, provided for a rate of $10.00 per room per year) (See, Plaintiff's Exhibit 1; Appendix A2). The only authority for such a tax rate was §94.270.3.

[5] Mr. Gray made this decision based on ***Jefferson County Fire Protection Dists. Ass'n. v. Blunt, Nixon, et al.***, 205 S.W.2d 866 (Mo. Banc 2006), despite the fact that the Supreme Court therein specifically stated that the reasoning of that decision was not to be applied to statutes enacted prior to the date of that decision (see Point II of this brief, *infr*a).

require a taxpayer to pay, under protest, a tax assessed in excess of the taxing body's statutory authority in order to challenge the taxing body's abuse of its authority.

Under the position advanced by Woodson Terrace, a city could impose a tax rate well above its authorized rate so, for instance, the total amount of the tax was $1,000,000.00, where the tax at the authorized rate would only be $1,000.00, yet the taxpayer could not challenge the rate without first paying the tax. If the taxpayer could not afford to pay the tax, it could never challenge the rate. While the circumstances here are not quite as egregious as the example, the tax sought be Woodson Terrace tremendously exceeds the rate authorized by statute. It is for just such extreme circumstances that an equitable remedy exists.

Moreover, the Court in ***John Calvin Manor, Inc. v. Aylward***, 517 S.W.2d 59, 63 (Mo.1974) held that the protest scheme set forth in § 139.031.1 is not the exclusive remedy available to a taxpayer who desires to contest the legality of a tax assessment. Specifically, this Court there held that a taxpayer could challenge an increased assessed valuation placed upon his property by suit for injunction. This Court held that the "traditional action in equity to enjoin collection of the tax has not been abrogated by § 139.031". ***Id.*** at 64 (emphasis added). The Court further noted that that case clearly demonstrated the need for the retention of equitable jurisdiction and the availability of injunctive relief, because there "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." There the assessed valuation had gone up 450 times the previous assessed valuation. Similarly, here, SLAH had no administrative forum

available to it to challenge the amount of the license tax assessed by Woodson Terrace, which would increase its tax burden by 2000%.

Ingels v. Noel, 804 S.W.2d 808, 810 (Mo. App. W.D. 1991) is similar. There, a dispute existed over the assessed value of real estate in 1988. As a result, Harold D. Ingels delivered to the Nodaway County collector, Mary Noel, and to the Polk Township collector, respectively, checks for payment of the 1988 real estate taxes in amounts based upon the 1987 assessed valuation and taxes. Also delivered simultaneously therewith were letters of protest. At that time, Noel, indicated an uncertainty about accepting payment in an amount less than the tax bill and the checks were eventually returned through the mail to the Ingels' attorney.

The Ingels then filed an injunctive action in the trial court. The trial court ruled in their favor, declaring the increased real estate tax assessment for 1988, and the tax computed thereon, to be void. The court also enjoined the collector from collecting, or attempting to collect, the taxes resulting from that increase and ordered her to correct her tax books to so reflect. The county appealed, arguing that the Ingels were bound by § 139.031 as their exclusive remedy for contesting the assessed valuation. The Court held that, "Taxpayers are not limited to the procedures of that statute. Equitable relief is available in certain cases." ***Id.***, at 809-810, *citing*, ***John Calvin Manor, Inc.,*** 517 S.W.2d 59, 63. The court found that therefore, "two avenues of relief were available to the Ingels. While it may have seemed in the first instance that the respondents [Ingels] chose the statutory method, technically, they failed to consummate their protest in accordance with the statute. Instead, these taxpayers elected the equitable cause of action. The court

correctly assumed jurisdiction of this equity action." The court held that "[s]ince the taxes paid, here, were rejected, the taxing authority had not been paid and injunctive relief is an appropriate remedy." ***Ingels*** at 810.

Similarly, in the instant case, Woodson Terrace rejected the payment by SLAH of the amount SLAH calculated that it owed under the applicable statute governing business license taxes for hotels in Woodson Terrace. Since, as occurred in the ***Ingels*** case, "the taxes paid . . . were rejected, the taxing authority has not been paid and injunctive relief is an appropriate remedy." ***Id.*** at 810.[6] Moreover, as the court reasoned in ***John Calvin Manor***, the legislature did not intend 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 to a taxpayer." 517 S.W.2d at 63. In other words, the courts in both ***John Calvin Manor*** and ***Ingels*** found that §139.031.1 only applies where a taxpayer seeks a refund of taxes already paid by it.

The retention of equitable remedies was and is necessary to combat a patently unconstitutional or illegal increase in a municipal tax, as is evidenced in this case. Woodson Terrace sought to impose a 2000% increase in the business license tax applicable to SLAH. In Fiscal Year 2007, SLAH paid a hotel business license tax to Woodson

[6] The Ingels' lawsuit was not rejected, despite the fact that they had not paid, or attempted to pay, taxes calculated based upon the 1988 assessment. Similarly, the fact that SLAH did not pay the full amount Woodson Terrace claimed as due does not foreclose it from extraordinary or injunctive relief.

Terrace in the amount of $5305.50, calculated at the rate of $13.50 per room per year (LF 166; Tr. 46-48; see also, Plaintiff's Exhibits 7 and 6, respectively). Calculated at the rate of $.85 occupied room per night, SLAH would have paid taxes in the amount of $110,685 in FY '07 and $86,867 in FY '08 for its hotel business license. (Tr. 20, 60, 66 and 68; see, Plaintiff's Exhibit 27; Appendix A27). To require a taxpayer to pay such a huge and illegal increase first, and then to file and pursue a protest to recover the illegally assessed tax, would be inequitable, in that taking such a large amount of capital out of a business is likely to have severe consequences.[7]

Furthermore, after noting that SLAH did not contend that Woodson Terrace's hotel license tax rate was confiscatory (Appellants' Brief, p. 16), Appellants nevertheless argue that the rate was not confiscatory. Aside from the gratuitous nature of this argument, there are several other problems with Appellants' argument. First, Appellants state 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)." (Id.) Not only does the transcript not indicate that this was the testimony, Appellants cannot speculate as to what was in the minds of other "taxpayers" when they pay taxes. John Gray, then Woodson Terrace's City Attorney, testified that the then-current

[7] Woodson Terrace argues that accrual of interest as provided by §139.031.4 would be adequate to compensate SLAH in the event it paid the license tax under protest and the protest was eventually upheld. However, payment of interest is not a substitute for a business having control of and being able to use its capital as it sees fit.

hotel license tax ordinance had "reduced the tax rate from $0.85 per occupied room per night to $0.32 per occupied room per night" (Tr. 169) and that "Motel 6 and Quality Inn are paying under the current taxing scheme." (Tr. 170). Hence, Appellants' factual statements in their brief are belied by the trial transcript. Moreover, such payments of any tax rate does not evidence that a particular tax rate is reasonable and not confiscatory. Appellants cannot opine as to what these other taxpayers "believe". (Further, pursuant to SLAH's Exhibit 23 at trial, Quality Inn's tax rate in 2008 was $13.50 and Days Inn's rate was $0.85 per occupied unit per day. (See, Inventory of Respondent's Exhibits, ED94904).)

As recognized by the Courts in ***John Calvin Manor*** and ***Ingels***, §139.031 does not abrogate the traditional equitable remedies available to challenge an illegal tax. The Courts in those cases held that the failure to give proper notice of a change in assessed valuation, as required under statute, made the taxes computed thereon void. Similarly, here, Woodson Terrace's imposition of a tax rate above what it was authorized to collect by statute made its computation of tax owed based on that rate void. Under the circumstances, in this case, an extraordinary or equitable remedy must be available to the taxpayer to prevent it from suffering irreparable harm as the result of being denied use of its capital pending resolution of a protest.

Woodson Terrace attempts to dismiss the holdings in ***John Calvin Manor*** and ***Ingels*** by saying that they were distinguished by ***General Motors v. City of Kansas City***, 895 S.W.2d 59 (Mo. App. W.D. 1995). While Woodson Terrace argues that ***General Motors*** stands for the proposition that ***John Calvin Manor*** and ***Ingels*** are "not applicable to a license tax protest," it provides no supporting authority for its statement. (Appellants'

Brief, pp. 22-23). General Motors had paid its occupation tax for three years without filing a protest at the time the tax was paid. It then filed suit seeking a refund. It was the failure to comply with §139.031 or to otherwise notify the City that it disputed the occupation tax, which the Court found foreclosed General Motors from equitable relief. Section 139.031 is not even applicable here because SLAH does not seek the refund of a previously-made payment. Rather, SLAH seeks a declaration that the tax is illegal as imposed.

As the Court stated in ***General Motors***, "The Supreme Court has consistently held that taxes, once paid, can only be recovered through proper statutory proceedings, and that the statutes must be adhered to. ***Ackerman Buick, Inc. v. St. Louis County***, 771 S.W.2d 343, 346 (Mo. banc 1989) (additional citations omitted)." ***General Motors*** at 62. However, "Defendant's contention that all equitable remedies were abrogated by the enactment of § 139.031 is contrary to ***John Calvin Manor***." ***Crest Communications v. Kuehle***, 754 S.W.2d 563, 566 (Mo. banc 1988).

Metts v. City of Pine Lawn, 84 S.W.3d 106 (Mo. App. E.D. 2002), also cited by Woodson Terrace, is similarly not applicable. Again, the issue there involved the "consequences of the [taxpayers'] failure to timely pursue the remedies available to them." 84 S.W.3d 106, 109. As in the other cases cited by Woodson Terrace, the taxes had been paid and the litigants were seeking a refund. The court held that, "Once paid, taxes, even taxes collected under an unconstitutional statute, can only be recovered through proper statutory proceedings." ***Id.*** (emphasis added). Here, the offered payment of taxes was rejected.

The issues in the ***Ford Motor Co. v. City of Hazelwood***, 155 S.W.3d 795 (Mo. App. E.D. 2005) case also revolved around the timeliness of both the payment and the protest letter, not the legality of the tax. The court found that a protest letter filed following the date of payment of taxes was not proper. ***Id.*** at 799. The court also explained that its holding was based upon the purposes of the payment under protest statute. Since Ford did not file a protest when it paid the taxes, Hazelwood was unaware that the funds were disputed and did not impound any portion of the payment. Moreover, Ford, "failed to indicate how it was precluded from making a protest at the time it paid its estimated tax." ***Id.*** 802. Here, SLAH immediately filed suit against Woodson Terrace after it learned the City's position, as stated in the letter sent by its city attorney (L.F. 74; Plaintiff's Exhibit 25; Appendix A24), for imposition of the substantially increased license tax. Hence, Woodson Terrace was put on notice that SLAH was "protesting" the taxes almost immediately and, since Woodson Terrace returned SLAH's payment, no payment was made pursuant to the statute. As such, § 139.031 does not preclude the relief sought by SLAH in this case.

In an effort to divert the Court's attention from the dramatic increase in taxes resulting from its unilateral repudiation of the statutory limit on its authority to impose a hotel license tax, Woodson Terrace essentially argues that to permit SLAH to pursue extraordinary or equitable relief in this case would open the floodgates to equitable litigation by taxpayers who would find such litigation preferable to the statutory method of protest provided by §139.031. However, the facts of this case appear to be unique (counsel was unable to find any other reported cases in Missouri of a taxing jurisdiction seeking to

impose a tax rate above that which it is authorized to impose by law). Further, unlike a taxpayer challenging a real estate assessment, the law provides no administrative remedy to SLAH by which it could challenge the excessive business license tax rate the City was attempting to charge.

SLAH does not dispute that in most cases a taxpayer will be required to follow the statutory remedy. However, this Court has stated that in extraordinary cases a taxpayer is entitled to pursue equitable remedies, such as where a taxpayer has not been given proper notice of an increased assessment and has therefore been denied an opportunity to pursue administrative remedies. Similarly where, as here, the taxing body is patently exceeding the statutory authority granted it by seeking to impose a tax grossly in excess of the amount it is statutorily authorized to charge, and has rejected a tax payment in the statutorily authorized amount, resort to an extraordinary or injunctive remedy is appropriate and should be available. The facts here, as well as existing case law, clearly support the trial court's determination that SLAH was entitled to utilize the extraordinary and equitable remedies pursued by it, and thus this Court should affirm the judgment entered by the trial court.

B. <u>The trial court had subject matter jurisdiction over the case</u>.

Woodson Terrace also argues that the trial court was without subject-matter jurisdiction. However, following the Supreme Court's decisions in ***J.C.W. ex rel. Webb v. Wyciskalla***, 275 S.W.3d 249 (Mo. banc 2009) and ***McCracken v. Wal-Mart Stores East, LP***, 298 S.W.3d 473 (Mo. banc 2009), this argument is clearly untenable. In those cases, the Court noted that, "Missouri's constitution is unequivocal in stating that circuit courts

'have original jurisdiction over all cases and matters, civil and criminal.' Mo. Const. Article V, Section 14." ***McCracken*** at 476-77. As noted in ***J.C.W.*** at 253, this includes the power to issue original writs. This Court there concluded that because the case before it was "a civil case...the circuit court has subject matter jurisdiction." Similarly, here, the trial court had subject matter jurisdiction of SLAH's petition seeking a writ and/or injunctive relief.

II. THE TRIAL COURT DID NOT ERR 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 SECTIONS 94.270.3 AND 94.270.6 RSMO. BECAUSE NEITHER SUBSECTION IS A PROHIBITED "SPECIAL LAW" IN THAT (A) SECTION 94.270.3 CONTAINS AN OPEN-ENDED POPULATION CLASSIFICATION AND IS PRESUMPTIVELY CONSTITUTIONAL AND THE BURDEN RESTS ON WOODSON TERRACE TO PROVE IT IS UNCONSTITUTIONAL, BUT WOODSON TERRACE FAILED TO SHOW THAT THE STATUTORY CLASSIFICATION IS ARBITRARY AND WITHOUT A RATIONAL RELATIONSHIP TO A LEGISLATIVE PURPOSE AND (B) SECTION 94.270.6 IS, ON ITS FACE, APPLICABLE TO ALL FOURTH CLASS CITIES. FURTHER, SECTION 94.270 DOES NOT VIOLATE ARTICLE VI, SECTION 15, OF THE MISSOURI CONSTITUTION BECAUSE THE LEGISLATURE MAY PASS LAWS APPLICABLE TO LESS THAN ALL CITIES IN THE SAME CLASSIFICATION.

A. Section 94.270.3 Is a Constitutional, General Law.

"Statutes are presumed to be constitutional. Accordingly, the burden to prove a statute unconstitutional rests upon the party bringing the challenge. This Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." ***Suffian v.***

Usher, 19 S.W.3d 130, 134 (Mo. banc 2000). This Court will "resolve all doubt in favor of the act's validity" and may "make every reasonable intendment to sustain the constitutionality of the statute." ***Westin Crown Plaza Hotel v. King***, 664 S.W.2d 2, 5 (Mo. banc 1984). "We construe the whole statute and we do so in light of a strong presumption of a statute's validity." ***State v. Shaw***, 847 S.W.2d 768, 776 (Mo. banc 1993) (citations omitted).

However, cities may not enact or enforce ordinances that conflict with state statutes or regulations. ***State of Missouri ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of the City of St. Ann***, 64 S.W.3d 310, 313 (Mo. 2002). "The power to tax is inherent in the state and any attempt by a municipality to impose a tax...not authorized by the general assembly by statute is invalid.... A city has no inherent power to tax." ***Whipple v. City of Kansas City***, 779 S.W.2d 610, 613 (Mo. App. W.D. 1989).[7] As a fourth class city, Woodson Terrace has only such powers to exact an occupational license tax as granted it by §94.270. **See *City of Odessa v. Borgic***, 456 S.W.2d 611, 613 (Mo. App. 1970).

As the party raising the challenge to §§94.270.3 and 94.270.6, Woodson Terrace bore the burden of demonstrating that the statute was unconstitutional. ***C.C. Dillon Co. v. City of Eureka,*** 12 S.W.3d 322, 327 (Mo. banc 2000). The City did not do so and,

[7] For example,§80.090 R.S.Mo. granted villages authority to license, tax, and regulate certain businesses, but hotels, motels, and tourist courts were not mentioned; accordingly the court held that the village did not have power to impose a license tax on hotels, motels, and tourist courts. ***Krug v. Village of Mary Ridge*** (App. 1954) 271 S.W.2d 867.

accordingly, the State statute governs the business license tax on hotels and motels, including Woodson Terrace.

For three years after the passage of §94.270.3, Woodson Terrace complied with its provisions, charging a hotel license tax at the maximum rate permitted thereunder, $13.50 per unit per year.[8] Woodson Terrace never attempted to impose the rate of $.85 per occupied room per night authorized by Ordinance 1606 until, in or about May, 2007, the City Collector sent a letter to SLAH and other hotels stating that it had sent a tax form seeking a rate of $13.50 per room per year to the hotels by error, and enclosing a hotel license tax form which stated the rate at $.85 per room per night. Woodson Terrace later explained that it was relying 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) (hereinafter "***Jefferson County***"), and that under the holding in that case it could ignore the limitation established by §94.270.3, claiming that it violates the prohibition against special legislation under Article III, Section 40(30) of the Missouri Constitution (see, the letter from the late John Gray, Esq., then the City Attorney for Woodson Terrace, L.F. 74; Appendix A24).

Prior to the decision in ***Jefferson County***, the Supreme Court had held on numerous occasions that a statute containing an open-ended population classification was presumed

[8] Woodson Terrace charged hotels $13.50 per room per night for fiscal years 2005, 2006, and 2007, even though §94.270.3 did not become effective until August 28, 2004, which was after the start of FY 2005.

to be a general law, and therefore constitutional. **See, e.g., *Treadway v. State***, 988 S.W.2d 508, 510-11 (Mo. banc 1999).

> The issue of whether a statute is, on its face, a special law or local law depends on whether the classification is open-ended. ***Tillis v. City of Branson***, 945 S.W.2d 447, 449 (Mo. banc 1997). Classifications based upon factors, such as population, that are subject to change may be considered open-ended. ***Id.*** 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.***

Treadway, at 510.

In ***School District of Riverview Gardens, et al., v. St. Louis County***, 816 S.W.2d 219, 222 (Mo. banc 1991), the Supreme Court noted that "statutes establishing classifications based on population are general laws, even when it appears with reasonable certainty that no other political subdivision will come within that population classification during the effective life of the law." This language was cited with approval by ***Treadway*** at 511. **See also, *State ex rel. City of Blue Springs v. Rice***, 853 S.W.2d 918, 920-21 (Mo. banc 1993) ("classifications are open-ended when it is possible that a political subdivision's status under the classification could change."). Thus, under the Supreme Court's jurisprudence prior to ***Jefferson County***, even if Woodson Terrace was the only municipality to which §94.270.3 applied at the time it was enacted (and even if it was

unlikely that any other city would ever be subject to its terms), it would still be presumed to be a general law because the statute contained a population-based classification.

Further, the Supreme Court recognized that the party challenging a statute as violating the prohibition against special laws has the burden of proving that the classification chosen by the General Assembly is unreasonable. **See *State ex rel. Pub. Defender Comm'n v. County Court of Greene County***, 667 S.W.2d 409, (Mo. 1984).[9] However, the Supreme Court propounded a new test in ***Jefferson County*** to be applied to determine whether a statute's use of a population classification makes it an unconstitutional special law. The court held that it would apply a multi-faceted test, stating:

> 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

[9] In fact, Woodson Terrace's argument attempts to throw the burden on SLAH to prove that the statute is reasonable. For instance, at p. 34 of Appellants' Substitute Brief, Woodson Terrace states that Guy Doza, an employee of LHM, which operates the St. Louis Airport Hilton Hotel (SLAH owns the property), was not aware of any differences between the revenue sources and levels of service provided by Woodson Terrace and several other fourth class cities, as if it was SLAH's burden to prove a rational basis for the statute, instead of Woodson Terrace's burden to prove that there was no rational basis for the classification made by the statute, which Woodson Terrace failed to prove at trial.

> 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. Because 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 870-71 (emphasis added).

The Supreme Court reiterated in ***Jackson County v. State Missouri***, 207 S.W.3d 608 (Mo. banc 2006), that the test enunciated in ***Jefferson County*** is not to be applied retrospectively to determine if a law passed prior to the date of the decision therein is a special law. It repeated that: "Classifications based on population are open-ended and, therefore, they are generally presumed to be constitutional." ***Id.*** at 611. It then noted that the Court in ***Jefferson County*** had recognized an exception to that general rule where a party challenging a statute was able to prove the three elements set forth in the test enunciated by this Court in that case. Finally, it stated that, "As discussed in ***Jefferson County***, that opinion's exception applies only to the statute at issue in that opinion and all statutes passed after the date of that opinion." ***Jackson County,*** 207 S.W.3d at 612 (emphasis added).

The date of the ***Jefferson County*** opinion was November 21, 2006. In the instant case, §94.270.3 was passed by the General Assembly during the 2004 legislative session, and §94.270.6 was passed by the General Assembly during the 2005 legislative session, both prior to November 21, 2006, so that the reasoning of ***Jefferson County*** is not applicable.

Woodson Terrace argues, at page 39, Footnote 9, of their brief, that the reasoning of ***Jefferson County*** should be applied to determine whether §§ 94.270.3 and 94.270.6 are special laws, because § 94.270.6 was contained in the same bill as §321.222 RSMo.,[10] the statute at issue in ***Jefferson County***. Not only is this contrary to the explicit direction given by the Supreme Court that its decision only be applied prospectively, but Woodson Terrace cites no case law in support of its position. Further, there is no logical reason to only apply the reasoning of ***Jefferson County*** to S.B. 210, but not to any other legislation passed in 2005. Woodson Terrace is simply attempting to obfuscate the issues by this argument. In that the test enunciated in ***Jefferson County*** is not applicable to the statutes at issue in the instant appeal, the remainder of Woodson Terrace's argument relying on it, must also be ignored.

Woodson Terrace's attempts at obfuscation continue when it launches into an argument that the Bill Summary of Senate Bill 758 and the testimony at trial relating to lobbying efforts evidence that this statute was special legislation. Bill summaries and bill titles are not actual parts of the legislation as passed. They have no binding legal authority.

[10] Both §94.270.6 and 321.322 were adopted as part of S.B. 210, 2005.

Further, as to the efforts of lobbyists, the law is clear that once a law has been adopted, and its provisions are express and unambiguous, courts are not at liberty to construe the language of an act or the words embodied therein in accordance with the intentions of its supporters or opponents. The function of the courts is to enforce the law according to its terms. ***Missourians for Honest Elections v. Missouri Elections Commission,*** 536 S.W.2d 766, 775 (Mo. App. 1976). Thus, even if such were in this record, a legislator's or lobbyist's statements and representations made before a vote are not conclusive upon the courts. ***Id.*** The identity of the persons or entities supporting a piece of legislation is therefore irrelevant, as is their interpretation of it.

Accordingly, the previous test utilized in Missouri must answer the question whether §94.270.3 is special legislation.

> A law based on open-ended characteristics is not facially special and is presumed constitutional. ***O'Reilly [v. City of Hazelwood]***, 850 S.W.2d [96] at 99 [(Mo. banc. 1993)]. Population classifications are open-ended in that others may fall into the classification. ***State ex rel. City of Blue Springs v. Rice***, 853 S.W.2d 918, 921 (Mo. banc 1993). Such laws are not special if the classification is made on a reasonable basis. ***Blave v. Smith & Entzeroth, Inc.***, 821 S.W.2d 822, 831 (Mo. banc 1991). The test for whether a statute with an open-ended classification is special legislation under Article III, Section 40, of the Missouri Constitution is similar to the rational basis test used in equal protection analyses. ***Id.*** at 832. The burden is on the party

> challenging the constitutionality of the statute to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose. ***Treadway v. State***, 988 S.W.2d 508, 511 (Mo. banc 1999).

Jefferson County Fire Protection Dist., 205 S.W.3d at 870 (emphasis added).

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. Moreover, even assuming that Woodson Terrace had met such proof as to 94.270.3, 94.270.6 is not special legislation. That section plainly applies to all fourth class cities, is open-ended and is therefore a general law (see section II.C. of this brief).

B. Section 94.270.6(2) Does Not Operate to Create a Special Law in §94.270.3.

Woodson Terrace argues that due to the operation of §94.270.6(2), the population classification in §94.270.3 is not open-ended. Yet, the cases cited by Woodson Terrace support the Judgment entered by the trial court in favor of SLAH. For instance, in ***State ex rel. City of v. Rice***, 853 S.W.2d 918 (Mo., 1993), the statute at issue applied to "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 the city with a population of more than three thousand." The statute effectively only applied to one

city at the time it was enacted. The court there stated that "[t]he 1980 census is an unchanging historical fact – making it completely impossible that the status of a political subdivision under this classification could change. Therefore, it is an immutable characteristic similar to geography or constitutional status." ***Id.*** at 921. The court found that the clause covering Blue Springs differs from other population-based laws because it relies on population at a specific time before the enactment of the clause and held that it was an unconstitutional special law. ***Id.***

The instant statute, §94.270.3, is not similar. The population classification in that statute was not limited to only such city or cities as met that classification as of a particular census. At the time that §94.270.3 was passed, it was conceivable that other cities could, in the future, potentially fall within the population classification, making it open-ended and presumptively constitutional.

"It is permissible to classify counties or other political subdivisions according to population, provided other counties or subdivisions may come within the classification in the future, even though the act may apply to only one county, city, or other political subdivision only, at the time of enactment." ***Collector of Revenue of the City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048***, 517 S.W.2d 49, 53 (Mo. 1974). The statute in question there was restricted to cities not within a county with a population in excess of 500,000 inhabitants who elected to be

subject to the law. This Court noted that "the likelihood or unlikelihood of other cities becoming subject to the legislation is not significant, so long as the classification is reasonable and the legislation will admit any municipality attaining the necessary status." ***Id.*** at 54. The Court decided that the population-based restriction was open-ended, presumed to be constitutional and subsequently held that the statute was constitutional as there was a reasonable basis for the exclusion. ***Id.***

Woodson Terrace does not cite any case law that would support its claim that legislation passed subsequent to passage of a presumptively general statute could somehow make it an unconstitutional special law. The decision in ***Walters v. City of St. Louis***, 259 S.W.2d 377 (Mo. 1953) is to the opposite effect. In that case, the statute only applied to charter cities with a population greater than 700,000 according to the most recent federal decennial census. The statute included language that it would expire two years after it became effective. This Court discussed the fact that it was practically certain that no city other than the City of St. Louis would attain the requisite population prior to the expiration of the law was not an issue because the statute did not exclude any city that may come within the classification. 259 S.W.2d at 383. The Court held that the statute was a general law that was constitutional as the classification was reasonably related to the legislative purpose.

Similarly here, §94.270.3 did not exclude any political subdivision that may attain the requisite population classification from being subject to the cap set forth in the statute. That a new statute was passed later which may prevent §94.270.3 from acting as a limit on the hotel license tax rate of any fourth class city other than Woodson Terrace in the future does not make §94.270.3 a special law.

In addition, in making this argument, Woodson Terrace asserts that it is forever limited to a rate of $13.50 per room per year by §94.270.3 (Appellant's Brief, 41). However, this is patently untrue. Under §94.270.6, Woodson Terrace may raise its rate by 5% a year up to a maximum of 1/8 of 1% (which is substantially more than the amount raised at a rate of $13.50 per room per year, see Exhibit 27; Appendix A27).

C. The Trial Court Properly Found that §94.270.6 Limited the Tax Rate that Woodson Terrace Could Charge to $13.50 per Room per Year for Fiscal Years 2008 and 2009.

The trial court correctly held that:

> Because the City had charged a tax rate of $13.50 per room for fiscal year 2005, the last year in which it collected a hotel business license tax prior to passage of §94.270.6, the City of Woodson Terrace cannot charge a license rate of more than $13.50, without further action by the City Council, and it cannot increase the tax rate by more than 5%

per year, to a maximum of one-eighth of one-percent of a hotel's gross income.

Conclusions of Law, ¶ 22. This Conclusion was based upon ¶ 18 of the trial court's Findings of Fact, in which the court found "that the business license tax rate for hotels and motels which was in effect in the City of Woodson Terrace on May 1, 2005 was $13.50 per unit per year." Essentially, the trial court determined that, because the rate charged by the City for FY 2005 was $13.50 per room per year, this was the amount which the City was authorized to charge under §94.270.6(2).

In reaching this conclusion, the court correctly held that the maximum rate that a City could charge for a hotel business license was the rate in effect (i.e., the rate actually charged by the City) on May 1, 2005, not the maximum authorized rate.[11] Thus, even assuming *arguendo* that §94.270.3 is unconstitutional special legislation, Woodson Terrace is still prohibited by §94.270.6 from charging more than $13.50 per unit per year without further action of its City Council, which may increase the rate to up to 1/8 of 1% of gross revenues, with the amount of tax not to increase by more than 5% per year.

[11] In different contexts, Missouri courts have recognized the difference between the authorized rate of taxation and the effective tax rate. **See, e.g. *State ex rel. Zoological Park Subdistrict of City and County of St. Louis***, 521 S.W.2d 369, 372 (Mo. 1975); and ***Green v. Lebanon R-III School Dist.***, 13 S.W.3d 278, 285-86 (Mo. banc 2000).

Further, §94.270.6 on its face applies to all fourth class cities, so that it does not constitute special legislation. ***State ex rel. Crow v. Fleming***, 44 S.W. 758, 760 (Mo. 1898).

Finally, Woodson Terrace argues at pages 40-42 of its Brief that by operation of §94.270.3, Woodson Terrace will "forever" be limited to the tax rate in effect as of May 1, 2005, and that it 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." Yet, the **sampling** admitted at trial by Exhibit 27 (Tr. 68; Appendix A27), illustrates that for the fiscal years 2007 and 2008, the greater of the calculated tax rate between "(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," is the former amount. In other words, in both fiscal years, the greater amount is the one-eighth of one percent of such hotels' gross revenue and so Woodson Terrace is not forever limited to only the rate generated by calculating the tax rate under the May 1, 2005 levy. In those two years alone, it is another, greater amount. Therefore, because the statute is presumed constitutional, and as 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, and because §94.270.6 is, on its face, a law generally applicable to all fourth class cities, Woodson Terrace must comply with the provisions of the statute which prohibit it from charging SLAH a business license tax in excess of $13.50 per room for the fiscal year beginning July 1, 2007.

D. Section 94.270 Does Not Violate Article VI, Section 15.

Woodson Terrace further argues in part D of Point II that§94.270 violates Article VI, Section 15, by subdividing fourth class cities into a number of different subclasses with regard to their authority to levy hotel license taxes. Moreover, Woodson Terrace's attack is now on the entirety of §94.270, not simply §§94.270.3 and 94.270.6. Such argument has not been raised before by Appellants and, therefore, has been waived. Nevertheless, SLAH will briefly address the argument.

Sections 94.270.3 and 94.270.6 do not violate Article VI, Section 15, in that the legislature is not prohibited from passing laws applicable to less than all cities within the same classification. ***Leoffler v. Kansas City***, 485 S.W.2d 633, 634 (Mo. App.1972) holds that statutes applicable to first class cities do not apply to first class charter cities. In ***State ex rel. City of Ellisville v. St. Louis County Bd. of Election Com'rs***, 877 S.W.2d 620 (Mo. 1994), the Court distinguished between legislative authority regarding cities and counties, stating as follows:

> 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*** 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.

Id. at 622-23.[12]

These two decisions make clear that Article VI, Section 15, of the Constitution does not require that a law applicable to a particular city must also be applicable to all other cities of the same classification. In fact, taking Woodson Terrace's argument to its logical conclusion, the legislature would be prohibited from authorizing a city or cities of a particular classification to charge a particular tax unless all cities of that class are permitted to charge the same rate (e.g., the tax authorized tax rate for all fourth class cities would have to be the same). This has never been the law in this state, and Woodson Terrace fails to cite any case law in support of this argument Thus, Woodson Terrace's claim that §§94.270.3 and 94.270.6, (and here the entirety of §94.270, as if it had been raised at trial) violate Article VI, Section 15, of the Missouri Constitution was properly denied at trial.

Even presuming the legislature was required to make all laws passed by it applicable to all cities of the same classification, §94.270.6 is applicable to all fourth-class cities, so that it would not violate such a requirement.

The trial court's Order and Judgment was proper and must be affirmed.

---

[12] ***State ex rel. City of Ellisville v. St. Louis County Bd. of Election Com'rs*** was subsequently overturned by a constitutional amendment. That in no way, however, affects the Court's analysis regarding the legislature's ability to distinguish between cities within the same classification.

III. THE TRIAL COURT DID NOT ERR IN FINDING THAT WOODSON TERRACE ORDINANCE 1719 WAS NULL AND VOID BY OPERATION OF SECTION 94.270.6 RSMO. BECAUSE SUCH SECTION IS CONSTITUTIONAL IN THAT IT DOES NOT VIOLATE THE UNIFORMITY CLAUSE OF THE MISSOURI CONSTITUTION BECAUSE THE LEGISLATURE IS NOT PROHIBITED FROM PASSING LAWS APPLICABLE TO LESS THAN ALL CITIES WITHIN THE SAME CLASSIFICATION. APPELLANT'S ADDITIONAL ARGUMENT THAT WOODSON TERRACE ORDINANCE 1719 DID NOT VIOLATE 94.270.6 RSMO. IN THAT IT REDUCED THE TAX RATE WAS NOT RAISED AT THE TRIAL COURT AND HAS, THEREFORE, BEEN WAIVED, AND BECAUSE THE TAX RATE AUTHORIZED BY ORDINANCE 1719 EXCEEDS THE MAXIMUM OF 1/8 OF 1% AUTHORIZED UNDER SECTION 94.270.6.

Woodson Terrace's argument that §94.270 violates the uniformity requirement of Article VI, Section 15, of the Missouri Constitution has been dealt with in the immediately preceding section (D) of Point II and will not be repeated here.

Furthermore, Woodson Terrace's additional citation to ***Riden v. City of Rolla***, 348 S.W.2d 946 (Mo. 1961) and ***Clark v. City of Overland Park***, 226 Kan. 602 (Ks. 1979) lend it no support for both cases are inapposite. ***Riden*** addressed the issue of whether Article VI, Section 15, was violated by permitting third class cities to tax occupations which fourth class cities were not permitted to tax. In other words, the issue was the alleged

discrimination between two classes of cities, not among cities of the same class. Thus, any comment by the Court concerning whether all cities of the same class must be granted the same powers is dicta. Further, the Court there specifically noted that, "Moreover, in considering a somewhat similar problem we have heretofore stated that 'legislation for cities according to class or population has long been recognized as reasonable classification.' ***Randolph v. City of Springfield***, 257 S.W. 449."[13]

Clark is a Kansas case and has no precedential authority, arising under provisions of the Kansas Constitution which do not have counterpart in the Missouri Constitution. Kansas, unlike Missouri, is a home rule state. Municipalities have authority to levy a tax unless that power is limited or prohibited by legislation "applicable uniformly to all cities of the same class." ***Id.*** at 609-10. In ***Clark***, the Kansas Supreme Court found that the legislature had not classified cities, so that it could not enact a law that distinguished between cities. In Missouri municipalities only have such taxing authority as granted by the legislature. ***Whipple v. City of Kansas City, supra***, 779 S.W.2d 613. Given the differences in state constitutional provisions between Missouri and Kansas, ***Clark*** is of no help in interpreting Article VI, Section 15.

---

[13] If Woodson Terrace's argument concerning Article VI, Section 15, was correct, then there would be no need for the multitude of court decisions addressing the issue of when statutes addressing less than all of the cities of a class, and distinguishing them by population, is special legislation in violation of Article III, Section 30, because all such legislation would be unconstitutional under Article VI, Section 15.

Finally, in subpart C of Woodson Terrace's Point III, it argues that because §94.270.3 is unconstitutional and the $13.50 room tax was never properly assessed (despite the fact that Woodson Terrace admittedly submitted applications and received payments from hotels at that rate), then their tax rate of $0.32 under Ordinance 1719 satisfies the requirements set forth in §94.270.6 (assuming it is deemed constitutional) by reducing the rate. Not only does this argument require Woodson Terrace to completely ignore the fact that it actually assessed the $13.50 rate for at least three years (fiscal years 2005, 2006 and 2007 and then "inadvertently" for 2008), Woodson Terrace never raised this argument at trial.

Moreover, it is a factually incorrect statement. Using fiscal year 2008 as an example as outlined in Exhibit 27 admitted into evidence at page 68 of the trial transcript, a tax rate of $0.32 in fiscal year 2008 would have totaled a fee of $32,703. (Tr. 68, Exhibit 27; Appendix A27). This amount is a 673.9% increase over the previously imposed tax rate of $13.50. Therefore, it would violate §94.270.6 because although a city may increase its tax rate by five percent per year, the total tax levied cannot exceed the greater of either (1) one-eighth of one percent of the hotels' gross revenue (i.e., $11,449 in fiscal year 2008, per Exhibit 27; Appendix A27) or the business license tax rate for such hotel on May 1, 2005 (i.e., $4,226, per Exhibit 27; Appendix A27). Plainly, the total fee of $32,703 would have greatly exceeded the permitted top limit as set forth in §94.270.6 based on gross revenue, or $11,449.

CONCLUSION

The trial court properly found in favor of SLAH and against Woodson Terrace as to the proper hotel/motel tax rate on SLAH's claim for declaratory judgment because SLAH's claim for declaratory relief was proper in that SLAH is not required to make a payment under protest of the contested taxes pursuant to §139.031 RSMo. in order to bring its claims for equitable relief in the trial court.

The trial court further correctly held that the applicable hotel/motel tax rate in effect as of May 1, 2005, was $13.50 per room per year because (A) §94.270.3 RSMo.is not a prohibited "Special Law" in that it contains an open-ended population classification, is presumptively constitutional so that the burden rests on Woodson Terrace to prove it is unconstitutional, and Woodson Terrace failed to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose; (B) because the rate charged by Woodson Terrace on May 1, 2005 was $13.50 per occupiable room per year, it was prohibited from charging more than this amount for FY 2008 and 2009, although it may increase this rate in the future up to 1/8 of 1% of a hotel's gross revenue, with the increase not to exceed 5% per year; and (C) Section 94.270 does not violate Article VI, Section 15, of the Missouri Constitution because the legislature may pass laws applicable to less than all cities in the same classification. Further, Woodson Terrace failed to preserve any constitutional attack on this Section in its entirety.

Finally, the trial court did not err in finding that Woodson Terrace Ordinance 1719 was null and void by operation of Section 94.270.6 RSMo. because such Section is constitutional in that it does not violate the uniformity clause of the Missouri constitution

because the legislature is not prohibited from passing laws applicable to less than all cities within the same classification. Appellant's additional argument that Woodson Terrace Ordinance 1719, in any event, did not violate 94.270.6 RSMo. and reduced the tax rate was not raised at the trial court, has therefore been waived, and is factually incorrect.

Both the rate of $.85 per day per room occupied, set by Woodson Terrace Ordinance 1606, and the rate of $.32 per occupied room per day, set by Woodson Terrace Ordinance 1719, exceed the rates authorized by §§94.270.3 and 94.270.6 when applied to SLAH, in that such rates would cause the business license tax imposed on SLAH to far exceed the license tax it would pay based on a rate of $13.50 per unit per year or one-eighth of one-percent of its gross revenue.

For all of the foregoing reasons, the trial court's Judgment should be affirmed.

Respectfully submitted,

DANNA McKITRICK, P.C.

By: 

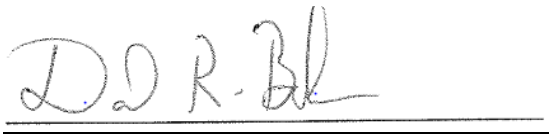
David R. Bohm, #35166
Laura Gerdes Long, #40331
7701 Forsyth Blvd., Suite 800
St. Louis, MO 63105-3907
(314) 726-1000/(314) 725-6592 fax
E-mail: dbohm@dmfirm.com
E-Mail: llong@dmfirm.com
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the foregoing Respondent's Substitute Brief were sent, via first-class mail, postage prepaid, this 11th day October, 2011, accompanied by an electronic copy, in Microsoft Word format, on a CD-Rom, to:

Frank J. Vatterott, Esq.
Vatterott, Shaffar & Dolan, P.C.
2458 Old Dorsett Road, Suite 230
Maryland Heights, MO 63043

Kevin O'Keefe, Esq.
Curtis, Heinz, Garrett & O'Keefe, P.C.
130 S. Bemiston, Suite 200
St. Louis, MO 63105



CERTIFICATE OF COMPLIANCE

By submitting this Brief, the undersigned counsel for Respondent hereby certifies the following:

1. This brief conforms with Missouri Rule of Civil Procedure 55.03;
2. This brief conforms with Missouri Rule of Civil Procedure 84.06(b) relating to length;
3. The number of words used in this brief is 11,669;
4. The number of lines of proportional type in the brief is 904;
5. The CD-Rom conforms with Missouri Rule of Civil Procedure 84.06(g);
6. The CD-Rom has been scanned for viruses and it is virus free.