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 Reply Brief of Appellants

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

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INTRODUCTION

This appeal considers whether the trial court erred in awarding Respondent SLAH, LLC ("SLAH") equitable relief even though it failed to comply with Section 139.031 RSMo's requirement to simultaneously pay a tax under protest and file a protest detailing its claims challenging Appellant Woodson Terrace's ("City" or "Woodson Terrace") Business License Tax. Further, this appeal considers whether Section 94.270.3 RSMo is a Special Law in violation of Article III, Section 40 of the Missouri Constitution and whether Section 94.270 RSMo, and more specifically subsections 3 and 6, violate the uniformity provision of Article VI, Section 15 of the Missouri Constitution.

ARGUMENT

I. SLAH's failure to comply with Section 139.031 RSMo foreclosed it from seeking equitable relief

A. The case law cited by SLAH concerning real property tax assessments is inapposite to the facts of this case

SLAH supports its assertion that it was not precluded from seeking equitable relief because of failure to comply with Section 139.031 RSMo by citing at length two cases involving increases to real property tax assessments, namely John Calvin Manor, Inc. v. Aylward, 517 S.W.2d 59 (Mo. 1974) and Ingels v. Noel, 804 S.W.2d 808 (Mo. App. 1991). SLAH's reliance on John Calvin Manor and Ingels is misguided and ignores the differences between business license taxes and real property assessments.

John Calvin Manor and Ingels, cannot be reviewed in isolation, and require considerations of the provisions of Section 137.180.1 RSMo. Section 137.180.1 RSMo

directs that a real property owner receive notice and be afforded an opportunity to appeal to, and a hearing before, the board of equalization, prior to an increased real property assessed value becoming effective.

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 assessed value of the property. Id. at 60. This 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, this Court determined that Section 139.031 is not an exclusive remedy if a real property owner has been deprived of statutorily mandated notice and hearing requirements. Id. at 64.

In Ingels, the court noted that it was faced with a similar fact pattern to that in John Calvin Manor, and thus affirmed the trial court's award of injunctive relief. Ingels at 810-811.

SLAH urges this Court to extend the exception for increases to real property assessed value to business license fees, arguing that the instant case is similar to the deprivation of the proper statutory notice requirements that occurred in John Calvin Manor and Ingels. Just such an extension was expressly and prudently rejected by the

Western District of the Court of Appeals in General Motors Corp. v. City of Kansas City, 895 S.W.2d 59 (Mo. App. 1995). In General Motors the court held that a taxpayer was barred from challenging the validity of an occupational license tax by its failure to comply with Section 139.031 RSMo. Id. at 60. The General Motors court held 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." Id. at 63.

The court in General Motors refused to extend this exception to an occupational license tax, remarking that John Calvin Manor and Ingels "do not aid GM." General Motors at 64. Similarly, those cases do not aid SLAH.

SLAH argues that the General Motors court did not hold that John Calvin Manor's exception to Section 139.031 RSMo is inapplicable to a license tax dispute, despite that being the very holding of General Motors. SLAH instead claims that General Motors is distinguishable because SLAH does not seek a refund of taxes paid. However, this claim does not render the holding of General Motors inapplicable to the instant case. SLAH in citing to Crest Communications v. Kuehle, 754 S.W.2d 563, 566 (Mo. banc 1988),[1] misrepresents Woodson Terrace's position. Woodson Terrace has never claimed that

[1] Another case dealing with improprieties related to an increase in the assessed value of real property.

Section 139.031 RSMo has abrogated equitable remedies entirely, rather that those remedies are limited to select extreme circumstances of a pre-tax levy due process violation, and that in the vast majority of cases, including this one, Section 139.031 RSMo applies.

SLAH alleges that it has not paid the disputed tax as to do so would cause it irreparable harm. Respondent's Brief at 16. This assertion is not supported by the facts. SLAH estimates that the hotel/motel annual business license tax sought by Woodson Terrace would be approximately $110,000.00. Thus, the payment due at the time SLAH could file a protest would have been approximately $27,500[2] from a company with gross receipts that year of approximately $10,500,000.

In fact, Article X, Section 22 of the Missouri Constitution (the "Hancock Amendment") provides taxpayers preliminary protection against increasing tax rates. The Hancock Amendment guarantees that any increase to the current levy of a "tax, license or fee" must first receive voter approval.

Unlike the increase in assessed value at issue in John Calvin Manor and Ingels, an increase to a business license tax is subject to the Hancock Amendment and requires voter approval. This allows those affected by the tax to not only vote for or against it, but to campaign for or against its passage. It is a constitutional safeguard to protect against excessive taxation, by establishing tax limits that "may not be exceeded without voter

[2] Woodson Terrace Ordinance 1606 requires that the hotel/motel business license tax be paid in four quarterly payments, not one yearly lump sum. See Appendix at A9.

approval." See e.g. Conservation Federation of Missouri v. Hanson, 994 S.W.2d 27, 30 (Mo. banc 1999). As such, the Hancock Amendment serves a similar function to Section 137.180.1 RSMo, in that they both provide an opportunity to protest an increase in the rate or assessment, before it becomes effective.[3] Depravation of such an opportunity may very well implicate the due process rights of a taxpayer. But SLAH has not been deprived of any such right.

Not only does the Hancock Amendment serve to prevent egregious increases to tax rates, so too does the prohibition against confiscatory taxation, which addresses another assertion by SLAH. SLAH insists that the holding in John Calvin Manor should apply to the instant case as to require taxpayers to pay under protest could allow a city to impose a totally egregious tax rate that a taxpayer could not afford to pay, thus precluding any challenge to that tax rate. Respondent's Brief at 16. This argument is without merit.

"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, this Court determined that a license fee levied against a billboard owner of $5,000, with expected gross revenues of $40,000 to $50,000 did not amount to a confiscatory tax. Id. For the financial year, July 1, 2003 thru June 30, 2004, SLAH's gross receipts were

[3] The City respectfully refers this Court to its thorough discussion of Metts v. City of Pine Lawn, 84 S.W.3d 105 (Mo. App. E.D. 2002) in its Initial brief at 19-20.

$10,502,327.00. Respondent's Exhibit 8.[4] Therefore, the business license tax, which SLAH estimates to be $110,000.00 per year, would equal approximately 1% of SLAH's gross receipts, a considerably smaller percentage than that found not to be confiscatory in Combined Communications Corp.

The holding in John Calvin Manor demonstrates that the provisions of Section 139.031 RSMo have not been enforced in those circumstances where due process rights have been violated. John Calvin Manor at 63. SLAH has never alleged that its due process rights have been violated. If SLAH had wished to claim that the hotel/motel business license tax is confiscatory it might have brought an equitable action to enforce its due process rights pursuant to Article I, Section 10 of the Missouri Constitution and The Fifth and Fourteenth Amendments of the US Constitution. It did not do so.

SLAH seemingly seeks to now sway this Court by claiming that the City rebuffed SLAH's attempts to pay what it considered the undisputed portion of the license tax. SLAH's proffered payment was an amount it calculated based upon a rate of $13.50 per occupied room per year. This is not the rate that the voters of Woodson Terrace adopted. The City did not have to accept the insufficient payment, and may have refused to do so for numerous legitimate and important reasons, such as the City not wishing to run the risk of waiving its rights to receive payment of the full tax bill or endorsing an invalid basis for calculating the tax. Such reasons are supported by SLAH now attempting on appeal to draw a negative inference from the City refusing to accept the payment, and to

[4] The last year SLAH paid its Business license fee based upon gross receipts.

boot strap its "partial payment" into some form of de facto compliance with Section 139.031 RSMo's requirement for payment under protest.

Section 139.031 RSMo does not allow partial payment; it requires **full** payment of the tax bill due at the time of protest. Further, when SLAH proffered its partial payment, it did not do so in conjunction with any tax protest. At trial, SLAH stipulated that "no payment was made under protest." Tr. Vol. I at 121. Furthermore, when discussing the standard of review, SLAH agreed that the facts pertaining to compliance with Section 139.031 RSMo were not in dispute. Respondent's Brief at 9. SLAH should not now at this late stage be permitted to claim otherwise.

B. The trial court's judgment and the position advocated by SLAH renders the Section 139.031 RSMo procedure entirely futile

SLAH states that it "does not dispute that in most cases a taxpayer will be required to follow the statutory remedy." Respondent's Brief at 23. However, this is entirely inconsistent with its earlier statement that Section 139.031 RSMo "only applies where a taxpayer seeks a refund of taxes already paid by it." Respondent's Brief at 18. In support of the latter contention, SLAH argues that this was the holding of the Courts in John Calvin Manor and Ingels. Neither the John Calvin Manor nor Ingels Courts found as such. SLAH's improper conclusion is premised on the fact that John Calvin Manor and Ingels, held that - in certain circumstances - implicating certain pre-tax levy due process violations, compliance with Section 139.031 RSMo is not necessarily mandated. However, neither court's holding would encompass an exception based solely on the circumstances that a taxpayer is not seeking a refund. Such a conclusion would render

Section 139.031 RSMo toothless as an enforcement mechanism. A taxpayer could simply withhold the tax payment, as SLAH has done, thereby unilaterally exempting themself from the scope of the statutory provisions. This would defeat entirely the very purpose behind Section 139.031 RSMo.

SLAH wishes this Court to believe that the prevailing policy behind Section 139.031 RSMo is to provide notice to the taxing body of the taxpayer's dissatisfaction. Respondent's Brief at 12. However, such a conclusion is entirely self serving and not supported by the law of Missouri.

As this Court recognized in B&D Investment Company, Inc. v. Schneider, 646 S.W.2d 759, 792 (Mo. banc 1983), "[t]he essential purposes of such statutes [as Section 139.031 RSMo] is to provide an expeditious method by which branches of government affected can obtain the revenue necessary for their maintenance without protracted delay or the hazards incident to the former procedure." Therefore, the fact that SLAH has satisfied itself that it put the City sufficiently on notice of its dissatisfaction of the tax rate, does not alleviate the requirement that it comply with the statutory procedure. Nor does it satisfy the essential public policies underlying Section 139.031 RSMo.

Section 139.031 RSMo does not require "substantial compliance," but instead requires strict compliance with its terms. See Ford Motor Co. v. City of Hazelwood, 155 S.W.3d 795, 798 (Mo. App. E.D. 2005). SLAH failed to plead or prove any sufficient reason why it chose not to comply with the provisions of Section 139.031 RSMo.

In truth, John Calvin Manor and Ingels stand for no more than the proposition that in certain extreme circumstances, namely when a taxpayer is deprived of a statutorily

guaranteed notice procedure for an increased property **assessment** or where due process rights are otherwise implicated, the taxpayer need not necessarily comply with Section 139.031 RSMo. John Calvin Manor at 64. This is **not** such a case.

C. Contrary to SLAH's assertion, Section 139.031 RSMo applies to protests alleging taxation in excess of a statutory limitation

SLAH questions the applicability of Section 139.031 RSMo to challenges to tax rates levied in excess of a "statutorily authorized rate," stating that it found no such case in Missouri. Respondent's Brief at 22-23. However, SLAH itself cited to at least one such case, namely Lane v. Lensmeyer, 158 S.W.3d 218 (Mo. banc 2005). In Lane it was alleged that the tax rate levied by the school district exceeded the statutory grant of taxing power under Section 67.110.2 RSMo, which required the tax rate to be set so as to produce substantially the same revenues as required by the budget. Id. at 221. This Court found that Section 139.031 RSMo **was** applicable, stating:

> "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."

Id. at 222

D. Woodson Terrace could not seek an advisory opinion as SLAH has suggested

Finally, SLAH hypothesizes that Woodson Terrace should have sought a judicial declaration that Section 94.270.3 RSMo was unconstitutional before adopting the tax rate

authorized by Woodson Terrace Ordinance 1606. Respondent's Brief at 15. Had Woodson Terrace done so, however, absent a live factual dispute with a protesting tax obligor - such as the context afforded by Section 139.031- it would have been asking a court to give an advisory opinion, which is something the courts in Missouri cannot do. State ex rel. McNary v. Stussie, 518 S.W.2d 630, 638 (Mo. Banc 1974).

II. Section 94.270.3 RSMo constitutes a special law in violation of Article III, Section 40 of the Missouri Constitution

A. The facts before the trial court showed there was and is no rational basis for the classifications made by the legislation

SLAH dispenses of the issue of special legislation by simply restating that the burden is upon Woodson Terrace to prove the lack of a rational basis for the population classification, and asserting that the City failed to meet that burden. Interestingly, SLAH does not actually assert that there **is** a rational basis for the classification. Neither the trial court, nor the Eastern District opined what rational basis might support the classification contained in Section 94.270.3 RSMo. The U.S. Supreme Court, in considering the rational basis test in the purview of an equal protection claim, stated: "even in the ordinary equal protection case calling for the most deferential of standards, **we insist on knowing the relation between the classification adopted and the object to be obtained**." Romer v. Evans, 517 U.S. 620,632 (1996) (emphasis added). Likewise, this Court should insist that the facts lead to some indication as to what the rational basis for the classification might actually be.

In Romer, the U.S. Supreme Court held that there was no rational basis for an amendment to the Colorado Constitution that precluded any legislative, executive or judicial action at any level of state or local government that is designed to protect homosexuals. Id. at 632. The Court stated that:

"[The Amendment] fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and

> undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that **the amendment seems inexplicable by anything but animus towards the class it affects; it lacks a rational relationship to legitimate state interests**."

Id. (Emphasis added)

So while it is true "[t]he rational basis test requires only that the challenged law bear some rational relationship to a legitimate state interest," Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Pemiscot County, 256 S.W.3d 98, 102 (Mo. banc 2008), some identifiable "rational basis" must be evident from the facts.

"A classification is constitutional if any state of facts can be reasonably **conceived**[5] to justify it," Miss Kitty's Saloon, Inc v. Missouri Department of Revenue, 41 S.W.3d 466, 467 (Mo. banc 2001). Again, therefore, there must be a rational basis for the classification that can be reasonably **conceived** from the evidence before the court.

The definition of "conceive" includes "to take into one's mind," "be affected by" and "evolve mentally." Webster's Third New International Dictionary. Thus, the evidence must cause one to construct a relation between the classification and a legitimate governmental objective. The evidence before the trial court left everyone, including the court itself, unable to extrapolate or articulate even the most tenuous of rational basis for the population classification.

[5] Emphasis added.

Courts in Missouri have recognized that cities may enact license taxes for two purposes: (1) for the inspection and regulation of businesses and occupations in an amount sufficient to defray the cost of such regulation and inspection; and (2) for the purpose of raising revenue. City of Florissant v. Eller Outdoor advertising Company of St. Louis, 522 S.W.2d 330, 332 (Mo. App. E.D. 1975). The purpose of revenue raising taxes "is to raise revenue to be paid into the general fund of the government to defray customary governmental expenditures." Zahner v, City of Perryville, 81. S.W.2d 855, 859 (Mo. banc 1991).

Consequently, a legitimate government purpose for legislation affecting the power to levy a license tax would have some relation to the inspection and regulation process or the level of municipal services that Woodson Terrace provides. Further, any proposed rational basis would have to demonstrate what unique characteristic a Fourth Class City having a population between 4,100 and 4,200, located in St. Louis County, has that is not shared by any similarly situated or populated city located elsewhere in St. Louis County or throughout the State. Mr. Gray, the late City Attorney for Woodson Terrace, testified as to the similarities between Edmundson and Woodson Terrace:

> "A. …Edmundson is to the west of us and it is also a fourth class city like we are, with a mayor/aldermen form of government. The only difference between the two of us is it might be like any of the hotel litigation, is that they are smaller, they are 800 to 900 population and our population 4200, I believe, at the time that the statutes were enacted that are in question, and they are located right opposite the entrance to--the south entrance and exit

to the airport, Lambert International Airport on the Natural Bridge Service Road just off Highway 70, and we're of course--and they have two major hotels along Natural Bridge, the Drury and the Marriott, and right next to them we have the Airport Hilton and Quality Inn, and then on the--down east towards Woodson Road on Natural Bridge, and then on the east side of Natural Bridge right at the corner, there's a motel 6, and then right on Woodson Road is the main north/south artery that goes through Woodson Terrace, and right around the corner from Natural Bridge is the Overland Park Hotel and the Days Inn, and so those are the hotels in our city, and the other two are in Edmundson.

Q. And is there any substantive, to your--based on your knowledge of the City of Woodson Terrace and your familiarity with the City of Edmundson, is there any meaningful difference between the two, other than one has a greater population?

A. Well, other than the size, but we have--they're the same vintage as Woodson Terrace, they were founded about the same time, with some development before World War II, but most of it coming right after World War II, or a lot of it.

Q. So they have the same vintage or infrastructure?

A. Well, yes, and the homes are--they're primarily single family, very small, modest homes that are aging and present the same problems for both of us with regard to maintaining housing codes and so on, and they have a

few new duplexes. The only other development residentially is that we do have some apartments on the very east end of Woodson Terrace and they don't have any apartments, but the main north/south artery for Edmundson is Edmundson Road and they share Edmundson Road with us, so the communities are very much alike.

Q. And they both--

A. They have--pardon me. They have their own park, church; we have a church and a park. They have their own police department; we have our own police department.

Q. So the communities offer substantially the same kind of services?

A. Sure.

Q. Have the same kind of housing stock?

A. Yeah.

Q. The same sort of tax base?

A. Yeah.

Tr. Vol. I. at 167-169.

Nothing in the testimony of Mr. Gray would present any reasonable rationale promoting a legitimate government interest for the population classification in Section 94.270.3 RSMo. The cities of Woodson Terrace and Edmundson provide similar municipal services, face similar societal issues and have similar needs, yet the legislature determined that Edmundson should be able to levy a hotel/motel business license tax at

twice the rate to which it purports to limit Woodson Terrace. See Section 139.031.2 RSMo.

SLAH's own witnesses conceded that they knew of no differences between Woodson Terrace and other similarly situated or populated cities in St. Louis County. Tr. Vol. I. at 124; Tr. Vol. I at 31-32.[6] Further, the evidence before the trial court conclusively establishes that SLAH engaged a lobbyist to address the tax rate **in Woodson Terrace**. Tr. Vol I. at 94-96. SLAH offered no evidence to refute that presented by Woodson Terrace and proferred no practical differences between Woodson Terrace and other municipalities. Thus, the evidence before the trial court was uncontroverted.

Add to this evidence the fact that the language contained in the Bill Summary for Senate Bill 758, which enacted Section 94.270.3 RSMo, expressly stated that it prohibits

[6] SLAH again claims that by referencing the testimony of SLAH's own witnesses that support Woodson Terrace's position, the City is attempting to reverse the burden of proof. This claim in nonsensical. There is no legal reason why Woodson Terrace may not elicit and cite to persuasive admissions by SLAH that support the City's position. SLAH's argument is akin to a defendant charged with shooting a victim admitting upon the questioning of the prosecutor that he indeed shot the victim, and the defense then claiming that for the prosecution to use that admission against the defendant is an attempt to reverse the burden of proof.

"Woodson Terrace" from levying and collecting a license tax on hotels and motels in an amount in excess of $13.50 per room per year. Defendant's Exhibit C, Appendix at A1.

In sum, the evidence before the trial court failed to support even a hint of a legitimate government purpose reasonably related to the classification utilized by Section 94.270.3 RSMo. The trial court's verdict was against the weight of the evidence presented at trial. Indeed, the evidence actually demonstrated that the population classification was "inexplicable by anything but animus" towards Woodson Terrace, much like the classification in Romer, *supra*.

B. By operation of Section 94.270.6(2) RSMo the population classification pertaining to Woodson Terrace is not open ended

SLAH muses that it is questionable whether "legislation passed subsequent to [the] passage of a presumptively general statute could somehow make it an unconstitutional special law." Respondent's Brief at 35. However, this is exactly what the legislature did through the enactment of Section 94.270.6 RSMo. the practical implications are evident. If, by means of example, the General Assembly had subsequently enacted Section 94.270.6 RSMo to read: "the population referred to in Section 94.270.3 RSMo shall be determined from the 2000 census," this would undisputedly render the population classification contained in Section 94.270.3 RSMo close-ended. While, the General Assembly was not as obvious in its enactment of Section 94.270.6 RSMo, it has for all intent and purposes accomplished the same goal.

SLAH's position is that 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. Even if, for instance, the City of Pine Lawn at the next census falls within Section 94.270.3 RSMo due to the operation of Section 1.100.2 RSMo,[7] Woodson Terrace will forever be treated differently by the limiting effect that Section 94.270.6(2) RSMo has upon the tax revenue that Woodson Terrace may receive 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, which SLAH asserts is a rate of $13.50 per occupied room per year, 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." So although Pine Lawn's tax would be reduced to $13.50 per occupied room per year, Section 94.270.6(2) RSMo's 2005 reference will not serve to limit future increases to that same level by Pine Lawn or any other city not limited by Section 94.270.3 RSMo on May 1, 2005.

[7] "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).

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 an amount which produces revenue no greater than $13.50 per room per year.[8] As such, Woodson Terrace is the only city that is subject to the perpetual limitation of its tax revenue as prescribed by Section 94.270.3 RSMo. Woodson Terrace will always be the only city bound to the upper limit on its hotel/motel tax revenue 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.

SLAH claims that in fact 0.00125% of their gross revenue substantially exceeds the rate of $13.50 per room per year, thus the City is not in reality bound by that limit. Perhaps that is true for SLAH in prior years. However, this may not be the case for future years, or for other hotels located within the City. The fact remains that by virtue of Section 94.270.6 RSMo, Woodson Terrace suffers an infirmity on its powers of taxation shared by no other city and that same infirmity will never be shared by any other city.

By contrast, Edmundson would be bound to a revenue cap twice that of Woodson Terrace. Even more egregious is the contrast between Woodson Terrace's limitation and that applicable to a city having a May 1, 2005 license tax based upon gross receipts. For example, if any 4th class city levied a 1/2 % gross receipts tax, then, of course, Section

[8] $13.50 per occupied room per year and $0.85 per occupied room per night are not fungible tax rates. The cap of $13.50 per occupied room per year, may rightfully be attained by assessing the rate at $0.85 per room per night until the limit is reached.

94.270.6(2) RSMo's May 1, 2005 revenue cap will always be the governing upper limit as 1/2 % will always exceed 1/8 %.

C. The business license rate in effect as of the effective date of Section 94.270.3 RSMo was $0.85 per occupied room per day not $13.50 per room per year

SLAH contends that the tax rate actually in effect in Woodson Terrace on May 1, 2005 was $13.50 per room per year, not $0.85 per room per night, because the former was the rate actually charged by the City for the fiscal year 2005. However, SLAH's argument fails as on January 22, 2004, Ordinance 1606 did not simply authorize a tax rate ceiling, but instead fixed both a basis for taxation and a rate of tax.[9] Subject to voter approval – that voter approval occurred – and the specified tax scheme and rate became effective on April 14, 2004. As such, the tax in effect as of May 1, 2005, for hotels and motels in Woodson Terrace was $0.85 per occupied room per night.

Therefore, SLAH would seemingly have to demonstrate that the City is estopped from levying the tax rate of $0.85 per occupied room per night, which was the lawful rate as of May 1, 2005 by reason of the City's Staff improper use of the unauthorized $13.50

[9] "The license fee for hotels and motels **shall be** Eighty-five Cents (.85c) per day per room occupied for a fee by Transient Guests…" Ordinance 1606, Appendix at A9. (Emphasis added)

tax paradigm in the fiscal 2005 license renewal process.[10] However, estoppel against the government is strongly disfavored, especially in the arena of tax enforcement:

> "Appellant cannot use equitable arguments to evade paying the required income tax to the state. The doctrine of estoppel is normally not applicable to acts of a governmental body. Fundamental to an estoppel claim against the government is that in addition to satisfying elements of ordinary estoppel, governmental conduct complained of must amount to affirmative misconduct. The Director's conduct in failure to enforce the statute in question does not amount to misconduct of the kind required to raise an estoppel against a governmental department."

Farmers' & Laborers' Co-operative Ins. Asso. v. Director of Revenue, 742 S.W.2d 141, 143-144 (Mo. banc 1987).

Accordingly, any alleged failure on the part of the City to enforce the tax rate prescribed in Ordinance 1606 does not render that rate ineffective, or otherwise prevent the City from collecting the tax at that rate, or the reduced rate set subsequently by Ordinance 1719.

[10] It should be noted that Woodson Terrace does not seek payment of the business license at the rate authorized by Ordinance 1606 for those years it mistakenly levied a tax at a different rate.

III. Sections 94.270 RSMo violates the uniformity requirement of Article VI, Section 15 of the Missouri Constitution[11]

SLAH, relying on State ex rel. City of Ellisville v. St. Louis County Board of Election Commissioners, 877 S.W.2d 620 (Mo. banc 1994), argues that Article VI, Section 15 of the Missouri Constitution does not require that **laws** be applicable to all cities within a class. What SLAH does not address is the constitutional requirement that all cities of the same class have **uniform powers** and be subject to **uniform restrictions**. The two are different considerations. Article VI, Section 15 of the Missouri Constitution plainly states:

> "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**…"

(Emphasis added)

[11] This issue was not raised on appeal for the first time as SLAH avers. Woodson Terrace alleged in its Amendment by Interlineation to its Answer, that subsections 3 and 6 of Section 94.270 RSMo violated Article VI, Section 15 of the Missouri Constitution. The effect of Subsections 3 and 6 renders the entirety of Section 94.270 RSMo in violation of Article VI, Section 15 of the Missouri Constitution.

"Words used in constitutional provisions must be viewed in context; their use is presumed intended, and not meaningless surplusage." Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. banc 1983). "The plain, ordinary, and natural meaning of words is that meaning which the people commonly understood the words to have when the provision was adopted." Id. Article X, Section 1 of the Missouri Constitution provides that:

> "The **taxing power** may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under **power granted to them by the general assembly** for county, municipal and other corporate purposes."

(Emphasis added)

Thus the Missouri Constitution recognizes taxation as a "power" of local governments, and that the power is granted by the general assembly. Therefore, Article VI, Section 15 of the Missouri Constitution's requirement that cities of the same class be **granted uniform powers**, and be **subject to uniform restrictions**, must apply to the power of taxation, as the language in the constitutional provision clearly mandates. Clearly, the adopters of the Missouri Constitution would not have interpreted Article VI, Section 15 of the Missouri Constitution to allow the general assembly to empower one fourth class city on the other side of the street from Woodson Terrace (Edmundson), to levy a business license tax on hotels and motels at twice the rate Woodson Terrace may levy.

SLAH objects to Woodson Terrace's use of "*dicta*" from Riden v. City of Rolla, 348 S.W.2d 946 (Mo. 1961), (Respondent's Brief at 42) which is ironic because SLAH

has no issues with "*dicta*" supporting arguments they wish to advance. In any event, this Court in Riden clearly stated that Article VI, Section 15 of the Missouri Constitution mandates "that cities *of the same class* shall possess the same powers and be subject to the same restrictions." Riden at 951. (Italics in original). The language from Riden, may well be *dicta* but that does not prevent the above quoted language from having persuasive value. See e.g. State ex rel. Anderson v. Hotsetter, 140 S.W.2d 21, 24 (Mo. banc 1940).

Interestingly, SLAH cites Riden for the proposition that "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." Respondent's Brief at 38.[12] (Internal citations and quotations omitted, emphasis added).

It cannot be disputed that classifications based only upon population have been upheld. But there is no precedent that upholds a division of cities based upon both class **and** population in the face of a challenge brought under Article VI, Section 15, of the Missouri Constitution. Section 94.270 RSMo authorizes fourth class cities to levy a business license tax on certain businesses and occupations, including hotels and motels. After the 2004 and 2005 legislative changes Section 94.270 RSMo also seeks to divide and differentiate that taxing authority by population and county. Once the legislature has chosen to grant taxing authority to a class of similarly situated city, it cannot then remove that power from some based upon population without violating the uniformity

[12] Citing Riden at 38 (which in turn was citing Randolph v. City of Springfield, 257 S.W.449, 453 (Mo. 1923).

requirement of Article VI, Section 15 of the Missouri Constitution. This conclusion is supported by the reasoning of the Kansas Supreme Court in Clark v. City of Overland Park, 226 Kan 602 (Ks. 1979), which is discussed at length in Woodson Terrace's Initial Brief at 49 – 51.

If this kind of subdivision of the powers of cities within the same class does not violate Article VI, Section 15 of the Missouri Constitution, then one may very well wonder what does.

CONCLUSION

For the reasons stated herein, and in their initial Brief, Appellants respectfully request 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 21st day of October, 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 6,175, 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.

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