IN THE
SUPREME COURT OF MISSOURI

JEFFERSON COUNTY FIRE PROTECTION DISTRICTS ASSOCIATION, ET AL.,	)	
Appellants,	)	
v.	)	**Case No. SC87239**
MATT BLUNT, GOVERNOR OF THE STATE OF MISSOURI, ET AL.,	)	
Respondents.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Byron Kinder, Judge

Respondent Blunt and Nixon's Brief

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I. Background

In their Statement of Facts, Appellants assert that the Home Builders Association of Greater St. Louis ("HBA") lobbied in favor of Senate Bill 210. (Appellants' Br. 5). While the accuracy or inaccuracy of that unsupported argument has no bearing on the legal issue before the Court, what the record reveals is that in April 2004, the HBA wrote a letter to the Antonia Fire Protection District Fire Marshall, Glenn Nivens, expressing its concerns "with the proposed fire prevention code for the Antonia Fire Protection District." (LF 45, 61). As detailed in the HBA's April 5, 2004 letter to the Antonia Fire Protection District, the HBA supported the model rule, as written and set forth in the *2003 International Residential Code* (*IRC*), relating to emergency escape and rescue openings in basements containing habitable space and sleeping rooms. (LF 45, 61). The HBA voiced its concern, however, over Antonia FPD's "plans to go above and beyond the requirements in the *2003 IRC*" in requiring emergency escape and rescue openings "on every basement, regardless of whether or not it has habitable space." (LF 45, 61). The HBA explained that it believed such a "costly requirement on a home buyer who does not plan to use his or her basement for anything more than storage" was unfair. (LF 45, 61).

From April to August 2004, the HBA wrote numerous letters encouraging the Jefferson County Fire Marshals Association and its members to adopt the *2003 IRC* as written. (LF 45-54, 61-70). In the alternative, the HBA offered a number of compromises that went above and beyond what the *2003 IRC* required but also allowed home buyers some

choice in the matter. (LF 49, 65). Specifically, the HBA proposed a rule that would prohibit bathrooms or bathroom rough-ins in unfinished basements on new construction unless an emergency opening was provided to allow for future conversion to habitable space. (LF 49, 65). In addition, the HBA sought a gradual phase-in of the new requirement in the event that the parties were unable to reach a compromise. (LF 51-54, 67-70).

II. Senate Bill 210

Whatever prompted Senate Bill 210, the Missouri Legislature ultimately passed it in May 2005, Respondent Governor Matt Blunt signed the bill (LF 198), and it took effect August 28, 2005. It included a new provision, § 321.222 (LF 184-85).

Section 321.222 authorizes certain municipalities to adopt a residential construction regulatory system. (LF 184-85). If a municipality adopts such a system, fire protection districts are prohibited from enforcing their own, previously or subsequently enacted residential construction regulatory system within the jurisdiction of the adopting municipality. (LF 184-85). This new law "only appl[ies] to any fire protection district located wholly within any county of the first class classification with more than [198,000] but fewer than [199,200] inhabitants," and only applies to residential construction. (LF 184-85). As of the 2000 census, Jefferson County had a population of 198,099. (LF 151).

III. Procedural history

Prior to Senate Bill 210's effective date, Appellants filed a Petition for Declaratory Judgment and Preliminary and Permanent Injunction. (LF 228-35). Cole County Circuit Court Judge Byron Kinder denied Appellants' request for preliminary injunction on August 24, 2005. (LF 227). After reviewing Respondents' Motions for Summary Judgment and hearing oral argument, Judge Kinder granted those Motions on September 27, 2005. (LF 7, 9-10). Appellants appeal from that decision. (LF 8).

Standard of Review

Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Rule 74.04(c); *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993).

This Court will review the Cole County Circuit Court's decision to grant the Respondents' Motions for Summary Judgment de novo. 854 S.W.2d at 376. In considering Appellants' appeal, this Court will accord Appellants the benefit of all *reasonable* inferences from the record and will review the record in the light most favorable to Appellants. *Id.*

Argument

Section 321.222 is a valid, constitutional law.

A. Section 321.222 is not a "special law" because it is "open-ended," i.e., it applies equally to all in a given class. (This responds to Appellants' Point I.1).

Section 321.222 is not a "special law" enacted in violation of Article III, § 40 of the Constitution of the State of Missouri. Rather, § 321.222 is a valid, constitutional law because is it "open-ended," i.e., it applies equally to all in a given class.

1. Section 321.222 contains a classification based on population.

Section 321.222 authorizes certain municipalities to adopt a residential construction regulatory system. If a municipality adopts such a system, fire protection districts are prohibited from enforcing their own, previously or subsequently enacted residential construction regulatory system within the jurisdiction of the adopting municipality.

Appellants assert that the newly-enacted § 321.222 violates Article III, § 40 because it applies only to fire protection districts located "wholly within any county of the first classification with more than [198,000] but fewer than [199,200] inhabitants." Section 321.222.7, SB 210. Appellants assert that the only county that fits that criterion is Jefferson County. Even if Appellants' assertion is true--that Jefferson County is *currently* the only county whose municipalities will be effected by this new statute--the law is still valid because it is based on population, an "open-ended," valid classification that makes the law general rather than specific.

As this Court previously held, statutes containing "open-ended" classifications based on population are constitutional, general laws. *Treadway v. State*, 988 S.W.2d 508 (Mo. banc 1999). In *Treadway*, this Court affirmed the grant of summary judgment on a claim challenging the constitutionality of statutes establishing vehicle emission testing programs applicable to a select portion of the state, and wrote:

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

> *"[S]tatutes 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."*

Id. at 510-11 (emphasis added).

Section 321.222 contains an "open-ended" classification based on population and applies equally to all fire protection districts located entirely within a first class county with a population between 198,000 and 199,200.

2. The size of the population bracket does not render the law unconstitutional.

Appellants admit that this Court has upheld statutes where the "open-ended" classification resulted in a class of only one at the time of their enactment (Appellants' Br. 14; LF 74) yet they contend that the size of the population bracket at issue in this case renders the law unconstitutional. They argue that the "open-ended" population classification set forth in § 321.222 is "illusory" because it was "cynically drawn with the intent to exclude all other counties in the state, now and in the future." (Appellants' Br. 15). Yet, they admit that § 321.222 "could theoretically apply to additional counties in the future, but only if they fall within the extremely narrow 1200 person range at a future census, amounting to a virtual statistical impossibility." (Appellants' Br. 15). Appellants have no evidence with which to support that claim, and it is, therefore, without merit. In their view, where Missouri courts have approved laws with classifications that result in a class of one there is an "expectation

that similarly situated political subdivisions could grow into the newly created class in the future[.]" (Appellants' Br. 14). In making this claim, Appellants misconstrue what the law requires.

This Court has not required absolute certainty that additional counties would come within the scope of a given law. As an example, consider *State ex rel. Fire Dist. of Lemay v. Smith*, 184 S.W.2d 593 (Mo. banc 1945). True, there the population bracket was much larger than the population bracket that Appellants complain of here--200,000 to 400,000. *Id.* But, at the time of its enactment, in approximately 1941, the law at issue in *Lemay* covered only St. Louis County. *Id.* Interestingly, according to population data contained in the record, it took both Greene and St. Charles Counties until 1990 to reach a population of at least 200,000. (LF 151-52). Yet, when this Court considered *Lemay* in 1945, it upheld the law as a constitutional, general law, even though it presumably took 39 years for additional counties to come within its scope.

Lemay is not an isolated case. In fact, this Court has repeatedly held that laws whose population-based classifications resulted in a class of one were constitutional, open-ended laws. *Roberts v. Benson*, 142 S.W.2d 1058, 1060 (Mo. banc 1940); *State ex rel. Fire Dist. of Lemay v. Smith*, 184 S.W.2d at 595; *Walters v. City of St. Louis*, 259 S.W.2d 377 (banc 1953); *Collector of Revenue of City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048 et al.*, 517 S.W.2d 49, 53-54 (Mo. 1974); *School Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 221 (Mo. banc 1991). The determination that the legislature can, consistent with the requirement that

it refrain from enacting special laws, pass general legislation impacting only one entity has stood the test of time. "Although [an] act may apply at the time of its enactment only to one county or to one city because of such classification on population, such fact alone does not make the act a special rather than a general law." *Roberts v. Benson*, 142 S.W.2d 1058, 1060 (Mo. banc 1940).

As this Court stated in *Collector of Revenue of City of St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens Serial Numbers 1-047 and 1-048 et al.*:

> [I]t is permissible to classify . . . according to population, provided the legislation is so drawn that other[s] . . . may come within the terms of the law or classification in the future. And this is so even though the act may apply to one county, city or other political subdivision only at the time of its enactment.
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> . . . .
>
> [T]he fact that only one city falls within the class does not make the legislation special as long as other cities may come within the class. Furthermore, 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.

517 S.W.2d at 53-54.

Appellants' focus on the number of counties currently covered by § 321.222 misses the mark. "The focus is not on the size of the class comprehended by the legislation. Rather the issue is the nature of the factors used in arriving at that class. Even very narrow classifications are permissible as long as they are based upon open-ended factors." *Tillis v. City of Branson*, 945 S.W.2d 447, 449 (Mo. banc 1997). The problem in *Tillis*, contrary to Appellants' mistaken assertions, was not the narrow population bracket, 2,000; rather, the law's "requirement that a city be in a county bordering Arkansas in order to qualify for the tourism tax" made the law close-ended and unconstitutional. *Id.* Such a fixed, geographical requirement is not present in § 321.222.

More than a century ago, this Court found that the constitutionality of a classification "does not depend upon numbers." *State ex rel. Lionberger v. Tolle*, 71 Mo. 645, 650 (1880). Discussing *Tolle* more recently, this Court found,

> [T]hat application of the law to the class of cities having a specified population level rendered the law general, not special. This was so, even though only the City of St. Louis fit the category; it was sufficient for the Court that other cities might reach that population level and that the law would apply to those cities.

School Dist. of Riverview Gardens v. St. Louis County, 816 S.W.2d at 221.

That only one county currently falls within the designated population bracket

> [A]lone does not make the act a special law for the reason the act will also apply to other counties which will attain the same population in the future. Where an act is potentially applicable to other counties which may come into the same class it is not [an unconstitutional, special law].

State ex rel. Fire Dist. of Lemay v. Smith, 184 S.W.2d at 595. In fact, open-ended classifications impacting only one entity have been specifically upheld at the request of a fire district. *See id.* ("St. Louis County is the only county now within the population bracket stated in the act. Such fact alone does not make the act a special law for the reason the act will also apply to other counties which will attain the same population in the future. Where an act is potentially applicable to other counties which may come into the same class it is not a local law.")

Again, § 321.222 is not an unconstitutional, special law simply because Jefferson County is the only county it now covers. Rather, § 321.222 is a constitutional, "open-ended" law readily capable of applying to additional counties and equally capable of becoming inapplicable to Jefferson County in a relatively short time in light of the fact that the applicable population span is but 1,200 inhabitants. Because § 321.222 is "open-ended" in that any variety of counties may be or cease to be subject to the law as their populations increase or decrease or their classifications change and because the statute utilizes no immutable criteria limiting its applicability, § 321.222 does not violate Article III, § 40.

B. There is a rational basis for § 321.222. (This responds to Appellants' Point I.2).

While Appellants discuss at length in their brief the lack of a rational basis to support § 321.222 (Appellants' Br. 16-19), the Petition for Declaratory Judgment and Preliminary and Permanent Injunction Appellants filed in the Circuit Court of Cole County is *silent* on this point (LF 228-35)--Appellants never asserted the absence of rational basis supporting the classification made in § 321.222, SB210. Without regard to the fact that Respondents' counsel noted this pleading failure, Appellants expended considerable time at the preliminary injunction hearing asserting that the statutory classification was not supported by a rational basis. Under these circumstances, Respondents are doubtful that the Court has jurisdiction to conduct a de novo review of this claim. Without submitting this issue to the Court by consent, Respondents will briefly discuss the law of rational basis and would assert that they would be entitled to summary judgment on this claim if it were before the Court.

A law that is based on "open-ended" classifications, such as population, "needs only a rational relation to a legitimate legislative purpose." *Zimmerman v. State Tax Comm'n of Missouri*, 916 S.W.2d 208, 209 (Mo. banc 1996). *See also, Higgins v. Treasurer of State of Missouri*, 140 S.W.3d 94, 98 (Mo. Ct. App. 2004). Despite the presumption of constitutionality owed to § 321.222, Appellants contend that the law is unconstitutional because it does not now cover other counties, such as Greene, Clay, and St. Charles. Such contentions have been consistently rejected by the courts.

If this Court finds any reasonable basis for the classification made in § 321.222, the constitutional validity of the statute must be upheld. *Lemay*, 184 S.W.2d at 595. In fact, "[u]nder the rational basis test, the legislature is afforded broad discretion in attacking societal problems, and the *challenger* bears the burden to show that the law is wholly irrational." *Treadway,* 988 S.W.2d at 511. (emphasis added). As this Court stated in *LeMay*:

> The question of classification is a practical one. A law may be directed to that class which is deemed to have the greater need for it. There may be omissions from the application of the law; the entire possible field does not have to be covered. There is bound to be some inequality resulting from any classification but unless it is unreasonable and arbitrary the classification must be approved.

184 S.W.2d at 596. As demonstrated in *Lemay*, the standard is extraordinarily minimal; any rational basis the legislature could have envisioned is sufficient to sustain the legislative classification. In *Lemay*, this Court was not swayed by the fact that there were "other congested areas to which the same act might have been applied." *Id.* at 595. That some areas were not covered by the law did not "stamp the classification as unreasonable." *Id.* For as this Court stated, "'The line [of demarcation] must be drawn somewhere.'" *Id.* at 596 (citations omitted).

In performing rational basis review, the courts grant the legislature considerable leeway.

> When looking for a rational basis, we note that 'State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it....' 'It is not the Court's province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature's determination.'

Greenlee v. Dukes Plastering Serv., 75 S.W.3d 273, 277-78 (Mo. banc 2002) (citations omitted). *See also Higgins*, 140 S.W.3d 94, 98 (Mo. Ct. App. 2004); and *Zimmerman*, 916 S.W.2d 208, 209 (Mo. banc 1996) (statute sustained because the "General Assembly could rationally relate" the distinction to the statutory classification).

Any number of concerns could have prompted the legislature to determine that it needed to reconsider the previously existing, allegedly uniform, method of empowering fire protection systems. One of the apparent objectives of § 321.222 is to streamline and centralize regulation of residential construction by vesting control over this process in one entity--the city, town, village, or county. The legislature could have thought it was inefficient to have multiple municipal permitting authorities required to evaluate new construction. Or the legislature could have thought that the burden and expense of creating,

updating, and enforcing "residential construction regulatory systems" placed an undo and unnecessary burden (often duplicating other existing regulatory systems) on already burdened fire protection districts, diverting them from the legislature's more important priority for these districts--fighting fires and training to fight fires. As it is obvious that residential construction occurs in areas with significant population growth, the legislature could have thought this burden particularly heavy in Jefferson County.[1] While there are other areas that experienced heavier growth, the legislature may have thought that those areas did not have the same mix of suburban and rural growth on which to test this new and potentially more efficient way of providing residential construction regulatory systems. And, as stated above, "the entire possible field does not have to be covered." *Lemay*, 184 S.W.2d at 596.

Appellants cannot complain that, when considering a new mechanism for providing residential construction regulatory systems, the legislature decided to act cautiously by applying the new mechanism to a narrow (but open-ended) class of counties until the benefits of the system could be evaluated. Article III, § 40 does not require the legislature to act precipitously. With the enactment of § 321.222, the legislature drew a line of demarcation based on population within which the Appellants are included and with which they take

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[1]In the Official Manual of the State of Missouri, 1995-1996, pg. 779, Jefferson County's population is listed as 171,380. In the Official Manual of the State of Missouri, 2003-2004, pg. 798, Jefferson County's population is listed as 198,099.

issue; however, that does not render the law an unconstitutional special law. It simply means Appellants are unhappy with the legislature's action.

C. Section 321.222 is not a special law and is not violative of Article III, § 41.

(This responds to Appellants' Point II).

Appellants argue that § 321.222 violates Article III, § 41 of the Constitution of the State of Missouri. That argument is, of course, inconsistent with their argument that § 321.222 is a special law, for Article III, § 41 applies only to general laws that create, by repealing or modifying existing statutes, what would be a special law if enacted directly: "The general assembly shall not indirectly enact a special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed." Section 321.222 does not partially repeal some general law; if there is an argument to be made that it creates a special law, it does so without reference to any other statute. As discussed above, there is not such argument, for § 321.222 uses the population-based approach that this Court has repeatedly held excludes a statute from the "special" category.

Conclusion

For the reasons stated above, this Court should affirm the Cole County Circuit Court's grant of summary judgment in favor of Respondents.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3,838 words.

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Appendix

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