IN THE MISSOURI SUPREME COURT

JEFFERSON COUNTY FIRE PROTECTION DISTRICTS ASSOCIATION, ET. AL. Appellants,	)	
	)	No. SC87239
v.	)	
MATT BLUNT, ET.AL., Respondents.	)	

On Appeal from the Circuit Court of Cole County
Honorable Byron Kinder, Senior Judge

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal by the Jefferson County Fire Protection Districts Association, et. al., from the entry of Summary Judgment in favor of Defendants Matt Blunt, et. al., on Plaintiffs' petition for declaratory judgment which sought a declaration that Senate Bill 210 (now R.S. Mo Section 321.222) constitutes "special legislation" in violation of the Missouri Constitution, Article III, Section 40.

As this appeal involves the constitutionality of a statute of this state, it is within the matters reserved for the exclusive jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

This is an action seeking a declaratory judgment that the provisions of Senate Bill 210 (now R.S.Mo. Section 321.222) passed during the 2005 Legislative Session, constitute a "special law" in violation of Article III, Section 40 of the Missouri Constitution.

Plaintiff Jefferson County Fire Protections District Association is a non-profit corporation composed of fire protection districts, all organized under R.S.Mo. Chapter 321 and located wholly within Jefferson County.* The individual members of the Association, including the Antonia Fire Protection District, Cedar Hill Fire Protection District, DeSoto Rural Fire Protection District, Goldman Fire Protection District, Hematite Fire Protection District, High Ridge Fire Protection District, Rock Community Fire Protection District, Hillsboro Fire Protection District, Shady Valley Fire Protection District, Springdale Fire Protection District, Dunklin Fire Protection District, Jefferson R-7 Fire Protection District, and Mapaville Fire Protection Districts are also named as plaintiffs, along with Ollie Stuckmeyer and Stephanie A. Mayer, who are individual residents and taxpayers of Jefferson County.

Each of the plaintiff fire districts is authorized by R.S.Mo. Section 321.200 to adopt and amend fire protection ordinances, rules and regulations not in conflict with the laws of this state. Pursuant to this power, each of the plaintiff fire districts has adopted and amended from time to time fire protection codes and regulations

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*There are 2 fire protection districts (Pacific and Eureka) which are located partly inside and partly outside of Jefferson County.

which it enforces throughout its district. Among other things, these codes regulate materials and methods of construction of residential and commercial structures within each district in order to promote fire protection and fire safety. One of the methods for enforcing such codes is through the routine inspection of new and rehabilitated structures to ensure compliance with such codes.

In May, 2005, the Legislature passed and subsequently Defendant Blunt signed, Senate Bill 210, part of which is now codified in R.S.Mo.Section 321.222. This section was enacted at the request of the Home Builders Association of Greater St. Louis and the Home Builders Association of Jefferson County (hereafter collectively the "HBA"). The trial court was presented with correspondence between the HBA and its attorneys, and several of the plaintiff fire protection districts concerning HBA member's dissatisfaction with the interpretation and enforcement of certain provisions of fire protection codes by those districts. See Affidavits of Glen Nivens at LF 43-54 and Matthew Mayer at LF 57-70 and attachments thereto.

Specifically, there was a dispute concerning a requirement by the fire protection districts that any basement bedroom have its own emergency access so that the occupant would not be trapped in a burning house with no ability to escape except through the burning house. HBA members building homes in Jefferson County objected to this requirement because of the additional construction costs it imposed on them. On behalf of these members, HBA and its attorneys threatened the plaintiff fire districts with legal action if they refused to stop imposing this requirement. See Affidavits of Glen Nivens at LF 43-54 and Matthew Mayer at LF 57-70 and attachments thereto. When the plaintiff fire protection districts refused the HBA's demands, HBA lobbied for a limitation on the authority of these districts to inspect and regulate new homes and rehabs.

New Section 321.222 applies solely to fire districts located entirely within Jefferson County. This is accomplished by creating a population classification, as follows:

> "7. This section shall only apply to any fire protection district located wholly within any county of the first classification *with more than one hundred ninety-eight thousand but fewer than one hundred ninety nine thousand two hundred inhabitants."* (emphasis added)

As such the range of the "class" of counties to which these provisions could theoretically apply is only 1200 people. The undisputed evidence from the state census established that Jefferson County is a first class county with a population of 198,099 as of the April 1, 2000 census. The next most populous county under 198,000 was Clay County with 184,006, having grown 30, 595 in total population from the prior census. Next below Clay County was Boone County with a 2000 census population of 135, 454, having grown by 23,075 in the preceding decade. (LF 191-193).

The substantive provisions of new Section 321.222 strip the Jefferson County fire protection districts of powers previously granted to them and all other fire protection districts across the state under Section 321.200 with regard to residential construction. Specifically, Section 321.222 provides, *inter alia*, as follows:

> "3. …[I]n the event a city, town, village or county adopts or has adopted…a residential construction regulatory system…within its jurisdiction, neither fire protection districts nor their boards shall have the power to implement a residential construction regulatory system… within the jurisdiction of such city, town, village or county.
>
> 4. Any residential construction regulatory system or any portion thereof adopted or previously adopted…by a fire protection district or its board …within the jurisdiction of a city town, village or county shall be null and void as of the date on which such city, town, village or county adopts…its own residential construction regulatory system…
>
> 6. Any residential construction regulatory system or any portion thereof adopted or previously adopted…by the applicable fire protection district or board that is in conflict with this section shall be void."

These provisions do not affect the powers of the plaintiff fire protection districts to regulate construction of commercial or industrial structures.

Plaintiffs filed this action in Cole County Circuit Court prior to the effective date of this legislation, and sought a preliminary injunction to prohibit enforcement

of this section, pending a decision on the merits. That request for injunction was denied by the trial court and the legislation went into effect on August 28, 2005. Thereafter, plaintiffs and several defendants filed Motions for Summary Judgment. Defendants' Motions were argued to the trial court on September 20, 2005. On September 27, 2005, in a Judgment drafted by defendants and left unchanged by the trial court, defendants' Motions for Summary Judgment were granted.

From that Judgment, plaintiffs have appealed.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE THE PROVISIONS OF R.S.MO. SECTION 321.222 CONSTITUTE A SPECIAL LAW PASSED FOR THE SOLE BENEFIT OF A PRIVATE PARTY IN VIOLATION OF ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION FOR THE REASONS THAT (1) THE PURPORTED "OPEN-ENDED" POPULATION CLASSIFICATION IS ILLUSORY SINCE IT WAS VERY NARROWLY DRAWN TO INSURE THAT NO OTHER COUNTY WOULD EVER BE SUBJECT TO THESE PROVISIONS, AND (2) THERE IS NO RATIONAL BASIS FOR TREATING JEFFERSON COUNTY FIRE PROTECTION DISTRICTS DIFFERENTLY FROM THOSE IN OTHER SIMILAR COUNTIES IN THE STATE

Missouri Constitution Article III, Section 40(30)

Fire District of Lemay v. Smith, 184 S.W.2d 593 (Mo banc 1945)

Tilles v. City of Branson, 945 SW2d 447 (Mo. banc 1997)

Treadway v. State of Missouri, 988 S.W.2d 508, 510 (Mo. banc 1999).

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE R.S.MO. SECTION 321.222 VIOLATES ARTICLE. III, SECTION 41 OF THE MISSOURI CONSTITUTION BECAUSE IT PARTIALLY REPEALS THE PROVISIONS OF R. S. MO. SECTION 321.200, A GENERAL LAW RELATING TO THE POWERS OF FIRE PROTECTION DISTRICTS

Missouri Constitution Article III, Section 41

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS SINCE DEFENDANTS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE PROVISIONS OF R.S.MO. SECTION 321.222 CONSTITUTE A SPECIAL LAW PASSED IN VIOLATION OF ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION FOR THE REASONS THAT (1) THE PURPORTED "OPEN-ENDED" POPULATION CLASSIFICATION IS ILLUSORY SINCE IT WAS VERY NARROWLY DRAWN TO INSURE THAT NO OTHER COUNTY WOULD LIKELY EVER BE SUBJECT TO THESE PROVISIONS, AND (2) THERE IS NO RATIONAL BASIS FOR TREATING FIRE PROTECTION DISTRICTS LOCATED WHOLLY WITHIN JEFFERSON COUNTY DIFFERENTLY FROM THOSE LOCATED IN OTHER SIMILAR COUNTIES IN THE STATE

STANDARD OF REVIEW

The standard of review of a motion for summary judgment was well established in *ITT Commercial Finance v. Mid-America Marine Supply Corp.* , 854SW 2d 371(Mo banc 1993). On appeal from the grant of a motion for summary judgment, this Court reviews the motion essentially *de novo.* The record below is to be reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record.

Summary Judgment is appropriate only when the record demonstrates that there is a set of material facts as to which there are no genuine disputes, and that based on those undisputed facts the moving party *is entitled to judgment as a matter of law.* The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. *Id.* at 376-380.

SUMMARY OF ARGUMENT

Article III, Section 40(30) of the Missouri Constitution provides in pertinent part that "[t]he general assembly shall not pass any local or special law: ...(30) where a general law can be made applicable." The Constitution further provides that the question of "whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject." Art. III, Section 40(30). R.S.Mo. Section 321.222 is a special law, enacted for the sole benefit of a private group, namely the Home Builders Association and its members, which singles out the fire protection districts of Jefferson County without any underlying public purpose.

1. Although purportedly containing an open-ended classification based upon population, the Statute was so narrowly drawn as to be effectively closed-ended and therefore presumptively a "special law"

The determination of whether a statute is, on its face, a special law depends initially on whether the classification adopted is considered "open-ended" or "closed-ended." *Treadway v. State of Missouri*, 988 S.W.2d 508, 510 (Mo. banc 1999). Generally, a "…statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." *School District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 222 (Mo. banc 1991) quoting *State ex rel Lionberger v. Tolle*, 71 Mo. 645, 650 (Mo. 1880). A statutory classification based upon factors which are not subject to change, such as geography, is considered closed-ended and is *presumptively* unconstitutional special legislation. On the other hand, classifications based upon factors that are subject to change, including population, *may be* considered open-ended and therefore *not presumptively* unconstitutional.

However, whether a classification is judged to be open- or closed-ended does not end the legal inquiry. Closed-ended classifications can still be adjudged constitutional if the Legislature had a strong, rational basis for making the special classification. *See, e.g., Treadway v. State of Missouri, supra.*, (auto emissions inspection program applicable solely to St. Louis area upheld). Likewise, a statute containing an apparently open-ended classification may still be struck down as special legislation. *Tilles v. City of Branson,* 945 SW2d 447 (Mo. banc 1997) (tourism tax statute held unconstitutional special legislation despite containing apparently open-ended population classification.)

In drafting Section 321.222, the scriveners very narrowly limited the applicability of the Statute to fire protection districts located "wholly within any county of the first classification with ***more than 198,000 but fewer than 199,200 inhabitants,"*** which renders the Statute applicable only to Jefferson County. Despite this extremely narrow population classification, Defendants argued below, and the trial court found, that Section 321.222 must be considered "open-ended" and therefore, presumptively constitutional on its face.

It is true that Missouri Courts have held a statute based upon a population classification may be "open-ended" even though it applies only to one county *at the time of enactment.* Underlying this principle, however, is the expectation that similarly situated political subdivisions could grow into the newly created class in the future and thereby share the advantage of Legislature's previous consideration of the issues facing similarly situated governmental entities. *Riverview Gardens,* 816 S.W.2d at 222. For example, in *Fire District of Lemay v. Smith,* 184 S.W.2d 593 (Mo banc 1945), this Court found that the population classification of 200,000 to 400,000 was reasonably drawn in order to make the possibility of another county falling within that calculation a very real one. In fact, according to the census data before the trial court, in 2000 both Greene and St. Charles County fell within this classification.

In accepting the defendants' position that this legislation was open-ended, the trial court improperly assumed that any classification based upon population, no matter how narrow, renders the statute constitutional under the provisions of Article III, Section 40(30). Under this rationale, a statute tailored to political subdivisions with a population *between 198,000 and 198,002* inhabitants would enjoy the same presumption of constitutionality based on being apparently "open-

ended". Such an argument elevates form over substance, and would emasculate the intent of the drafters of our constitution to prohibit special laws serving private interests. Moreover, it is directly contradicted by the holding of this Court in *Tilles, supra.*, where the City of Branson tax legislation was held to be an unconstitutional special law despite containing a population classification of 2,000 persons, since it was apparent that it could only apply to the Branson area.

In this case, Section 321.222 could *theoretically* apply to additional counties in the future, but only if they happen to fall within the extremely narrow 1200 person range at a future census, amounting to a virtual statistical impossibility. According to the undisputed census data presented to the trial court, the only other county close to this population classification as of the latest census is Clay County with 184,006 residents, which represented an increase of 30,595 from the 1990 census. The likelihood that Clay County or any other county will have a population falling within the 1200 person range of Section 321.222 is extremely remote. Indeed, it is a reasonable inference that the population classification was drawn so narrowly *in order to ensure* that no other fire protection districts would ever be affected except those located wholly within Jefferson County.

The purported open-ended nature of §321.222, based as it is on a population bracket of a mere 1200 people, is ***illusory*** and was, in fact, cynically drawn with the intent to ***exclude*** all other counties in the state, now and in the future. As such, the classification is *de facto* closed-ended, and therefore, presumptively unconstitutional.

2. The Classification of R.S.Mo. Section 321.222 Is Arbitrary and Without Any Rational Relationship to a Proper Legislative Purpose.

Even if one could reasonably conclude that the population classification of 198,000 to 199,200 is truly open-ended, the legislation still violates Article III, Section 40(30) because there is absolutely no rational relationship between the classification of counties within a narrow population bracket of 1200 persons, and the elimination of the powers of fire protection districts located wholly within those counties to regulate residential construction. *See, e.g. Fire District of Lemay v. Smith, supra* where this Court found a nexus between a population classification of between 200,000 to 400,000 to the legislative purpose of a tax to promote fire safety, since the need for fire safety is greater in more heavily populated areas. *See also Inter-City Fire Protection Dist. v. Gambrell*, 231 SW 2d 193 (Mo 1950) (population classification must be reasonable and germane to the purposes of the law).

Defendants offered several creative rationalizations to the trial court to establish some nexus between the population classification of 198,000 and 199,200 and the withdrawal of the general powers otherwise invested in fire protection districts to conduct inspections of residential construction. For example, several of the Defendants decried the duplicative permitting process in Jefferson County, ignoring the fact that this duplication of jurisdiction has existed *in every county of the state* where the voters have seen fit to establish a fire protection district under Chapter 321. Even if this were a proper legislative purpose, it does not relate only to counties with populations of between 198,000 and 199,200.

Defendants also rationalize that the legislation is justified by unique

problems relating to residential development in Jefferson County. This claim is belied by the fact that the legislation *does not even cover all of Jefferson County,* since it leaves out the Pacific and Eureka Fire Protection Districts, both of which are located in growing areas adjoining St. Louis County. (See Mayer affidavit.) Moreover, such problems relating to population growth and residential development exist equally in other metropolitan St. Louis counties, such as St. Charles County with a population of 283,883, as well as in other growing counties across the State, such as Greene, with a population of 240,391, and Clay with a population of 184,006.

Defendants also offer the novel rationalization that the Legislature may have sought to "experiment" with a new regulatory scheme at first applicable only in Jefferson County, but later possibly to be expanded to other similar counties. Appellants have been unable to find an "experiment" exception to the application of Article III, Section 40(30) of the Missouri Constitution, and Defendants have cited absolutely no authority which would support the creation of such an exception by this Court.

In his concurring opinion in *Riverview Gardens,* at 226, Judge Lowenstein sitting by designation, rightly described such rationalizations as little more than **"...a sophistic exercise [which] should not allow the state to make [an] arbitrary and unreasonable distinction."** Defendants' rationalizations are likewise pure sophistry. Of course, all of these rationalizations fly in the face of the undisputed facts that this legislation was designed to single out and punish Jefferson County fire protection districts by eliminating their long-existent powers granted by the voters under Chapter 321 to enforce duly adopted codes for the protection of the public from fire.

In the absence of any meaningful nexus between the population

classification chosen by the drafters of this legislation, and the elimination of powers of fire districts to conduct residential inspections, it can only be concluded that this legislation is a special law, which must be held to violate Article III, Section 40(30) of the Missouri Constitution.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE R.S.MO. SECTION 321.222 VIOLATES ARTICLE. III, SECTION 41 OF THE MISSOURI CONSTITUTION BECAUSE IT PARTIALLY REPEALS THE PROVISIONS OF R. S. MO. SECTION 321.200, A GENERAL LAW RELATING TO THE POWERS OF FIRE PROTECTION DISTRICTS

SUMMARY OF ARGUMENT

Article III, Section 41 of the Missouri Constitution provides that "The general assembly shall not indirectly enact a special or local law by the partial repeal of a general law..." The enactment of R.S.Mo. Section 321.222 constitutes a partial repeal of R.S.Mo. Section 321.200, a general law establishing the powers of fire protection districts, at least as to fire protection districts located wholly within Jefferson County.

ARGUMENT

Appellants' research has uncovered no case dealing with the provisions of Article III, Section 41 separate from a general discussion of an alleged special law under Article III, Section 40(30). However, construing the language of Section 41 according to its plain meaning, it is clear that the effect of R.S.Mo. Section 321.222 is nothing less than the repeal of the general powers granted to every fire protection district in this state under R.S.Mo. 321.200 as to the plaintiff fire districts. Section 321.222 therefore qualifies as a special law separately under Article III Section 41, because it undermines and repeals provisions of a general law which are otherwise applicable throughout the state. In other words, this

legislation creates an after the fact exception to the general statutory scheme established by R.S.Mo.Section 321.200, under which the voters of Jefferson County established plaintiff fire protection districts in the first instance. To deprive these legally established districts of the powers invested in them by the electorate at the behest of special private interests is the essence of special legislation.

CONCLUSION

It is hard to imagine a clearer case of special legislation than that presented here. The drafter's cynical attempt to create open-endedness in the statute by a population classification bracket of 1200 persons is completely transparent. Moreover, despite the efforts of creative legal minds to engage in a "sophistic exercise" to rationalize the legislation, it is clear that it was designed for only one purpose; i.e., to allow HBA to avoid compliance with the fire protection codes enacted by the duly elected Directors of the Jefferson County fire protection districts.

To allow this legislation to stand would effectively emasculate Article III, Sections 40(30) and 41 from the Missouri Constitution. In future, a clever draftsman need only include a population bracket of 2 or more persons in any special legislation, and, if challenged, leave it to the lawyers to "dream up" some rationalization. That is not the law.

This Court should, therefore, reverse the grant of Summary Judgment in favor of Defendants, and declare R.S.Mo. Section 321.222 to be unconstitutional.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he mailed 1 copy and 1 diskette of this Appellants' Brief to the following, being all counsel of record in this matter, on the ___th day of March, 2006:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

The undersigned hereby certifies that this Brief complies with the limitations contained in Rule 86.06 (b) and contains 3,765 words, and that the disk filed herewith pursuant to Rule 84.06(g) has been scanned for viruses and is virus free.

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APPENDIX