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 13

APPELLANTS' REPLY BRIEF

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STATEMENT OF FACTS

This Reply Brief will respond to the separate Briefs filed by Respondents Blunt et. al. (hereafter "State's Brief") and Respondents HBA et. al. (hereafter "HBA's Brief").

Aside from being laced with argument, Respondents' respective Statements of Fact contain errors which should be corrected.

In its Brief, the State contends that new Section 321.222 "…authorizes certain municipalities to adopt a residential construction regulatory system" (State's Brief at 6). In fact, counties and cities across the State have been authorized to adopt, and have in fact adopted, systems for inspecting residential construction for many years prior to the enactment of Section 321.222. *See, e.g., R.S.Mo. Sections 64.170, 67.280, 77.500, 78.060, and 79.370*, among others) New Section 312.222 did not *grant* any authority to Jefferson County or to municipalities within Jefferson County that they did not already hold. Rather, this provision only *restricted and limited* the power of the existing fire protection districts within unincorporated Jefferson County and those municipalities.

In their Brief, the HBA et. al. state that Appellants "did not present any evidence controverting the material facts" in their various Motions For Summary Judgment. This is simply inaccurate. The Legal File reflects that Appellants filed affidavits with several documents attached to them, both in opposition to Respondents' Motions for Summary Judgment and in Support of their own Motion for Summary Judgment, which the trial court never heard. (See L.F. at 43-54 and 57-70). The controverting facts set forth in these affidavits and attachments are referred to throughout Appellants' Response In Opposition to Defendants' Motion For Summary Judgment. (LF at 71-81)

HBA et. al also contend in their Statement of Facts that Chapter 321, authorizing the establishment of fire protection districts throughout the State,

created the "potential for dual regulation" of residential construction. (Brief at 6) Of course this contention is more in the nature of argument than fact. It is also a complete smokescreen.

First, this dreaded "potential for dual regulation" has existed since 1947, when Chapter 321 was originally enacted, apparently without any discernable effect on the homebuilding industry across the State. Further, dual regulation exists in any county of the State where fire protection districts have been established under Chapter 321, since counties, cities and fire protection districts have all been empowered by the Legislature to regulate residential construction within their jurisdictions. The only fact relating to this "dual regulation" that is unique to Jefferson County is that HBA members were unhappy with the interpretation and enforcement of certain codes by fire protection districts there, and after threatening to file suit, chose instead to lobby for the enactment of Section 321.222 in order to deprive these troublesome fire protection districts of their power to enforce their legally adopted codes. (See affidavits of Glen Nivens at LF 43-54, and Matthew Mayer at LF 57-70, and attachments thereto).

The purpose behind this legislation was not to eliminate the burden of "dual regulation", as argued by HBA et. al in their Brief, but rather to eliminate the strict enforcement of fire protection codes by Appellants.

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 ISSOURI 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

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

A. *The Population Classification Adopted Here is Not Reasonable And Is Intended To Exclude All Other Counties Except Jefferson*

Both the State and HBA rely on reported decisions which conclude, *inter alia*, that a classification based on population, as opposed to fixed geographic features, is generally considered open-ended, and therefore a general rather than a special law. *See e.g., Riverview Gardens School District v. St. Louis County,* 816 SW 2d 219 (Mo banc 1991). Respondents also rely on cases which state that the mere fact that there is only one

County which falls within the population classification on the date of enactment does not *per se* invalidate an otherwise open-ended classification. *See e.g., State ex. rel. Fire District of Lemay v. Smith*, 184 SW 2d 593 (Mo banc 1945).

Appellants do not dispute these general principals. However, they are not without limitation. In fact, this Court has tempered these principals in the same cases cited by Respondents. Specifically, in *Collector of Revenue v. Parcels of Land Encumbered with Tax Liens 1-047 and 1-048*, 517 SW 2d 49 (Mo banc 1974): this Court stated, at 53-54:

> "[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.*…The 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 that 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.
>
> (emphasis added)

This language makes clear that in order to avoid being considered special legislation, a valid population classification must be drawn in a

manner which allows other entities to fall within the classification in the future, even if there is only one county or municipality that meets those criteria today. Furthermore, any population classification must be *reasonable*, i.e. not arbitrary or capricious.

The population classification here fails to meet either of these limitations. First, it does not admit of the possibility of another entity qualifying in the future. While it is theoretically possible that Clay County, being the next closest county in population below the subject classification of 198,000 to 199,200, might fall within the classification at the next census, the chances are remote. The population bracket of 1200 is less than 1% of the total population of a county required to qualify. The likelihood of Clay County population increase in the next census falling within this narrow 1% range is roughly comparable to winning the lottery.

More to the point, the HBA and other drafters of the legislation chose such an unreasonably narrow population classification deliberately in order to minimize if not eliminate any real possibility that Clay or any other county would qualify in the future. Such a narrow classification is substantively no different than adopting a population bracket of only one or two residents, or one or two hundred. At the point where the size of the population classification becomes miniscule and the likelihood of another county ever falling within the classification becomes a virtual impossibility, the entire concept of an open-ended classification becomes a sham.

At a minimum, such a classification is not reasonable, as required by *Collector of Revenue v. Parcels of Land Encumbered with Tax Liens 1-047 and 1-048,* but rather is arbitrarily drawn for the benefit of a special interest, here the HBA. This classification cannot stand as a truly open-

ended classification based upon population, but must be seen for what it is, a classic piece of special legislation.

Finally, it must also be pointed out that the State's contention in its Brief at 15-16 that the classification is open-ended because Jefferson County may cease to be subject to the law as its population increases, is an inaccurate statement of the law. Under R.S.Mo. Section 1.100.2, a county included in a population classification at the time of enactment remains in that classification even though its population subsequently changes to take it outside of the classification.

B. *Respondents' Rationalizations For The Classification Are "Mere Sophistries"*

Judge Lowenstein eloquently characterized the type of arguments presented by Respondents herein in support of this legislation as **"...**a sophistic exercise [which] should not allow the state to make [an] arbitrary and unreasonable distinction.**"** *School District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 226 (Mo. banc 1991).

The chief rationale cited by Respondents is the alleged problem of "dual regulation" discussed at length above. Even if this dual regulation is the problem it is portrayed to be by HBA, despite its existence since 1947, there is no nexus between the alleged problem and the classification of counties with a population of between 198,000 and 199,200. By contract, the nexus between counties of that size (namely Jefferson County) and the HBA's desire to rid themselves of pesky Jefferson County fire protection district inspectors is plain.

Respondents next offer as rationale the growing population density of Jefferson County, which this Court accepted in *Fire District of Lemay v. Smith*, 184 S.W.2d 593 (Mo banc 1945). However, in *Lemay*, the

classification was between 200,000 and 400,000, and since then other counties have attained that classification. The same cannot be said for the 1200 resident bracket selected by the drafters here. Obviously a county with just under or just over this narrow population bracket has the same characteristics of population density as does Jefferson County. Its exclusion from the legislation can only be fairly characterized as arbitrary.

Finally, Respondents suggest that the Legislature has the right to "experiment" with a new regulatory scheme in Jefferson County before applying it statewide. There is of course no authority for an exemption from Article III, Section 40(30) for experimental legislation, unless this Court chooses to craft one in this case.

More to the point, all of these rationalizations are transparent attempts to conceal the true nature of the legislation at issue. Unlike *Treadway v. State of Missouri*, 988 S.W.2d 508, 510 (Mo. banc 1999), there is no overriding public interest which justifies legislation affecting only the St. Louis metropolitan area. On the contrary, this case is much closer on its facts to *Tilles v. City of Branson,* 945 SW2d 447 (Mo. banc 1997), where this Court invalidated legislation authorizing a special tourism tax which contained both an apparently open ended population classification of between 2000 to 4000, but also a geographic element of bordering the State of Arkansas. The Court correctly determined that legislation to be in violation of Article III, Section 40(30).

Although Section 321.222 does not contain the geographic element found in *Tilles,* it is equally special legislation which cannot be converted into general legislation by the mere insertion of a unreasonable population classification or rationalized on the basis of a purported "dual system of regulation", population density, or "experimental" legislation.

Respondents essentially ask this Court to ignore the reality of the origin and purpose of this legislation, and permit it to stand because it includes the narrowest of population classifications and the thinnest of sophistic rationalizations. To accept Respondents' arguments here would be to draft a recipe for future scriveners on how to dress up special legislation in a false costume of general legislation. Stripped on its artificial coverings, this legislation should be seen by this Court for what it is—a classic piece of special legislation which the Constitution and citizens of this State intended to prohibit.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06©

The undersigned hereby certifies that this Brief complies with the limitations contained in Rule 86.06 (b) and contains 2476 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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