No. SC87239

IN THE SUPREME COURT
STATE OF MISSOURI

JEFFERSON COUNTY FIRE PROTECTION DISTRICT ASSOCIATION, et al.,	)
Plaintiffs/Appellants,	)
vs.	)
MATT BLUNT, et al.,	)
Defendants/Respondents.	)

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

JOINT BRIEF OF RESPONDENTS HOME BUILDERS ASSOCIATION OF GREATER ST. LOUIS, COUNTY OF JEFFERSON, MISSOURI, CITY OF ARNOLD, MISSOURI, AND CITY OF SCOTSDALE, MISSOURI

Dennis J. Kehm, Jr., #50371
Office of County Counselor
P.O. Box 100
Hillsboro, MO 63050
Phone: (636) 797-5072
E-mail: DKehmJr@jeffcomo.org
Attorneys for Respondent County of Jefferson, Missouri

Robert K. Sweeney, #38322
9806 Big Bend Road
Kirkwood, MO 63122
Phone: (314) 821-9882
FAX: (314) 865-1423
E-mail: rks122659@aol.com
Attorneys for Respondent City of Arnold, Missouri

JoAnn T. Sandifer, #38602
Husch & Eppenberger, LLC
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
Phone: (314) 480-1500
FAX: (314) 480-1505
E-mail: joann.sandifer@husch.com

James B. Deutsch, #27093
John Bardgett, #14886
Blitz, Bardgett & Deutsch, L.C.
308 High Street, Suite 301
Jefferson City, MO 65101
Phone: (573) 634-2500
Fax: (573) 634-3358
E-mail: jdeutsch@blitzbardgett.com
jbardgett@blitzbardgett.com
Attorneys for Respondent Home Builders Association of Greater St. Louis

Bianca Eden, #50301
Wegmann, Gasaway, Stewart, Dieffenbach,
Tesreau & Sherman, P.C.
P.O. Box 740
Hillsboro, MO 63050
Phone: (636) 797-2665
FAX: (636) 797-3505
E-mail: weglaw@mindspring.com
Attorneys for Respondent City of Scotsdale

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Statement Of Facts

1. The Parties.

Plaintiffs brought this case challenging the constitutionality of legislation passed by the Missouri General Assembly in 2005 dealing with certain regulatory powers of fire protection districts. The plaintiffs include the Jefferson County Fire Protection District Association, a Missouri non-profit corporation consisting of fire protection districts located within Jefferson County, Missouri, individual fire protection districts allegedly established under the authority of Chapter 321 R.S.Mo. and located within Jefferson County, and two residents of Jefferson County, Missouri. L.F. 87.

Defendant Matt Blunt is the Governor of the State of Missouri who signed the legislation at issue in this case. L.F. 197, 232. Defendant Jeremiah Nixon is the Attorney General of the State of Missouri. L.F. 198, 232. Plaintiffs also named as defendants all the political subdivisions of the State of Missouri located within the boundaries of one or more of the fire districts in Jefferson County, including defendants Jefferson County, Missouri ("Jefferson County"), the City of Arnold ("Arnold") and the City of Scotsdale ("Scotsdale"). L.F. 232. Defendant Jefferson County is a local government organized under the Missouri Constitution and existing under the laws of Missouri as a first-class county. L.F. 84, 144.

Intervenor-defendant Home Builders Association of Greater St. Louis ("HBA") is a not-for-profit Missouri corporation comprised of developers and others associated with the shelter industry in the St. Louis metropolitan area, which includes Jefferson County. L.F. 174, 178. HBA members have undertaken and are continuing to undertake residential construction and rehabilitation projects in Jefferson County. L.F. 174-75, 178-79. The circuit court granted the HBA's motion to intervene in these proceedings. L.F. 224.

2. Senate Bill 210.

Chapter 321 R.S.Mo. authorizes the creation of fire protection districts and sets forth the powers and authority of said districts. On August 28, 2005, Senate Bill 210 officially became law and amended Chapter 321 R.S.Mo. by adding Section 321.222 to that chapter. L.F. 168, 182. Section 321.222 R.S. Mo. ("Section 321.222") provides, *inter alia*:

> [n]otwithstanding the provisions of any other law to the contrary, in the event a city, town, village, or county adopts or has adopted, implements or has implemented, or enforces a residential construction regulatory system or any portion thereof applicable to residential construction within its jurisdiction, neither fire protection districts nor their boards shall have the power, authority or privilege to adopt, enforce, or implement a residential construction regulatory system or any portion thereof . . . .

L.F. 184.

Section 321.222 applies to fire protection districts located within first-class counties with more than one hundred, ninety-eight thousand but fewer than one hundred, ninety-nine thousand, two hundred inhabitants. L.F. 185.

Jefferson County is a first class county with one hundred, ninety-eight thousand, ninety-nine inhabitants according to the 2000 Census. L.F. 186-193.

3. Residential Construction Regulation Prior to Senate Bill 210.

Prior to passage of Senate Bill 210, Chapter 321 created the potential for dual regulation of residential construction in various political subdivisions of Missouri. Jefferson County is an example of this dual regulation. L.F. 170, 175-76, 179-80. There are thirteen different fire protection districts located wholly within Jefferson County. L.F. 145, 231. The fire protection districts in unincorporated and incorporated Jefferson County required builders to obtain building permits for residential construction in Jefferson County, which in turn required compliance with the fire protection districts' regulations and codes governing new construction. L.F. 170, 175-76, 179-80.

Pursuant to statutory authority, Jefferson County also adopted its own regulations controlling the construction, reconstruction, alteration or repair of buildings within unincorporated Jefferson County. § 64.170 R.S.Mo., L.F. 145, 156-159. Under its building code, Jefferson County issues building permits and conducts inspections to ensure compliance with its codes, including numerous provisions relating to fire safety. L.F. 145, 156-161. Jefferson County employs twenty-six employees in its building division, twelve of which are inspectors. L.F. 160-61.

In incorporated areas of Jefferson County, the municipalities are vested with statutory authority to regulate new construction. § 77.500 R.S.Mo. For example, Arnold is a city located wholly within Jefferson County. L.F. 98. Pursuant to statutory authority, Arnold has adopted regulations controlling the construction, reconstruction, alteration or repair of buildings and structures within its corporate limits. L.F. 99, 105-118. Arnold issues building permits and conducts inspections to ensure compliance with its building code, including numerous provisions relating to fire safety. L.F. 99, 105-118. With a department engineer and seven staff inspectors, Arnold is fully staffed, funded and capable of implementing its building codes with respect to residential construction. L.F. 100, 104.

Therefore, prior to passage of Senate Bill 210, residential builders in Jefferson County were subject to two independent building inspections and were required to comply with two different regulatory schemes. L.F. 170, 174-180. In addition, both the governing municipal entity and the applicable fire protection district had their own requirements pertaining to the subdivision of land, requiring builders to comply with the subdivision requirements of both entities to obtain the necessary permits and approvals to subdivide property. L.F. 100, 104, 170, 176, 180. The dual scheme of residential construction was burdensome and expensive for builders, as well as the inspecting agencies. It required two sets of inspections that generated the issuance of two sets of permits, issued upon satisfaction of two sets of requirements and payment of two sets of fees. L.F. 175-76, 179-80.

The dual scheme of residential construction regulation increases the cost of homebuilding and impacts the feasibility of constructing new residential subdivisions. L.F. 176, 180. For example, some portion of the redundant permit and inspection fees were ultimately passed on to the consumers in Jefferson County, so the dual regulatory system drove up the costs of new homes in Jefferson County. L.F. 176, 180.

4. Proceedings Below.

Plaintiffs filed this Petition for Declaratory Judgment and Preliminary and Permanent Injunction in August of 2005. L.F. 228. The sole count of the petition alleges that section 321.222 was passed and signed into law in violation of the Missouri Constitution, Article III, Section 40 because the applicable provisions thereof apply only to fire protection districts located within Jefferson County. L.F. 228.

Judge Byron Kinder of the Circuit Court of Cole County denied the plaintiffs' motion for preliminary injunction, and the parties consented to an expedited scheduling order for defendants to file motions for summary judgment. L.F. 227. Defendants Blunt and Nixon, Jefferson County, Arnold and the HBA all filed motions for summary judgment seeking a declaration that Section 321.222 did not violate Article III, Section 40 of the Missouri Constitution. L.F. 93-97, 141-43, 194-96, 220-222. Plaintiffs did not present any evidence controverting the material facts in those motions. L.F. 71- 81, 82-84. Instead, plaintiffs filed their own cross-motion for summary judgment asking the court to declare Section 321.222 unconstitutional as a matter of law. L.F. 71.

Following oral argument, the circuit court granted defendants' motions for summary judgment. L.F. 7, 9, 71-92. The court entered its order on defendants' motions

before defendants responded to the cross-motion for summary judgment and before submission of that motion to the circuit court. L.F. 7, 71-81.[1]

In his judgment, Judge Byron Kinder determined that section 321.222 was a "general," not a special law, in that the classification contained therein is based on population, an open-ended criterion. L.F. 9. He further determined that "[d]efendants have urged conceivable, rational grounds upon which the statute may be upheld." L.F. 10. Finding no material facts in dispute, Judge Kinder granted judgment to defendants as a matter of law. "Plaintiffs have failed to carry their burden of showing that the statute is unconstitutional." L.F. 10.

This appeal followed. L.F. 8.

[1] The circuit court entered an order continuing the plaintiffs' motion for summary judgment "to be reset in the event that Defendant's motion for summary judgment is denied." L.F. 7. In addition to the reasons set forth herein, Plaintiffs' request that this Court enter judgment in its favor is inappropriate because plaintiffs' motion has not been submitted, or ruled upon by, the court below.

Points Relied On

I. The Trial Court Properly Granted Summary Judgment To Defendants Because Plaintiffs Failed To Prove That Section 321.222 R.S.Mo. Clearly And Undoubtedly Violates Article III, Section 40 Of The Missouri Constitution, In That:

A. Section 321.222 Constitutes A General Law That Contains an Open-Ended Population Classification; and

B. The Population Classification In Section 321.222 Bears A Rational Relationship To Conceivable Legislative Purposes.

Walters v. City of St. Louis, 259 S.W.2d 377 (Mo. 1953);

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

State ex rel. Fire Dist. Of Lemay v. Smith, 184 S.W.2d 593 (Mo. banc 1945);

Inner-City Fire Protection Dist. v. Gambrell, 231 S.W. 193 (Mo. banc 1950).

II. The Trial Court Properly Granted Summary Judgment To Defendants Because Plaintiffs Failed To Prove That Section 321.222 R.S.Mo. Clearly And Undoubtedly Violates Article III, Section 41 Of The Missouri Constitution, In That Section 321.222 Employs An Open-Ended Classification And Thus Does Not Create A Special Law By Repeal Of A General Law.

Inner-City Fire Protection Dist. v. Gambrell, 231 S.W. 193 (Mo. banc 1950);

State ex rel. Crites v. West, 509 S.W.2d 482, 483 (Mo. App. 1974);

Christiansen v. Fulton State Hospital, 536 S.W.2d 159 (Mo. banc 1976); *S.S. & W. Inc., v. Kansas City*, 515 S.W.2d 487 (Mo. 1974).

Standard of Review

The Missouri Rules of Civil Procedure encourage the use of summary judgment to permit resolution of claims as early as they are properly raised in order "to avoid the expense and delay of meritless claims or defenses and to permit the efficient use of scarce judicial resources." *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id*. at 380-81.

This Court's review of the trial court's grant of summary judgment is *de novo. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo. banc 1993). This Court may affirm the trial court's judgment as long as the judgment can be sustained under any legal theory that is reasonably consistent with the pleadings. *Smith v. Square One Realty Co.*, 92 S.W.3d 315, 317 (Mo. App. 2002); *State ex rel. Conway v. Villa*, 847 S.W.2d 881, 886 (Mo. App. 1993). This standard of review governs points I and II below.

Argument

I. The Trial Court Properly Granted Summary Judgment To Defendants Because Plaintiffs Failed To Prove That Section 321.222 R.S.Mo. Clearly And

Undoubtedly Violates Article III, Section 40 Of The Missouri Constitution, In That:

A. Section 321.222 Constitutes A General Law That Contains An Open-Ended Population Classification; and

B. The Classification In Section 321.222 Bears A Rational Relationship To Conceivable Legislative Purposes.

There are two, and only two, questions before this Court: is section 321.222 general legislation; and, if so, can any conceivable rational basis be urged in its defense? Since the law is based upon an open-ended population classification, the first question is answered in the affirmative. And since population is a rational basis for classifications relating to fire protection, the second question is similarly answered. That inquiry ends this Court's analysis. The answers to these questions defeat plaintiffs' challenges to the constitutionality of section 321.222 as a matter of law.

An act of the Missouri legislature carries a strong presumption of constitutionality. *City of St. Charles v. State of Missouri*, 165 S.W.3d 149, 150 (Mo. banc 2005). The court should resolve any doubts concerning the constitutionality of legislation in favor of the procedural and substantive validity of the legislation. *Id*. "Moreover, the party attacking the constitutionality of a statute must show that the constitutional limitation has been clearly and undoubtedly violated." *Id.* (quotations omitted). *See also State ex rel. Fire Dist. Of Lemay v. Smith*, 184 S.W. 2d 593, 594-95 (Mo. banc 1945) (court will not declare an act unconstitutional unless it plainly contravenes the Constitution).

Plaintiffs have not met their burden, and this Court should affirm.

1. Section 321.222 Is Not A Special Law.

Article III, Section 40 of the Missouri Constitution provides that "[t]he general assembly shall not pass any local or special law . . . where a general law can be made applicable." V.A.M.S. Const. Art. 3, § 40(30). "The issue of whether a statute is, on its face, a special law or local law depends on whether the classification is open-ended." *Treadway v. State*, 988 S.W.2d 508, 510 (Mo. banc 1999). Classifications based upon factors that are subject to change, such as population, are open-ended. *Id*. Whereas classifications based upon immutable characteristics, such as historical facts or geography, are special laws. *Id*.

This Court's prior holdings firmly establish the open-ended nature of classifications based upon population. In T*readway*, the plaintiff asserted a special legislation challenge to statutes setting up vehicle emissions testing programs. The trial court granted summary judgment in favor of the State, and this Court affirmed. Although the statutes effectively applied only to the St. Louis metropolitan area, the classifications in the statutes employed open-ended criteria, such as county classification, population, charter status, and nonattainment criteria. *Id*. at 510-11. "These variables are not immutable characteristics. The statutes employ factors that would not exclude a county from satisfying the statutes' criteria should such a county in the future fall into one of the listed factors . . . ." *Id*. at 511. Citing a long line of its prior decisions holding that classifications based upon open-ended criteria such as population are general laws, this Court determined that the vehicle emissions statutes were general laws. *Id*. at 511 (citations omitted).

Here, as in *Treadway*, section 321.222 employs open-ended criteria. It identifies affected fire protection districts by factors that are subject to change, to wit: county classification and population. Missouri statutes specifically provide that counties classifications are subject to change based upon changes in assessed value. §§ 48.020-030 R.S.Mo. And the total population of any county is obviously a fluid number. The fact that the statute currently applies only to fire protection districts located within Jefferson County does not make it "special" legislation because the statute would apply to fire protection districts in other counties if those counties attain the same statutory criteria.

The classifications in section 321.222 are not based upon immutable characteristics. Under the decisions of this Court, section 321.222 is therefore a general law rather than a special law.

Plaintiffs do not dispute that the population bracket in the statute is, on its face, open-ended. They argue, however, that the classification is illusory because it is unlikely that any other county will fall within the specified population bracket. This Court has firmly rejected this exact argument. *Walters v. City of St. Louis*, 259 S.W.2d 377 (Mo. 1953), *aff'd,* 347 U.S. 231 (1954).[2]

[2] The United States Supreme Court's decision only addresses the plaintiffs' due process and equal protection challenges to the statute based upon alleged discrimination between the classes subject to the tax. The Court rejected those challenges. 347 U.S. 231.

In *Walters*, plaintiffs challenged as special legislation a statute authorizing any constitutional charter city having a population in excess of 700,000 to levy and collect an earnings tax. *Id*. at 381. The effective date of the act was July 29, 1952 and, by its terms, the act expired on April 1, 1954. *Id*. The City of St. Louis was the only city falling within the specified classification when the statute was enacted. *Id*. at 380-81. The plaintiffs argued that while the statute purported to be applicable to all cities attaining the specified population, it was not in fact open-ended because the expiration date effectively prohibited any other city from coming within the benefits of its provisions. *Id*. at 382.

This Court rejected that argument, holding that this rationale would unconstitutionally deny the general assembly's right to authorize legislation of limited duration granting powers to cities such as St. Louis simply because their population far exceeds that of other cities. *Id*. at 382-383. The Court stated that it would not "den[y] the well established rule of 'open-endedness' to legislation pertaining to cities (or counties or other subdivisions) of a specified classification [even] when it appears with reasonable certainty that no other city (or political subdivision) will come within the classification during the term of the legislation . . . ." *Id*. Since, by its terms, the statute applied to any constitutional charter city attaining the specified population, this Court determined that it was a general law. *Id*. at 383. "The conceded fact that it is a practical certainty no other city in this State will attain a population of more than 700,000 prior to the expiration date of the act, April 1, 1954, does not in the least affect the situation." *Id.*

This Court has since consistently held that the likelihood of more than one entity falling within the specified classification is not necessary, so long as the criteria is open-

ended. *School District of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 221, 222 (Mo. banc 1991). In that case, this Court set forth the governing test as follows: "[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, and that classification does not depend upon numbers."[3] *Id* at 221 (quoting *Lionberger v. Tolle*, 71 Mo. 645, 645 (Mo. 1880)). This Court noted that its prior decision in *Walters* broadened the definition of a general law when it held that legislation classifying political subdivisions by population is not special or local, even if the statute is of limited duration 'so long as it applies to all within, or that may come within, the enumerated class during its effective period.' *Id*. at 222 (quotations omitted).

> This "open-endedness" allows the legislature to address the unique problems of size with focused legislation; it also permits those political subdivisions whose growth or decline brings them into a new classification the advantage of the legislature's previous consideration of the issues facing similarly situated governmental entities. *Walters* stands for the proposition that statutes establishing classifications based on population are general laws, even when it appears with reasonable certainty that no other

[3] Plaintiffs' brief contains only a portion of the relevant test, conveniently omitting the last phrase establishing that the number of entities falling within the specified classification is not relevant to the law's status as general legislation. *See* plaintiffs' Brief, p. 13.

political subdivision will come within that population classification during the effective life of the law.

Riverview Gardens, 816 S.W.2d at 222. *See also Treadway*, 989 S.W.2d at 511.

Although this Court ultimately held in *Riverview* that legislation dealing with procedures for political subdivisions in Missouri to revise their tax levies, was "special," it did so because the classification therein was "founded on a unique, constitutionally-sanctioned form of government recognized for the City of St. Louis," *i.e.*, "political subdivisions the greater part of which is located in first class charter counties adjoining any city not within a county or any city not within a county" and on "mere geographic proximity to the City of St. Louis." *Id*. The Court noted that "we do not believe a classification open to other political subdivisions only upon a change in the constitution is open-ended in the same sense as a classification based on population." *Id.*

Section 321.222 does not employ a classification based upon a constitutionally-sanctioned form of government or geographic proximity; its classifications are based upon fluid characteristics. This Court has firmly established that a population classification -- no matter how many entities fall within the classification or how likely it is that others will come within the classification -- is an open-ended classification and does not create a special law.

Even if relevant, there is a much greater likelihood here that other cities could come within the specified classification than there was in *Walters*. The closest first class county in terms of population is Clay County, with a 2000 population of 184,006. L.F. 84, 146. Clay County could conceivably come within the parameters of the statute. And

since the statute is not of limited duration, many of the other sixteen first-class counties in Missouri could potentially gain or lose the necessary population to fall within the specified population at some time in the future. L.F. 186. In the meantime, "[t]he line of demarcation must be drawn somewhere" and the legislature, in its wisdom, has drawn it thus. *See State ex rel. Fire Dist. of Lemay v. Smith*, 184 S.W. 2d 593 (Mo. banc 1945).

Plaintiffs rely upon this Court's decision in *Tillis v. City of Branson*, 945 S.W.2d 447, 448 (Mo. banc 1997), for their argument that section 321.222 is special legislation. But that case proves the opposite. There, the Missouri legislature approved a "municipal tourism tax" that could be imposed by "any municipality of the fourth classification with a population of more than three thousand inhabitants but less than five thousand inhabitants and with more than five thousand hotel and motel rooms inside the municipal limits and which is located in a county that borders the state of Arkansas." *Id*. at 448. To determine whether the laws were special laws, this Court stated that "[t]he 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." *Id*. at 449.

This Court held that the legislation was an unconstitutional special law, but only because of the law only applied to cities in a county bordering Arkansas. This requirement imposed a geographic, and hence, immutable, classification. "[This requirement] makes [the tax] a closed-ended classification." *Id.* No such criterion is present in section 321.222.

The prior decisions of this Court are controlling here. Since section 321.222 classifies based upon open-ended criteria, it is a general law.

2. As a General Law, Senate Bill 210 Must Be Upheld Because It Bears A Conceivable Rational Relationship To A Legislative Purpose.

A general law will be upheld if the classification therein is made on a reasonable basis. *Savannah R-III School District v. Public Schools Retirement System,* 950 S.W.2d 854, 859 (Mo. banc 1997). "[O]nly where [a] statutory classification is arbitrary and without a rational relationship to a legislative purpose has this Court found a law founded on open-ended criteria unconstitutional." *Treadway,* 988 S.W.2d at 511. The standard is based upon the same principles that underlie equal protection challenges. If the statute does not involve a fundamental right or a suspect class, it will be upheld if there is any *conceivable* rational basis to uphold the regulatory scheme. *Savannah,* 950 S.W.2d at 859-860; *United C.O.D. v. State of Missouri,* 150 S.W.3d 311, 313 (Mo banc 2004); *Fust v. Attorney General,* 947 S.W.2d 424, 432 (Mo. banc 1997). Under 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,* 998 S.W.2d at 508.

This Court has recognized that fire protection is a matter that may warrant legislative classification. *State ex rel. Fire Dist. of Lemay v. Smith,* 184 S.W.2d 593 (Mo. 1945). In that case, this Court upheld the constitutionality of an act providing for the incorporation of fire protection districts in counties with populations between 200,000 and 400,000. 184 S.W.2d at 593. Noting that the question of classification is primarily

for the legislature, this Court stated that it must sustain the classification if there is any reasonable basis for it. *Id*. at 816. The Court held that the act's classification on the basis of population was proper because population is germane to the purpose of the act, fire protection, in view of the greater likelihood of the spread of fire in densely populated areas. *Id*. at 595.

The Court rejected the argument that the law was not reasonable because it did not give the right of organizing fire districts to all the congested areas that need it, but only to those with the populations covered by the act.

> 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.

Id. at 596. The Court determined that "where population is a reasonable basis for classification it is only necessary that the act apply to all places of the same population designated in the law. The fact [that] there may be congested areas in counties having a different population does not make the act a special law." *Id*. at 595.

Similarly, in *Inner-City Fire Protection Dist. v. Gambrell*, 231 S.W.2d 193, 196 (Mo. banc 1950), this Court rejected a special legislation challenge to an act excluding from fire protection districts property in first-class counties with a population in excess of 450,000 and located in a city not wholly within the district. The Court cited *Lemay* for

the proposition that classification based upon population is germane to the purpose of fire protection. *Id*. at 198. It concluded that exclusion of the specified property from the authority of fire protection districts was rational because "it may reasonably be assumed that equal or greater fire protection will be provided where such property is so taken into a city." *Id*.

Here, too, population is a reasonable basis for classifications relating to the powers of fire districts. As in *Gambrell*, it is reasonable to assume that first-class counties with a minimum population of one hundred, ninety-eight thousand inhabitants are large enough to provide the same, or greater, fire prevention regulation as the fire protection districts. It is therefore reasonable for the legislature to use population as a line of demarcation in section 321.222. Once that determination is made, this Court's inquiry can come to an end. The act applies to all places of the same population designated in the law, and thus the existence of any inequities resulting from the classification do not render it unconstitutional. *Lemay*, 184 S.W.2d at 596.

Nevertheless, there are additional conceivable grounds for the classifications in section 321.222, even if the law currently only applies to Jefferson County fire protection districts. It is reasonable to assume that areas with greater populations have more residential development. One of the apparent objectives of section 321.222 is to streamline and centralize regulation of residential construction by vesting control of this process in one entity – the city, town, village or county. The dual scheme of residential regulatory construction authorized in Chapter 321 is unquestionably burdensome for residential builders and detrimental to home buyers. L.F. 168–181. The Missouri

legislature may have recognized that this system is particularly unnecessary and burdensome for counties of the size identified in section 321.222.

The population bracket in Section 321.222 targets "mid-size" or "larger" first-class counties. L.F. 169, 186-93. The specified population captures counties in transition from rural communities to larger, more metropolitan, communities. L.F. 186-93. For example, Jefferson County is considerably larger than many of the more rural first-class counties. L.F. 186-93. The smallest first-class county is Camden County, with a population of 37,051. L.F. 186, 191. On the other hand, Jefferson County, and the population bracket in Section 321.222, are considerably smaller than the more metropolitan first-class counties, such as St. Louis, with a population of 1,016,315. L.F. 193.

The legislature may have recognized that a county with the specified population bracket identifies a county that is large enough to have in place or to develop the funds, trained personnel, and infrastructure to conduct its own regulatory system for residential construction, in contrast to smaller, more rural counties that may need the expertise and support of the fire protection districts to carry out residential inspections. The undisputed facts establish that Jefferson County has adopted residential construction regulations, including provisions relating to the fire safety of such structures, and that it has the necessary staff to implement the required inspections. L.F. 165-61. On the other hand, a county the size of Jefferson County is not so large that it needs the dual system to ensure adequate inspection of construction within its territory.

Based upon historical data relating to populations of Missouri counties in recent years, the general assembly may also have recognized that counties reaching the specified population bracket would likely have experienced spurts of rapid growth. L.F. 186. For instance, between 1990 and 2000, Jefferson County was one of the fastest growing counties in the State. L.F. 186-93. According to the 1990 decennial census, the population of Jefferson County grew by fifteen percent in only ten years. L.F. 186, 192.

This population growth necessarily translates to significant growth in residential construction. Therefore, the legislature may have reasonably deemed the dual system of residential construction regulation too cumbersome, expensive and time-consuming to accommodate such counties' growing housing demands. Or it may have determined that separate regulation by numerous fire-protection districts in a county (thirteen in Jefferson County L.F. 145) creates unnecessary and problematic inconsistency throughout counties and undermines the housing industry's ability to keep up with the population growth, for example, by creating administrative conflicts and inconsistencies for any new developments that span the boundaries of more than one fire district. Or the legislature may simply have determined that the resources of the fire protection districts in such rapidly growing areas should be reserved for the primary job of those districts – fighting fires.

Finally, the Missouri legislature may be experimenting with a new, singular scheme of residential construction regulation that, if successful, will eliminate the burden and redundancy of the current dual system. This is a legitimate legislative goal, where, as here, the legislature chose a reasonable classification to test this new system. "The

science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion applied to the exigencies of the state as they arise. It is the science of experiment." *Sailors v. Board of Education of the County of Kent*, 387 U.S. 105, 109 (U.S. 1967).

Here, the Missouri legislature, in its discretion, may have decided that the dual system of residential construction regulation is overly burdensome and therefore, enacted section 321.222 to test the efficacy of a singular system on a subsection of the State. Counties within the population bracket stated in the Bill are reasonable subjects for this experiment as they have large enough populations to test the adequacy of a singular system but are not so large as to make the experiment difficult to implement. Thus, the legislature's demarcation was not only reasonable, but wise.

Chapter 321 itself demonstrates that the general assembly has frequently chosen to regulate the powers of fire protection districts on the basis of population. This chapter is replete with other such classifications prescribing or limiting the powers of fire protection districts based on population or county classification. *See, e.g.*, section 321.015 (excluding from certain limitations on the persons that may hold the office of fire protection district director various types of counties, including certain counties with a population of at lease nine hundred thousand inhabitants) (apparently applies only to Jefferson County); § 321.015 (number of directors may be increased to five "except that in any county of the first classification with a population of more than nine hundred thousand inhabitants such increase in the numbers of directors shall apply only in the

event of a consolidation of existing districts"); § 321.242 (outlining different sales taxes that may be imposed by fire districts of specified populations in certain classifications of counties); § 321.690 (requiring audits of fire districts in counties of the first class having 900,000 inhabitants and in counties of the first class that have a population of 100,000 or more that adjoin no other county of the first class).

Chapter 321 thus contains various classifications granting or limiting the statutory powers granted to fire districts similar to those in section 321.222. The Missouri legislature has frequently recognized that population and county classifications are reasonable grounds for distinguishing between the powers granted to such districts.

This Court need not select any one basis for upholding the statute. Nor is this Court limited to the potential basis suggested herein. As long as this Court determines that any conceivable rational basis exists for the classification in section 321.222, the statute must be upheld.

For this reason, plaintiffs' argument that the Bill was passed at the behest of HBA in response to disputes between the HBA and the Jefferson County fire districts bears no relevance to the issue before this Court. In support of this argument, plaintiffs submitted an affidavit of Representative Jeff Roorda, consisting almost solely of his speculation as to why various legislators may have voted for Senate Bill 210. L.F. 55-56. These attestations are wholly inappropriate because Mr. Roorda cannot possibly have personal

knowledge of the motives of each and every legislator that voted for the Bill.[4] More importantly, the motives of the legislators are completely irrelevant to the constitutionality of the Bill.

A court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive." *United States v. O'Brien*, 391 U.S. 367, 383 (U.S. 1968). "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Id*. (*citing McCray v. United States*, 195 U.S. 27, 56 (1904)). *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 292 (2000). The courts will not void a statute that is, under well-settled criteria, constitutional on its face on the basis of what a few legislators have said about it. *O'Brien*, 391 U.S. at 384. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Id*. Plaintiffs' claims regarding the motives of the legislators who enacted the relevant provisions of Senate Bill 210 have no bearing upon the sole issue before this Court – whether there is any *conceivable* basis to uphold the statute as written.

[4] The HBA moved to strike various attestations in the three affidavits filed by plaintiffs on the grounds that they consist of opinions and speculation and are not based upon the affiants' personal knowledge. Supplemental Legal file of Respondent HBA, at 10.

Plaintiffs also argue that the Bill lacks rational basis because two fire protection districts located in Jefferson County, Pacific and Eureka, straddle county boundary lines and are not wholly contained within Jefferson County. Those districts are thus not subject to section 321.222. Plaintiffs suggest that this renders the legislation arbitrary in that those adjacent counties might have similar needs. Again, their arguments fail.

The fact that other areas could benefit from similar legislation does not render the classification unreasonable. This Court has so held. In *Lemay*, this Court upheld a law authorizing the creation of fire districts in areas of a specified population on the grounds that there may be greater need for fire protection in congested areas. 184 S.W.2d at 816. The plaintiffs argued that the law was unreasonable because it did not give other congested areas the same right to create fire districts. This Court rejected that argument. Since the act applied generally to all congested areas similarly situated, *i.e.*, situated in counties of the same population bracket, the fact that there were other congested areas to which the same act might have been applied did not render the classification unreasonable. *Id*. at 595.

> 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.

Id. *See also State ex rel. Atkinson v. Planned Industrial Expansion Authority*, 517 S.W.2d 36, 43-44 (Mo. banc 1975)(law granting municipalities of a specified minimum population special powers to eliminate blighted conditions was not unreasonable merely because other municipalities might have the problems the act seeks to cure).

Moreover, had the legislation included the Pacific and Eureka Fire Protection Districts, the counties in which they sit would be faced with unacceptable inconsistencies in residential construction regulation. Pacific and Eureka Fire Protection Districts would be operating under the singular system of residential construction under section 321.222 while all other fire protection districts located in the counties in which those districts sit would continue to enforce their own fire safety codes through the inspection and permit process. Therefore, the Missouri legislature could well have concluded that limiting the law to districts located wholly within Jefferson County avoided undesirable inconsistency in residential construction regulation in counties adjacent to Jefferson County. This decision was not arbitrary or unreasonable.

Finally, plaintiffs' affidavits suggest that section 321.222 is unreasonable in that it applies only to residential, as opposed to commercial construction. L.F. 59. Again, this argument is unavailing. The legislature could reasonably have decided that section 321.222 should apply to residential construction regulations because the fees associated with duplicative permitting affect individual consumers in a way that fees associated with commercial construction do not; they drive up housing costs. L.F. 171, 176, 180. In any event, "[t]he line of demarcation must be drawn somewhere." *Id*. at 596.

The Missouri legislature has consistently recognized that population is a reasonable basis for classification of the powers of fire protection districts. Here, the legislature again employed population to further a legitimate legislative purpose, *i.e*. the implementation of an efficient, singular residential construction regulatory system in all first-class counties with the specified population. The plaintiffs have not sustained their burden of establishing the invalidity of section 321.222. This Court should affirm.

II. The Trial Court Properly Granted Summary Judgment To Defendants Because Plaintiffs Failed To Prove That Section 321.222 R.S.Mo. Clearly And Undoubtedly Violates Article III, Section 41 Of The Missouri Constitution, In That Section 321.222 Employs An Open-Ended Classification And Thus Does Not Create A Special Law By Repeal Of A General Law.

Plaintiffs also argue that the enactment of section 321.222 constituted a partial repeal of the general law in Section 321.200 in violation of Article III, Section 41 of the Missouri Constitution. That section provides that "the general assembly shall not indirectly enact a special or local law by the partial repeal of a general law . . ." Plaintiffs' argument fails for the same reason set forth above: section 321.222 is not a special law.

This argument fails for the initial reason that it is not properly before this Court. Plaintiffs failed to assert any violation of Article III, Section 41 in their petition. L.F. 228-35. The petition asserts only a violation of Section 40. L.F. 228-35. It is well established in Missouri that constitutional challenges must be specifically raised at the earliest opportunity. *Christiansen v. Fulton State Hospital*, 536 S.W.2d 159, 160 (Mo.

banc 1976); *S.S. & W. Inc., v. Kansas City*, 515 S.W.2d 487, 489 (Mo. 1974). Here, plaintiffs waived this particular constitutional challenge by failing to raise it at the earliest opportunity -- in their petition.

Even if properly before this Court, plaintiffs have not established any violation of this constitutional provision. Plaintiffs assert that section 321.222 represents repeal of the general powers granted to every fire protection district in the state. That may well be the case. But the repeal does not violate Article III, Section 41 unless the legislation creates a special law. As set forth above, section 321.222 is based upon an open-ended population classification and thus is not a special law.

In *Gambrell*, this Court addressed the validity of a law much like this one, excluding certain property from the purview of the general law authorizing the creation of fire protection districts. 231 S.W.2d at 198. The Court recognized that "the act under consideration is an amendment of an existing law. It provides for the exclusion of territory from such a fire protection district." But because the exclusion was based upon population, this Court held that it was not a special law. *Id.* That holding controls here.

Missouri fire protection districts are creatures of statute. See *State ex rel. Crites v. West*, 509 S.W.2d 482, 483 (Mo. App. 1974) (holding that the dissolution of a fire district must be sought pursuant to the specific statutory procedure expressed by the legislature). Any powers these entities possess are granted by the Missouri legislature. *Id*. The Missouri legislature therefore has the ability to limit or even remove their powers. Contrary to plaintiffs' argument, the Missouri Constitution does not prohibit all exceptions to the statutory scheme, only those that create special laws.

Section 321.222 does not contravene the statutory scheme. It simply represents the general assembly's permissible tweaking of that scheme.

Conclusion

For the foregoing reasons, the undersigned defendants respectfully request this Court to affirm the circuit court's grant of summary judgment to defendants.

Respectfully Submitted,

HUSCH & EPPENBERGER, LLC

By: _____

JoAnn T. Sandifer, #38602
190 Carondelet Plaza, Suite 600
St. Louis, MO 63105
Phone: (314) 480-1500
Fax No: (314) 480-1505
E-mail: joann.sandifer@husch.com

BLITZ, BARDGETT & DEUTSCH, L.C.

By: _____

James B. Deutsch, #27093
John Bardgett, #14886
308 High Street, Suite 301
Jefferson City, MO 65101
Phone: (573) 634-2500
Fax: (573) 634-3358
E-mail: jdeutsch@blitzbardgett.com
jbardgett@blitzbardgett.com

Attorneys for Respondent Home Builders Association of Greater St. Louis

OFFICE OF THE COUNTY COUNSELOR, COUNTY OF JEFFERSON, MISSOURI

By: _____

Dennis J. Kehm, Jr., #50371
Office of County Counselor
P.O. Box 100
Hillsboro, MO 63050
Phone: (636) 797-5072
E-mail: DKehmJr@jeffcomo.org

Attorneys for Respondent County of Jefferson, Missouri

CITY OF ARNOLD, MISSOURI

By: _____
Robert K. Sweeney, #38322
9806 Big Bend Road
Kirkwood, MO 63122
Phone: (314) 821-9882
FAX: (314) 865-1423
E-mail: rks122659@aol.com

Attorneys for Respondent City of Arnold, Missouri

WEGMANN, GASAWAY, STEWART, DIEFFENBACH, TESREAU & SHERMAN, P.C.

By: _____
Bianca Eden, #50301
P.O. Box 740
Hillsboro, MO 63050
Phone: (636) 797-2665
FAX: (636) 797-3505
E-mail: weglaw@mindspring.com

Attorneys for Respondent City of Scotsdale

Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 7, 215 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 97 SR-2. The undersigned counsel further certifies that the accompanying diskette has been scanned and is free of viruses.

JoAnn T. Sandifer

Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing brief and a diskette were forwarded this 10th day of May, 2006, by first class mail, postage prepaid, to:

Steven W. Koslovksy, Esq.
Francis J. Vatterott, Esq.
2458 Old Dorsett Road, Suite 230
Maryland Heights, MO 63043

Stephan C. Walker, Esq.
Elm Court Plaza
1731 East Elm Street
Jefferson City, MO 65101

Jeremiah W. Nixon, Esq.
James R. McAdams, Esq.
Shannon W. Morgan, Esq.
Office of Attorney General
P.O. Box 899
Jefferson City, MO 65102

David M. Korum, Esq.
Shepherd, Taylor, Korum & Fitzroy, L.L.P.
222 South Central Avenue, Suite 804
Clayton, MO 63105-3509

Stanley D. Schnaare, Esq.
Schnaare Law Firm, P.C.
321 Main Street
P.O. Box 440
Hillsboro, MO 63050-0440

_____