Preliminary Statement

Article III, § 40(30), of the Constitution of Missouri prohibits enacting any special law where a general law could be made applicable. This provision applies to municipal ordinances just as it does to state statutes. That is, no city may enact an ordinance that creates a fixed class based on unchangeable geographic and historical facts where a general, open class would serve the same purpose.

The City of Sullivan is a fourth-class city. Sullivan's Code of Ordinances requires property owners living within 100 feet of the City's sewer system to connect to it. In 1996, the City began planning an extension to its existing municipal sewer system. Its Board of Aldermen submitted a three million-dollar bond issue to the electorate, which was passed. The bond issue was designated as paying for the entire cost of constructing the extended sewer lines.

After the City's engineers finished planning the new lines, the Board enacted Ordinance No. 2581, amending the City's fee schedule for permits and taps to connect to the sewer. The ordinance separates new sewer connectors into two classes. Owners of property in Sullivan generally pay a $500.00 "permit and inspection" fee to connect to the City's sewer and receive a sewer tap. Property owners in area of the 1996 addition, however, pay a blanket fee of $3,750.00 or $4,250.00, depending on the type of tap. They receive the same permit, sewer service, tap, and materials as all other new sewer connectors in Sullivan.

Appellant Judith Sites is the trustee of a trust that owns property in the post-1996 sewered area. The trust's property has a private, septic tank-based sewage system. The

City informed Ms. Sites she would have to connect to the new sewer line near her property and pay a fee of $3,750.00. She refused to pay the $3,750.00 fee. In response, the City filed a petition for injunctive relief against her in the Circuit Court of Crawford County, seeking to enjoin her from using her private sewage system, require her to connect to the municipal sewer, and require her to pay the ordinance's $3,750.00 fee.

Ms. Sites answered that the ordinance's higher fee class to which she was subject was a special law where a general law could be made applicable, in violation of the Constitution, and thus she could not be compelled to pay the $3,750.00 fee. The circuit court disagreed and held that the ordinance did not violate Mo. Const. art. III, § 40(30). The court issued the injunction the City requested. Ms. Sites appeals from that decision.

The purpose of the ordinance is to set forth the means by which property owners connect to Sullivan's municipal sewer system and the fees they must pay. The means are the same for all, but the fee is different for some. The ordinance creates a fixed class of persons in a particular geographic area based on particular historical facts and requires them to pay 750% more than all other property owners to receive the same service using the same materials simply because they live in this particular area. Whatever the City's reasons for wanting more money through its sewer connection fees, it could have gotten it through a law of general applicability, rather than creating a special, fixed class.

The ordinance's higher fee class is a special law where a general law could be made applicable, in violation of the Constitution of Missouri. This Court should reverse the portion of the trial court's judgment requiring Ms. Sites to pay the ordinance's $3,750.00 fee.

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Cases

Jurisdictional Statement

This is an appeal from a judgment upholding a municipal ordinance as Constitutional and assessing monetary damages against the appellant for violating that ordinance.

An appeal involving the Constitutional validity of a municipal ordinance is not part of this Court's exclusive appellate jurisdiction under Mo. Const. art. V, § 3. *Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907, 911 (Mo. banc 1997). Therefore, this appeal was within the jurisdiction of the Missouri Court of Appeals. *Id.* This case arose in Crawford County. Pursuant to § 477.060, R.S.Mo., venue lay in the Southern District. The appellant incorrectly appealed to this Court, Case No. SC89596, and on January 21, 2009, this Court transferred this case to the Missouri Court of Appeals, Southern District, where it was designated Case No. SD29596.

On March 31, 2010, the Court of Appeals issued an opinion reversing the judgment below in part. The respondent filed a Motion for Rehearing and an Application for Transfer, both of which the Court of Appeals denied on April 22, 2010. Thereafter, the respondent filed a timely Application for Transfer in this Court. On June 29, 2010, this Court sustained the application and transferred this case.

Therefore, pursuant to Mo. Const. Art. V, § 10, which gives this Court authority to transfer a case from the Court of Appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule," jurisdiction lies in this Court.

Statement of Facts

A. Background of City of Sullivan Ordinance No. 2581

Sections 705.070 through 705.200 of Respondent City of Sullivan's Code of Ordinances require property owners in Sullivan to connect their toilet facilities to the City's municipal sewer system if their property is located within 100 feet of a sewer line (L.F 8, 11-18).

In 1996, the City began planning to construct an addition to its sewer system in areas that previously had no municipal sewer service (Tr. 62). The City's Board of Aldermen proposed a bond issue to fund the construction of the new sewer lines (Tr. 62). In August of 1996, the Board of Aldermen submitted to the voters of Sullivan a proposed issue of $3,305,000.00 in revenue bonds to be used to improve and expand the existing waterworks and sewer system (L.F. 30; Plaintiff's Exhibit 2; Appendix A8-11).

The City held informational public hearings on the proposed bond issue (L.F. 30). Sample ballots were sent to the City's residents describing where the new sewer lines would be laid and the fees required to connect to the new system (Tr. 60). The bond issue passed and was authorized effective December 3, 1996 (L.F. 30; Plaintiff's Exs. 1 and 2; Appx. A13).

Thereafter, the City's engineers planned out the bond issue's new sewer lines (L.F. 30; Plaintiff's Ex. 1; Defendant's Ex. B; Appx. A13). In May of 1999, once the plans were complete, the Board of Aldermen passed Ordinance No. 2574, which issued the $3,305,000.00 in bonds (L.F. 30; Plaintiff's Ex. 1; Defendant's Ex. B; Appx. A13-30). Ordinance No. 2574 provided that the City would repay the bonds from the net revenues

of the operation of its whole sewer system (L.F. 20; Plaintiff's Ex. 1; Defendant's Ex. B; Appx. A18-19).

In July of 1999, the Board of Aldermen passed Ordinance No. 2581, which repealed the City's existing sewer connection fee schedule and promulgated a new one (Tr. 25; Defendant's Ex. A; Appx. A31-33). The Ordinance states:

> There shall be two (2) classifications for user fees on connection of sewer permits:
>
> a. Class One:
>
> 1) Type A. A four inch (4") sewer tap, and
>
> 2) Type B. A sewer tap in excess of four inches (4").
>
> A permit and inspection fee of $60.00 for a Type A Sewer Connection or $75.00 for a Type B Sewer Connection shall be paid to the City Collector at the time the application is filed to cover the material and equipment cost required to make said tap.
>
> b. Class Two (1996 Revenue Bond Projects):
>
> 3) Type A. A gravity connection, and
>
> 4) Type B. A pressure connection (grinder pump).
>
> A permit and inspection fee of $3,750.00 for a Type A Sewer Connection or $4,250.00 for a Type B Sewer Connection shall be paid to the City Collector at the time the application is filed to cover the material and equipment cost to make said tap. Sewer connections made after the completion of the unsewered areas identified in the 1996 Revenue Bond are

> subject to a permit and inspection fee inflation adjustment (consumer price index) calculated from the date of completion of the unsewered areas identified in the 1996 Revenue Bond to the date of permit for the connection.

(Defendant's Ex. A; Appx. A32). The City's Code Administrator, Dan King, testified that, by the time of trial, a new ordinance had increased the $60.00 fee for previously sewered areas to $500.00 (Tr. 31-32).

For residents of the newly sewered areas, Ordinance No. 2581 set the fee for connecting through a gravity connection fee at $3,750.00 and the fee for connecting through a grinder pump at $4,250.00 (Tr. 25-26; Defendant's Ex. A; Appx. A32). In order to utilize the sewer system, Ordinance No. 2581 forced residents of previously unsewered areas to pay their own costs for labor and installation, in addition to these connection fees (Tr. 5; Defendant's Ex. A; Appx. A32). Residents of the "previously sewered areas" of Sullivan only pay $500.00 (Tr. 31-32). For example, the owner of a newly-built residence located in a previously sewered area would pay $500.00 to connect to and utilize the City's sewer system (Tr. 31). Mr. King testified that citizens charged the $500.00 connection fee in the previously sewered area receive the same tap materials and sewer service as citizens in the newly sewered area who must pay $3,750 (Tr. 39-40).

Mr. King further stated that the cost of materials to make a tap into the main line is roughly $100.00 (Tr. 33). He estimated that the cost of the labor to lay the line and make the tap also would be less than $3,750.00 (Tr. 33). Part of the $3,750.00 fee required by Ordinance No. 2581 was apportioned to pipe and materials that would not be used at each

connection site (Tr. 42). Mr. King testified that the $3,750.00 connection fee bears no relation to the actual cost of connecting to and utilizing the public sewer system (Tr. 44).

B. The Judith Ann Sites Trust and its property

The Judith Ann Sites Trust owns twelve-and-a-half acres in an area within Sullivan that had no municipal sewer service before the 1996 bond project (Legal File 7, Tr. 4, 68). Appellant Judith Ann Sites, the trustee of the Trust, mows six of the acres, and the other six are forested (Tr. 68). She always has maintained a private septic tank-based sewer system on the Trust's property (Tr. 24, 70). The Trust's property is one of 336 plats the City's engineer designated as "unsewered" areas that would receive sewer service in the 1996 bond project (Tr. 17; Plaintiff's Ex. C).

Construction of the new sewer system began near the Trust's property (Tr. 5). On August 20, 2002, the City sent Ms. Sites a letter describing the process of laying sewer lines near the property (Tr. 19). It advised Ms. Sites it would need to obtain an easement over her trust's property in order to lay a main sewerage line (Tr. 5).

The City's engineers proposed laying a main line gravity feed through the Trust's property to connect all of the houses on the Trust's property's road (Tr. 21). The sewer line required an easement twenty feet wide crossing the middle of the Trust's lot, which would destroy much of the property's forested area (Tr. 68). The easement would restrict how Ms. Sites could use the property once the pipe was laid (Tr. 55). For instance, she would not be able to build any permanent structures over the easement (Tr. 55).

The City offered to compensate Ms. Sites for the loss of her use of the property due to the easement (Tr. 21). The City calculated its proposed compensation based on a

flat rate per square foot, irrespective of the damage or loss a property owner might have suffered due to the installation of the sewer line (Tr. 36). If Ms. Sites agreed to the easement and the City's proposed compensation, the Trust would have to pay the difference between the $3,750.00 connection fee and that compensation (Tr. 21).

Ms. Sites did not agree to the easement (Tr. 23). In response, the City laid a gravity feed adjacent to the Trust's property, rather than through it (Tr. 23). The eventual sewer line was located within one hundred feet of the Trust's property (Tr. 23).

After it had laid the sewer line, the City sent Ms. Sites a letter advising her that the installation was complete (Tr. 24). The letter stated she had 210 days from December 1, 2004, to connect her toilet system to the City's main sewer line (Tr. 24). The City told her she would have to pay the $3,750.00 gravity feed connection fee, plus any costs for labor and materials (Tr. 24).

Ms. Sites did not comply with the City's demands (Tr. 24, 70). Instead, she ignored them and continued to maintain her private, septic tank system (Tr. 24, 70).

The City's engineer, Robert Schaffer, estimated that the cost to connect a gravity line from Ms. Sites's house to the main line adjacent to her property would be $11,340.00, plus the $3,750.00 gravity feed connection fee (Tr. 53). If Mr. Sites chose to build a gravity line from her septic tank to the main line, the cost would be approximately $7,580.00, again plus the gravity feed connection fee (Tr. 53). Ms. Sites cannot connect to the City's sewer system unless she pays the $3,750.00 connection fee plus the costs of construction in either of these two scenarios (L.F. 20).

C. Proceedings below

On December 8, 2005, the City filed a Petition for Injunctive Relief against Ms. Sites in the Circuit Court of Crawford County, seeking to enjoin her from using a private septic tank system on the Trust's property, require her to connect to the new sewer line, and pay both the construction costs and Ordinance No. 2581's $3,750 fee (L.F. 7-10).

Ms. Sites answered that injunctive relief was improper because Ordinance No. 2581's required fee to tap into the sewer line is unlawful (L.F. 20). *Inter alia*, she alleged that the imposition of the $3,750.00 sewer connection fee in the newly sewered area is a special law where a general law could be made applicable, in violation of Mo. Const. art. III, § 40(30), placing her in a special classification of persons required to pay higher rates for access to the same public sewer system as the rest of the properties in the City using the same tap and materials (L.F. 20).

In reply, the City denied that Ordinance No. 2581 violated the Constitution (L.F. 23). It stated Ms. Sites was collaterally estopped from raising her arguments because of the Missouri Court of Appeals, Eastern District's decision in *Larson v. City of Sullivan*, 92 S.W.3d 128 (Mo. App. 2002), and her arguments also were barred by laches (L.F. 24). The City then moved the trial court to strike Ms. Sites's answer for these same reasons (L.F. 26-27). On January 3, 2007, the court denied the City's motion (L.F. 4).

The circuit court tried the case on March 25, 2008 (L.F. 5; Tr. 86). At trial, Ms. Site's central argument was that the higher fee class for the newly sewered area to which the City was attempting to subject her was a special law where a general law could have been made applicable, in violation of the Constitution, and thus was invalid (Tr. 6).

On July 9, 2008, the trial court entered judgment in the City's favor (L.F. 45; Appx. A1-4). Among its conclusions, it held "the imposition of sewer tap fees in the amount of $3,750.00 does not violate Article III, Section 40 … of the Constitution of the State of Missouri" (L.F. 46; Appx. A3). It permanently enjoined Ms. Sites from discharging sewer effluent without connecting to the City's sewer system (L.F. 47; Appx. A4). The court ordered the City could enter Ms. Sites's property to connect her toilet system to its sewer (L.F. 47; Appx. A4). The court awarded the City $3,750.00 in damages, the amount of the connection fee (L.F. 46-47; Appx. A3-A4). It held Ms. Sites liable for the costs of running the sewer line from her toilet system to the City's main line (L.F. 46-47; Appx. A3-A4).

Ms. Sites timely appealed to this Court (L.F. 48), which designated the case No. 85956. On January 21, 2009, on Ms. Site's motion, the Court transferred this appeal to Missouri Court of Appeals, Southern District. On March 31, 2010, the Court of Appeals issued an opinion reversing the judgment below in part and affirming it in part, and remanding the case to the trial court.

On June 29, 2010, this Court transferred this case.

Point Relied On

The trial court erred in holding that City of Sullivan Ordinance No. 2581 is valid *because* the ordinance is a special law in violation of Mo. Const. art. III, § 40(30), and therefore is invalid *in that* the ordinance arbitrarily requires property owners near new sewer lines to pay a 750% higher fee to connect to those sewer lines than it does for owners of new properties near sewer lines existing at the time of the ordinance's enactment to receive the same services using the same materials, and thus enacts a classification based on the immutable characteristics of historical and geographic facts.

City of Springfield v. Sprint Spectrum, L.P., 203 S.W.3d 177 (Mo. banc 2006)

Harris v. Mo. Gaming Comm'n, 869 S.W.2d 58 (Mo. banc 1994)

Tillis v. City of Branson, 945 S.W.2d 447 (Mo. banc 1997)

Sch. Dist. of Riverview Gardens v. St. Louis County, 816 S.W.2d 219 (Mo. banc 1991)

Mo. Const. art. III, § 40(30)

City of Sullivan Ordinance No. 2581

Argument

The trial court erred in holding that City of Sullivan Ordinance No. 2581 is valid *because* the ordinance is a special law in violation of Mo. Const. art. III, § 40(30), and therefore is invalid *in that* the ordinance arbitrarily requires property owners near new sewer lines to pay a 750% higher fee to connect to those sewer lines than it does for owners of new properties near sewer lines existing at the time of the ordinance's enactment to receive the same services using the same materials, and thus enacts a classification based on the immutable characteristics of historical and geographic facts.

Standard of Review

The Constitutional validity of a municipal ordinance is a question of law that this Court reviews *de novo*. *State ex rel. Sunshine Enters. of Mo., Inc. v. Bd. of Adjustment of the City of St. Ann*, 64 S.W.3d 310, 314 (Mo. banc 2002). When the Constitutionality of a municipal ordinance under Mo. Const. art. III, § 40(30), is at issue, that Constitutional provision specifically provides that the issue is a "judicial question to be judicially determined without regard to any legislative assertion on that subject."

This case was tried by a court, rather than a jury. Thus, the judgment below "will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Hightower v. Myers*, 304 S.W.3d 727, 731-32 (Mo. banc 2010) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). The Court "views the evidence and permissible inferences drawn from the evidence in the light most favorable to the judgment." *Id.* at 732.

* * *

The Constitution of Missouri prohibits enacting any special law where a general law can be made applicable. This Court consistently has interpreted this provision as barring any law that creates a fixed class based on immutable characteristics such as geographic location and historical facts where a general class could apply to meet the law's purpose. City of Sullivan Ordinance No. 2581 requires property owners connecting to the City's sewer lines constructed after 1996 to pay a connection permit fee of at least $3,750.00, plus the costs of installation. For property owners connecting to any other City sewer lines, however, the ordinance only mandates they pay $500.00 and do not have to pay the costs of installation. The City's code administrator testified that both the $3,750.00 payers and the $500.00 payers receive the same sewer tap and sewer services using the same materials. Nonetheless, the trial court held the higher fee class was not a special law where a general law could be made applicable. Was this error?

A. Standards for analyzing whether a law is a special law where a general law could be made applicable.

Appellant Judith Sites challenges the validity of City of Sullivan Ordinance No. 2581 under Mo. Const. art. III, § 40(30), the "Special Laws Clause," which provides:

> The general assembly shall not pass any local or special law:
>
> …
>
> (30) where a general law can be made applicable, and 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.

This provision "applies to city ordinances as well as to state laws." *McCaig v. Kansas City*, 256 S.W.2d 815, 816 (Mo. banc 1953).

What today is art. III, § 40(30) first appeared in the Constitution of 1865, although it did not then include the final portion prohibiting judicial deference to the legislature. *City of Springfield v. Smith*, 19 S.W.2d 1, 4 (Mo. banc 1929). As a result, despite the Special Laws Clause as it then existed, courts tended "to defer very largely and in some instances entirely, to the wisdom of the Legislature in matters of classification." *Id.*

In the Constitution of 1875, the people of Missouri amended this provision to insert its final clause, thereby ensuring "that the express constitutional language should control and that such questions were to be determined by the courts" without any regard to why the enacting body created the classification it did. *Id.* (citing *Henderson v. Koenig*, 68 S.W. 72, 76 (Mo. banc 1902)). This change means that courts cannot

> dodge the question by modestly referring to the wisdom of the law-giver as to the soundness of the classification or that it may hide behind a presumption, if to the judicial mind unreasonableness as to classification appears. But it does mean (unless the ["judicially determined"] clause is to be held meaningless) that the judiciary shall use its own processes of logic in determining the presence or absence of reasonableness or unreasonableness in the given classification.

Id. at 3.

The longstanding law of Missouri is that "a general law is a 'statute which relates to persons or things as a class.'" *City of Sprinfield v. Sprint Spectrum, L.P.*, 203 S.W.3d

177, 184 (Mo. banc 2006) (quoting *Reals v. Courson*, 164 S.W.2d 306, 307 (Mo. 1942)). Conversely, "a statute which relates to *particular* persons or things of a class is special." *Reals*, 164 S.W.2d at 307-08 (emphasis added). Special laws "do not embrace all of the class to which they are naturally related." *Id.* at 308.

"The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes, that makes it special, but what it excludes." *McKaig*, 256 S.W.2d at 817. Thus, "a law may not include less than all who are similarly situated. If it does, it is special, and therefore invalid, because it omits a part of those which in the nature of things the reason of the law includes." *Id.* at 818. It is "not enough," though, to demonstrate merely this; "in order to find the statute invalid as a special law, it must be found that members of the stated class are omitted 'whose relationship to the subject matter cannot by reason be distinguished from that of those included.'" *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 831 (Mo. banc 1991) (quoting *State v. County Court of Greene County*, 667 S.W.2d 409, 412 (Mo. banc 1984)).

While weighing whether a law is a special law involves many of "the same principles and considerations that are involved in determining whether the statute violates Equal Protection in a situation where neither a fundamental right nor a suspect class is involved, i.e. where a Rational Basis Test applies," *id.* at 832, the test for special laws is not precisely the same as the pure Rational Basis Test used in Equal Protection analysis. For, unlike Equal Protection or Due Process, "where the test is whether the legislative classification rests upon some difference which bears a reasonable and just relation to the

Act in respect to which the classification is proposed," the question in analyzing whether a law is a special law where a general law could apply "is whether, *considering the purposes of the Act*, a general law could have been made applicable." *Borden Co. v. Thomason*, 353 S.W.2d 735, 763 (Mo. banc 1962) (emphasis in the original).

As the Supreme Court of Nebraska[1] recently observed:

> Special legislation analysis is similar to an Equal Protection analysis, and often the two are discussed together because, at times, both issues can be decided on the same facts. As a result, language normally applied to an Equal Protection analysis is sometimes used to help explain the reasoning employed under a special legislation analysis. But the focus of each test is different. The analysis under a special legislation inquiry focuses on the Legislature's purpose in creating the class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. This is different from an Equal Protection analysis under which the state interest in legislation is compared to the statutory means selected by the Legislature to accomplish that purpose.

Hug v. City of Omaha, 749 N.W.2d 884, 890 (Neb. 2008).

Whereas the Rational Basis Test asks "whether the challenged state action rationally furthers a legitimate state purpose or interest," *San Antonio Indep. Sch. Dist. v.*

[1] Nebraska's Special Laws Clause is virtually identical to Missouri's: "where a general law can be made applicable, no special law shall be enacted." Neb. Const. art. III, § 18.

Rodriguez, 411 U.S. 1, 56 (1974), Missouri's Special Laws Clause analysis asks whether "members of the stated class are omitted 'whose relationship to the subject-matter cannot by reason be distinguished from that of those included.'" *Blaske*, 821 S.W.2d at 831 (quoting *County Court*, 667 S.W.2d at 412).

So, the Rational Basis Test and the special laws test are different. They do not ask the same question. The Rational Basis Test is a far looser standard than the special laws test. A special classification may be rationally related to a legitimate state purpose but still have an indistinguishable relationship to the purpose of the law from those who are excluded. *Borden*, 353 S.W.2d at 763.

A law relating "to particular persons or things of a class is special, and that classification does not depend on numbers." *Sch. Dist. of Riverview Gardens v. St. Louis County*, 816 S.W.2d 219, 221 (Mo. banc 1991) (quoting *State ex rel. Lionberger v. Tolle*, 71 Mo. 645, 650 (1880) (quoting *Wheeler v. Phila.*, 77 Pa. 338, 348 (1875))). A facially special law is presumed unconstitutional and will be invalid unless the party defending the law can show "the vice sought to be corrected, they duty imposed, or the permission granted is so unique to the persons, places, or things classified that a generally applicable law could not achieve the same result. *Id.*

As such, analyzing a law's constitutionality under the Special Laws Clause is a two-step process. First, "does the [challenged law] constitute a 'special law' under" Mo. Const. art. III, § 40(30)? *Sprint Spectrum*, 203 S.W.3d at 182. Second, "if so, has [the party defending the law] met its burden of showing a substantial justification for adoption of this law rather than a generally applicable law"? *Id.*

In this case, the higher fee class of the City's Ordinance No. 2581 constitutes a special law under the Constitution, and must be presumed unconstitutional. Further, the City has no substantial justification for levying a 750% higher sewer connection fee on residents of the newly sewered area to receive the same sewer service, tap, and materials as residents of the previously sewered area. The ordinance's higher fee class is invalid.

B. The ordinance's 750% higher fee classification for some new sewer connectors is facially special and thus must be presumed unconstitutional.

Missouri's general test for whether a law is facially special is "the rule of 'open-endedness,'" which originated in *Walters v. City of St. Louis*, 259 S.W.2d 377, 382 (Mo. banc 1953). Under this test, if a law sets a class based on closed-ended characteristics, such as "historical facts, geography, or other immutable characteristics," it is presumed unconstitutional, and the burden shifts to the lawmaker to show a substantial justification for enacting a special law, rather than a general law. *Doe v. Phillips*, 194 S.W.3d 833, 849 (Mo. banc 2006).

A classification is closed-ended and therefore facially special when it is "impossible" that the status of members of the class could change. *Sprint Spectrum*, 203 S.W.3d at 186 (holding a law applying only to certain cities was facially special because it was "impossible for the status of the excluded cities to change"). "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." *Id.* Closed-ended classifications are based on factors that are "set, solid, and fixed." *Id.*

The classification at issue in this case is plainly closed-ended and thus facially special. The City's Ordinance No. 2581 provides that there

> shall be two (2) classifications for user fees on connection of sewer permits:
>
> c. Class One:
>
> 5) Type A. A four inch (4") sewer tap, and
>
> 6) Type B. A sewer tap in excess of four inches (4").
>
> A permit and inspection fee of $60.00 for a Type A Sewer Connection or $75.00 for a Type B Sewer Connection shall be paid to the City Collector at the time the application is filed to cover the material and equipment cost required to make said tap.[2]
>
> d. Class Two (1996 Revenue Bond Projects):
>
> 7) Type A. A gravity connection, and
>
> 8) Type B. A pressure connection (grinder pump).
>
> A permit and inspection fee of $3,750.00 for a Type A Sewer Connection or $4,250.00 for a Type B Sewer Connection shall be paid to the City Collector at the time the application is filed to cover the material and equipment cost to make said tap. Sewer connections made after the completion of the unsewered areas identified in the 1996 Revenue Bond are subject to a permit and inspection fee inflation adjustment (consumer price

[2] By the time of trial, a new ordinance had increased this $60.00 fee to $500.00 (Tr. 31-32).

> index) calculated from the date of completion of the unsewered areas identified in the 1996 Revenue Bond to the date of permit for the connection.

(Defendant's Ex. A; Appx. A32).

Thus, for sewer connection fee purposes, the ordinance divides all properties within Sullivan into one of two classes: (1) "previously sewered areas," to which existing sewer lines extended before the Ordinance; and (2) "newly sewered areas" where the new sewer lines financed by the 1996 revenue bond would go (Tr. 30-31; Plaintiff's Ex. C). As the City's code administrator testified, property owners in both areas receive the same sewer service, tap, and materials (Tr. 39-40).

The City's Code of Ordinances requires that all owners of property located within 100 feet of the municipal sewer system connect to it (L.F. 8). If a property in one of the previously sewered areas needs to connect to the sewer lines near it – for example, if a new residence is constructed on a previously vacant lot – then under Ordinance No. 2581 its owner must pay a connection fee of $500.00 (Tr. 31). Conversely, if a property in one of the new sewered areas needs to connect to the sewer lines near it, as the City requires of Ms. Sites, the ordinance charges its owner at least $3,750.00 (Tr. 33; Defendant's Ex. A; Appx. A32).

The ordinance's sewer fee classifications are facially special because they are based on immutable geographic characteristics and historical facts. Whether a property is located in a previously sewered or newly sewered area is "set, solid, and fixed." The classes are not open-ended, because they cannot ever change. If a property is located in

an area that had municipal sewer service before the 1996 bond projects, its owner's required permit and inspection fee is $500.00 – period. If a property is located in an area that did not have municipal sewer service prior to the 1996 bond issue, however, the owner's permit and inspection fee is at least $3,750.00. Properties located in the newly sewered areas subject to the special, 750% higher fee will never be properties in the previously sewered areas subject to the lesser fee.

Over the Special Laws Clause's 145-year history, this Court has declared invalid numerous other laws that, like this ordinance, also treated fixed, particular persons or things of a class disparately than members of those persons' or things' general class. In this case, the ordinance does so based on both fixed geographical and fixed historical characteristics. This Court has long held that basing a subclass on these types of fixed characteristics renders a law facially special, and thus presumptively unconstitutional.

Many cases in which the Court found a law to be unconstitutionally special have involved disparate treatment of classes based on geography. In *Riverview Gardens*, a state statute established "different procedures for adjusting *ad valorem* taxes in political subdivisions in St. Louis County and the City of St. Louis than appl[ied] to political subdivisions elsewhere in Missouri." 816 S.W.2d at 220. Political subdivisions in other counties could raise the taxes by legislation, but those in St. Louis City and County could do so only by referendum. *Id.* This Court held the statute "constitute[d] special legislation." *Id.* at 222. While the statute purported "to establish a procedure … applicable to each of the political subdivisions of the state," within those "general provisions are exceptions for 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.'" *Id.* A general law could have been enacted, because "the procedures for reassessment imposed generally under [the statute] could apply equally well to the political subdivisions located in" St. Louis City and County. *Id.* The State had enacted a special law where a general law could have been applied. *Id.* The Court invalidated the disparate treatment for St. Louis and severed the special subclass from the general statute. *Id.* at 223.

In *Harris v. Mo. Gaming Comm'n*, a statute regulated the appearance and docking requirements for riverboat casinos generally throughout Missouri, but then exempted riverboats located in a specific geographic location: those near the Eads Bridge in downtown St. Louis. 869 S.W.2d 58, 60 (Mo. banc 1994). This Court held that this separate classification was a facially special law based on closed-ended geographical characteristics, because the exemption was geographically limited to riverboats near the Eads Bridge, despite the otherwise statewide applicability of the law. *Id.* Because the law was facially special, it was presumptively unconstitutional. *Id.*

In *Tillis v. City of Branson*, the Court also invalidated a law as special that treated something differently based on its geography. 945 S.W.2d 447, 449 (Mo. banc 1997). A state law created a Missouri Tourism Tax that applied to municipalities containing "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.* The only city that fit those specifications was the City of Branson. *Id.* But the law was facially special not because it only applied to Branson, but because it

was based on a fixed, geographical classification: it could never apply to any city in a county that did not border Arkansas. *Id.*

In this case, the ordinance establishes a 750% higher fee for new sewer connectors in the newly sewered area of Sullivan than apply to new connectors elsewhere in the City. Those elsewhere pay only $500.00 for a sewer connection permit and tap, whereas those in the newly sewered area must pay $3,750.00 for the same permit and tap. While Ordinance No. 2581 purports to establish a procedure applicable to all of Sullivan, within its general provisions is an exception for a fixed class of new sewer connectors. As with the disparate treatment for St. Louis in *Riverview Gardens*, the Eads Bridge riverboat in *Harris*, and the City of Branson in *Tillis*, the ordinance's treatment of new connectors in the newly sewered area of Sullivan is a special law.

In other cases, the Court has invalidated an unconstitutionally special law because it enacted a fixed class based on immutable historical characteristics. In *Sprint Spectrum*, a statute imposed a cap on municipal business license taxes, but exempted certain municipalities that had enacted a business license tax on companies providing wireless telephone service prior to 1980 and had attempted to collect the tax prior to 2005, which was a date prior to the statute's enactment. 203 S.W.3d at 181. This Court held the exemption was facially special, and thus presumptively unconstitutional, because it was based on an immutable, historical fact. *Id.* at 185-86. "[T]here is no changing actions completed or left incomplete at a date set in the past … It is impossible for the status of the excluded cities to change because the excluded cities did not take the specified actions prior to the necessary date." *Id.* at 186. None of the reasons the defending party

advanced showed why "the legislature could [not] have enacted a generally applicable law that stated" any of those reasons. *Id.* at 187. The State had enacted a special law where a general law could have been applied. *Id.* The Court invalidated the disparate tax cap exemption and severed it from the statute. *Id.* at 187-88.

Here, the ordinance imposes a general connection fee for new sewer connectors in Sullivan of $500.00, but then exempts new sewer connectors on properties where the municipal sewer lines were not planned before 1996, a date prior to the ordinance's 1999 enactment, and charges them a fee of $3,750.00 for the same permission, service, and materials. In addition to the immutable geographic characteristics of the higher fee class, it is also facially special, and thus presumptively unconstitutional, because it is based on an immutable, historical fact. It is impossible for the status of the new connectors excluded from the general, $500.00 fee class to change because their properties did not have sewer service planned prior to the necessary date. The higher fee class is facially special, and thus must be presumed unconstitutional.

Unmistakably, Ordinance No. 2581's classes are rooted in a given property's immutable characteristics. The characteristics are historical (pre-1996 versus post-1996) and geographic (falling inside certain fixed boundaries versus falling outside them) (Plaintiff's Ex. C). Both classes receive exactly the same sewer service, permission, and tap materials (Tr. 39-40), but one pays a wildly higher connection fee that is entirely based on the respective properties' immutable historical and geographic characteristics.

The ordinance's higher fee classification is a facially special law and must be presumed unconstitutional. Unless the City can show a substantial reason for enacting

that special law, rather than a general law applying to all new sewer connectors in Sullivan, it must be held invalid.

C. There is no substantial justification for the ordinance's special sewer fee classification, rather than a general law applying to all new sewer connectors.

The purpose of Ordinance No. 2581 is to set the fee for connecting to Sullivan's municipal sewer system to receive both permission to connect and a sewer tap. The substantial evidence before the trial court – from the City's own expert – was that previously sewered areas and newly sewered areas receive the same permission, the same sewer tap, the same materials, and the same sewer service. Considering the purpose of the ordinance, the City easily could have enacted a general law to set its sewer connection fees. There is no substantial justification why all new connectors could not have been charged the same fee or why some other, general classification applying to all new connectors could not have been enacted. The ordinance's special, higher sewer fees class for the newly sewered areas is unconstitutional.

If a law is facially special "because it applies to a fixed subclass," as the higher fee class does in this case, "then it will be invalidated unless substantial justification is shown for utilization of a special rather than a general law." *Sprint Spectrum*, 203 S.W.3d at 182. Where a statute's classification is fixed, "instead of presuming that it is constitutional, the presumption is that it is unconstitutional." *Id.* at 186 (quoting *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993)).

"The burden, therefore, shifts to … the party defending the statute, to show that it is constitutional. *In order to meet this standard, the mere existence of a rational or*

reasonable basis for the classification is insufficient." *Id.* (emphasis added). Instead, the defending party "must demonstrate a substantial justification to exclude" the excluded class. *Id.* (quoting *O'Reilly*, 850 S.W.2d at 99). Moreover, "in so showing it cannot rely on a legislative determination that a special law was necessary." *Id.*

To show a substantial justification for using a special law, rather than a general law, the party defending the special law must prove that "the vice sought to be corrected, they duty imposed, or the permission granted is so unique to the persons, places, or things classified that a generally applicable law could not achieve the same result." *Riverview Gardens*, 816 S.W.2d at 221.

There is no such substantial justification in this case.

The increased fee is not justified by some heightened cost to the City for the new connectors in the newly sewered area, as opposed to the previously sewered area, to tap into the sewer system. The evidence was that tapping into the post-1996 sewer line is the same cost to the City as tapping into the pre-1996 sewer line (Tr. 38). The City's Code Administrator testified, "It's just a question of whether you're in the new sewered area or the older area" (Tr. 38). The two areas even receive "the same tap material" (Tr. 38). The City provides "the same materials for a resident to tap onto the" pre-1996 sewer line as it does for the post-1996 line (Tr. 39).

Nor can the 750% higher charge be justified by the City's costs obviously incurred in constructing the sewer in the newly sewered area, as the bond issue paid for that construction in full. The ballot language in Ordinance No. 2336 stated that the bond issue would allocating "$3,305,000 for the purpose of extending and improving the City's

combined waterworks and sewerage system, the cost of operation and maintenance of said combined waterworks and sewerage system and the principal of and interest on said revenue bonds" (Defendant's Ex. B; Appx. A9-10, A13). Ordinance No. 2574, which actually issued the bond, comprehensively provides for the issuance and redemption of the bonds, the establishment of the revenue funds and accounts created by the bonds, the application of bond proceeds, and the application of any revenues generated by the bonds (Defendant's Ex. B; Appx. A13-26).

Ordinance 2574 creates a "Construction Account" into which proceeds received from the sale of the bonds simultaneously were deposited when the bonds were delivered (Defendant's Ex. B; Appx. A20). It specifies that

> the City assigns the proceeds of the Bonds held in the Construction Account to the Bondowner to secure the City's obligations under this Ordinance. Moneys in the Construction Account will be disbursed to the City *for the sole purpose of paying the cost of extending and improving the System in accordance with the plans and specifications prepared by the Consulting Engineer*…"

(Defendant's Ex. B; Appx. A20).

There was no evidence before the trial court that the bond issue was insufficient to pay for the construction of those new sewer lines. Indeed, in Article VIII of Ordinance No. 2574, the City covenanted that it

> will fix, establish, maintain and collect rates and charges for the use and services furnished by or through the System to produce income and

> revenues sufficient to (a) pay the costs of the operation and maintenance of the System; (b) pay the principal of and interest on the Bonds as and when due; and

meet its capitalization and reserve requirements under Missouri law (Defendant's Ex. B; Appx. A22). This says nothing of the "rates and charges" being used for the costs of *construction*, rather than operation and maintenance. This is because the construction was to be paid through the bond proceeds deposited in the Construction Account.

The City's need to repay the revenue bond also cannot be a substantial justification for charging new connectors in the newly sewered area 750% more for a sewer connection permit and tap than those in the previously sewered area. Section 250.120, R.S.Mo., requires the City to impose adequate sewer fees and charges in order to pay the cost of maintenance and operation of its sewer system and pay the principal of and interest on its revenue bonds. But there is no evidence that the higher fee class is tied in any way to the existence of any outstanding revenue bonds. The ordinance does not, for example, provide that the special, higher fee class will sunset when the bond is eventually repaid. It does not list the difference between the two classes' fees, $3,250, as a separate fee for repayment of the bonds. In fact, the bond issue's ballot language specified that its principal and interest would be "payable from the revenues derived by the City *from the operation to its combined waterworks and sewerage system, including all future improvements and extensions thereto*" (Appx. A10) (emphasis added). The bond plainly is to be repaid from revenues from the *whole* sewer system, *including* the addition to be constructed – not *just* from the addition.

Even if the purpose of the higher fee somehow were to help repay the revenue bonds (though there is no evidence of this), it would be irrelevant to the Special Laws Clause analysis of the higher fee class. For, the City plainly "could have enacted a generally applicable law" that equally operated to meet its obligation under § 250.120. *Sprint Spectrum*, 203 S.W.3d at 187. It could have increased all sewer connection fees in for new connectors in Sullivan. Alternatively, it could have made all sewer connection fees in Sullivan proportional in some manner to the cost of providing the new sewer service for each individual, newly-connected property. Either approach would have been a general law applying to all new sewer connectors in Sullivan, rather than a special law based on fixed, historical and geographic characteristics.

Moreover, the City's duty to repay revenue bonds under § 250.120 cannot be read as an authorization for it to enact a special law where it equally could enact a general law to meet that duty. That statute plainly envisions cities enacting general laws to meet its requirements: when a city issues a revenue bond for the construction of a sewer system, it must repay the bond through the collection of sewer fees and charges. A general law would suffice to meet the requirements of § 250.120, and thus the City cannot enact a special law. Mo. Const. art. III §40(30).

Evidently, the City wanted more money through its sewer connection fees than it was receiving before Ordinance No. 2581. Whatever its reason for desiring this, it could have accomplished this aim generally, rather than specially.

The benefit Ordinance No. 2581 provides – access to the municipal sewer system – is the same for all city residents. The same materials are used to tap into the sewer line

and the same manner of waste disposal is used, regardless of location. Only the fee the ordinance charges differs according to one's address. By paying the $3,750.00 fee, a new connector in the newly sewered area gets nothing more than a new connector in the previously sewered area of the city paying the $500.00 fee: access to the sewer system. There is no special benefit to the new connectors in the newly sewered areas of Sullivan "so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result." *Riverview Gardens*, 816 S.W.2d at 221.

There is no substantial justification for Sullivan requiring owners of property in one geographical and historical area of the City to pay a 750% higher sewer connection fee than owners of all other properties to obtain the same permission, service, and materials. The higher fee class of the City's Ordinance No. 2581 is a special law where a general law could be made applicable. It therefore violates Mo. Const. art. III, § 40(30), and is invalid. The trial court erred in holding otherwise.

This Court should reverse the portion of the trial court's judgment requiring Ms. Sites to pay a sewer connection fee of $3,750.00.