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## JURISDICTIONAL STATEMENT

Relator, Broadway-Washington Associates, Ltd. (“BWA,” hereinafter), is a defendant in a condemnation suit filed by the Tax Increment Financing Commission of Kansas City (“TIF,” hereinafter), styled **Tax Increment Financing Commission of Kansas City v. Broadway Center, LTD., f/k/a Broadway-Washington Associates, Ltd., et al.**, Case No. 04CV226433 (Circuit Court of Jackson County, Missouri, at Independence). On July 13, 2005, respondent, the Hon. Michael W. Manners, entered his Judgment of Condemnation in this underlying lawsuit. A copy of the Judgment appears in the Appendix to BWA’s Opening Brief (**Appendix to Opening Brief for Relator [“App.,” hereinafter] at pp. A-1 - A-13**). On September 20, 2005, BWA filed its Petition for Writ of Prohibition with this Court, arguing that respondent’s action in entering his Judgment of Condemnation was clearly in excess of his jurisdiction. This Court issued its Preliminary Writ of Prohibition on November 1, 2005, directing respondent to answer the Petition on or before December 1, 2005. TIF, on its own behalf and on behalf of respondent, answered the Petition on December 1, 2005. A copy of this Court’s Preliminary Writ appears in the Appendix to BWA’s Opening Brief (**App. at p. A-104**). This Court has jurisdiction of this original action in prohibition pursuant to **Article V, §4, of the Missouri Constitution** and **§ 531.010, RSMo.**

## STATEMENT OF FACTS

As noted above, BWA is a defendant in a condemnation suit filed by TIF pending in the Circuit Court of Jackson County, Missouri, at Independence. Respondent is the judge presiding over the condemnation action.

TIF was created pursuant to Missouri's **Tax Increment Financing Allocation Act, §§99.800-.865, RSMo.** TIF filed its Petition In Condemnation (and its Amended Petition in Condemnation) pursuant to authority it claimed was derived from Ordinance No. 991015, City Ordinances of the City of Kansas City, Missouri. **Petition for Writ of Prohibition at ¶ 3; Respondent's Answer to Petition for Writ of Prohibition at ¶ 3. See Exhibit "B" to Petition for Writ of Prohibition at pp. 8-9 (Exhibit "B," hereinafter) (App., pp. A-22 - A-23); Exhibit "C" to Petition for Writ of Prohibition at pp. 5-6 (Exhibit "C," hereinafter) (App., pp. A-34 - A-35); see also Exhibit "D" to Petition for Writ of Prohibition (Exhibit "D," hereinafter) (App., pp. A-43 - A-52).** BWA was named as a defendant, together with other individuals and entities.

The property that TIF seeks to condemn is located in downtown Kansas City, Missouri, close to the intersection of 12<sup>th</sup> Street and Broadway **Petition for Writ of Prohibition at ¶ 2; Respondent's Answer to Petition for Writ of Prohibition at ¶ 2.** It is improved as a surface parking lot, and is adjacent to the Bartle Hall Convention Center. While TIF has suggested during the pendency of these proceedings that BWA's parking lot is somehow more delapidated or less asthetically appealing than other parking lots in the

Kansas City metropolitan area, there is no evidence before the Court that demonstrates that the condition of this particular parking lot differs in any significant manner from other parking lots of similar age, or similarly situated. In fact, this lot is utilized extensively by residents and tourists alike, perhaps most notably when “events” are scheduled at the Convention Center.

The Petition and the Amended Petition describe the property TIF sought to condemn in the same manner, which is reproduced in the Appendix to the instant Brief. **Petition for Writ of Prohibition at ¶ 4. See Exhibit “B” at pp. 14-15 (App., pp. A-28 - A-29); Exhibit “C” at pp. 12-13 (App., pp. A-41 - A-42).** Ultimately, TIF’s legal description is the description for the real property ordered condemned by respondent in his Judgment of Condemnation. **See Exhibit “A” to Petition for Writ of Prohibition at pp. 4-5 (Exhibit “A,” hereinafter) (App., pp. A-4 - A-5).**

Ordinance No. 991015 also describes the real property which the City Council of Kansas City authorized (or attempted to authorize) TIF to acquire. A close comparison of that description with TIF’s legal description - - set forth in the Petition, the Amended Petition, and in the Judgment of Condemnation - - reveals that Ordinance No. 991015 does not authorize the acquisition of BWA’s property. **Compare Exhibit “A” at pp. 4-5 (App., pp. A-4 - A-5), Exhibit “B” at pp. 14-15 (App., pp. A-28 - A-29), and Exhibit “C” at pp. 12-13 (App., pp. A-41 - A-42) with Exhibit “D” at pp. 2-7 (App., pp. A-45 - A-50).** The real property respondent ordered condemned, in other words, was never identified by the City Council of Kansas City as a proper subject of TIF’s claimed power of eminent domain.

Equally significant is the fact that Ordinance No. 991015 was adopted by the City Council of Kansas City on September 2, 1999 (with an effective date of September 12, 1999). **Petition for Writ of Prohibition at ¶ 3; Answer to Petition for Writ of Prohibition at ¶ 3. See Exhibit “D” at p. 9 (App., pp. A-52).** The initial TIF petition was filed five (5) years later, on September 13, 2004. **See Petition for Writ of Prohibition at ¶ 2; Answer to Petition for Writ of Prohibition at ¶ 11.** Respondent heard evidence relating to the Petition (and the Amended Petition) on May 31, 2005.

Respondent’s Judgment of Condemnation was entered on July 13, 2005, just short of six (6) years after adoption of Ordinance No. 991015. The condemnation commissioners appointed by respondent met on September 30, 2005, and on October 19, 2005, the commissioners filed the report of their award in damages. The next day, October 20, 2005, TIF paid the Commissioners’ Award into the trial court registry, some six (6) years and three (3) months after the adoption of Ordinance No. 991015. The statutory authorization for TIF to proceed in condemnation, however, lapsed in September 2004, by which time it should have “acquired” the property subject to Judgment of Condemnation as mandated by **§99.810.1(3), RSMo.**

BWA brought to respondent’s attention the fundamental deficiencies and flaws in the authority for TIF’s attempted exercise of the power of eminent domain - - and the consequent absence of respondent’s jurisdiction to proceed - - through a Motion to Dismiss. **Answer to Petition for Writ of Prohibition at ¶¶ 12, 14.** Respondent over-ruled the Motion to Dismiss, and BWA made application to the Western District of the Court of Appeals for a

Writ of Prohibition. **Answer to Petition for Writ of Prohibition at ¶ 13.** That Court declined to issue the requested Writ. **Id.** BWA filed the instant action in prohibition with this Court on September 10, 2005, and on November 1, 2005, this Court issued its preliminary Writ of Prohibition. TIF, on its own behalf and on behalf of respondent, answered the Petition in Prohibition on or about December 1, 2005. A separate answer was filed on behalf of certain other defendants in the underlying matter, Dale E. Fredericks, Carol Fredericks, The Dale E. Fredericks IRA Rollover Account, and Sangamon Associates, Ltd. These defendants claim a minority ownership interest in the relator's real property.<sup>1</sup>

BWA now requests that the Court make its Preliminary Order in Prohibition

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<sup>1</sup> Sangamon Associates, Ltd., is not the sole remaining general partner of BWA as it alleges in paragraph 12 of its Answer to the Petition for Writ of Prohibition. The Managing General Partner is the Carpenter 1985 Family Partnership, Ltd. ("Carpenter"). **BWA Partnership Agreement, Article 5, Section 1 (App. A-85).** It holds 75% of the partnership interests. The Carpenter 1985 Family Partnership, Ltd., is a Missouri limited liability company in good standing, and assigned Charter Number LP0003833. The Managing General Partner has authority to bring this action. **Id. at Article 5, Section 1, 5.** The death of Allan Carpenter did not dissolve or change The Carpenter 1985 Family Partnership, Ltd. The other members of the Carpenter 1985 Family Partnership, Ltd. continue to manage that partnership and it continues to serve as Managing General Partner of BWA pursuant to the Agreement.

peremptory and absolute.

**POINTS RELIED ON**

I

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM  
TAKING ANY FURTHER ACTION IN THE UNDERLYING MATTER OTHER THAN  
DISMISSING THE PETITION IN CONDEMNATION BECAUSE THE AUTHORITY OF

THE TAX INCREMENT FINANCING COMMISSION TO PROCEED WITH CONDEMNATION OF RELATOR'S REAL PROPERTY HAS LAPSED AND EXPIRED AND RESPONDENT WAS THEREFORE WITHOUT JURISDICTION TO ENTER HIS JUDGMENT OF CONDEMNATION IN THAT THE TAX INCREMENT FINANCING COMMISSION HAD ONLY FIVE (5) YEARS FROM THE DATE THE KANSAS CITY CITY COUNCIL ADOPTED ORDINANCE NO.991015, OR SEPTEMBER 13, 1999, WITHIN WHICH TO "ACQUIRE[] BY EMINENT DOMAIN" RELATOR'S PROPERTY, §99.810.1(3), RSMO., AND THE TAX INCREMENT FINANCING COMMISSION HAD NOT "ACQUIRED" THE PROPERTY BY SEPTEMBER 13, 2004, BUT MERELY COMMENCED THE LEGAL PROCEEDINGS NECESSARY TO DO SO ON OR ABOUT THAT DATE.

**State ex rel. Missouri Cities Water Co. v. Hodge, 878 S.W. 2d 819 (Mo. 1994)**

**County of Jefferson v. Quiktrip Corporation, 912 S.W. 2d 487 (Mo. 1995)**

**Butler v. Mitchell - Hugeback, Inc., 895 S.W. 2d 15 (Mo. 1995)**

**Citizens Electric Corporation v. Director of Revenue, 766 S.W. 2d 450 (Mo. 1989)**

**§99.810.1, RSMo.**

**Mo. Const., Art. I, §26**

## II

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING MATTER OTHER THAN DISMISSING THE PETITION IN CONDEMNATION BECAUSE THE TAX INCREMENT FINANCING COMMISSION WAS NEVER PROPERLY AUTHORIZED BY THE KANSAS CITY CITY COUNCIL TO CONDEMN RELATOR'S REAL PROPERTY AND RESPONDENT WAS THEREFORE WITHOUT JURISDICTION TO ENTER HIS JUDGMENT OF CONDEMNATION IN THAT THE PROPERTY AREA

DESCRIBED IN THE CONDEMNATION PETITION IS NOT WITHIN THE PROPERTY AREA DESCRIBED AS A “CONSERVATION AREA” IN ORDINANCE NO. 991015, THE LEGISLATION CLAIMED BY THE TAX INCREMENT FINANCING COMMISSION TO AUTHORIZE THE CONDEMNATION PROCEEDINGS BEFORE RESPONDENT.

**State ex rel. Terrell v. Nicholls, 719 S.W. 2d 862 (Mo. App., E.D., 1986)**

**State ex rel. Gove v. Tate, 442 S.W. 2d 541 (Mo. 1969)**

**§99.820.1, RSMo.**

### III

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING MATTER OTHER THAN DISMISSING THE PETITION IN CONDEMNATION BECAUSE THREE (3) ADDITIONAL PROCEDURAL AND SUBSTANTIVE DEFECTS ASSOCIATED WITH THE CONDEMNATION PROCEEDINGS TOGETHER AND/OR SEPARATELY DEPRIVE RESPONDENT OF JURISDICTION IN THAT (A) THE TAX INCREMENT FINANCE COMMISSION NEVER MADE ANY GOOD FAITH OFFERS TO PURCHASE

RELATOR'S PROPERTY PRIOR TO COMMENCING CONDEMNATION PROCEEDINGS, BUT ONLY OFFERS CONDITIONED ON CERTAIN INDEMNIFICATION REQUIREMENTS; (B) THE TAX INCREMENT FINANCING COMMISSION OMITTED ONE RECORD OWNER FROM THE AMENDED PETITION IN CONDEMNATION; AND, (C) THE KANSAS CITY CITY COUNCIL FAILED IN TERMS TO FIND "AT LEAST THREE FACTORS" PRESENT AUTHORIZING DESIGNATION OF PROPERTY AS A "CONSERVATION AREA" AS REQUIRED BY §99.805(3), RSMO., IN ORDINANCE NO. 991015.

**City of Columbia v. Baurichter, 713 S.W. 2d 263 (Mo. 1986)**

**State ex rel. Missouri State Highway Commission v. Pinkley, 474 S.W. 2d 46**

**(Mo. App., E.D., 1971)**

**State ex rel. Weatherby Advertising Co. v. Conley, 527 S.W.2d 344, 336**

**(Mo. 1975)**

**State ex rel. Missouri Highways & Transportation Commission v. Black, 702**

**S.W.2d 525, 526 (Mo. App., E.D.,1985)**

**§523.010, RSMo.**

**§99.805(3), RSMo.**

**ARGUMENT**

**I**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING  
RESPONDENT FROM TAKING ANY FURTHER  
ACTION IN THE UNDERLYING MATTER OTHER  
THAN DISMISSING THE PETITION IN  
CONDEMNATION BECAUSE THE AUTHORITY OF  
THE TAX INCREMENT FINANCING COMMISSION TO  
PROCEED WITH CONDEMNATION OF RELATOR'S  
REAL PROPERTY HAS LAPSED AND EXPIRED AND**

RESPONDENT WAS THEREFORE WITHOUT JURISDICTION TO ENTER HIS JUDGMENT OF CONDEMNATION IN THAT THE TAX INCREMENT FINANCING COMMISSION HAD ONLY FIVE (5) YEARS FROM THE DATE THE KANSAS CITY CITY COUNCIL ADOPTED ORDINANCE NO. 991015, OR SEPTEMBER 13, 1999, WITHIN WHICH TO “ACQUIRE[] BY EMINENT DOMAIN” RELATOR’S PROPERTY, §99.810.1(3), RSMO., AND THE TAX INCREMENT FINANCING COMMISSION HAD NOT “ACQUIRED” THE PROPERTY BY SEPTEMBER 13, 2004, BUT MERELY COMMENCED THE LEGAL PROCEEDINGS NECESSARY TO DO SO ON OR ABOUT THAT DATE.

The power of eminent domain - - the right of the government to deprive a property owner of his or her land without consent - - has been aptly described by this Court as “frightening.” State ex rel. Missouri Highway & Transportation Commission v. Keevan, 895 S.W. 2d 587, 589 (Mo. 1995). The Pennsylvania Supreme Court once declared “[t]he power of eminent domain, next to that of conscription of man-power for war, is the most awesome grant of power under the law of the land.” Winger v. Aires, 371 Pa. 242, 89 A.2d

**521, 522 (Pa. 1952).** Missouri’s Bill of Rights, Article I of the Constitution of 1945, contains no less than three (3) separate provisions that in terms address and limit the scope of this “awesome” power. **Mo. Const., Art. I, §§26 - 28.** The uses, and the potential for abuses, of eminent domain continue to be the subject of great public interest and concern. In this State, Governor Blunt recently appointed a special task force to study Missouri condemnation law and procedures; this task force issued some eighteen (18) recommendations for improvement at the close of 2005. **See Final Report and Recommendations of the Missouri Eminent Domain Task Force, <http://www.mo.gov/mo/eminentdomain> (December 30, 2005).**

Of course, much good is achieved for the public through the proper exercise of this power by the federal, state, and local governmental entities. Nonetheless, eminent domain is sometimes misused. The instant case is illustrative: here, TIF has clearly overreached its authority in its attempt to condemn BWA’s real property located in down-town Kansas City. In so doing, TIF prevailed upon respondent to act in manifest excess of his jurisdiction in entering his Order of Condemnation of July 13, 2005. The only available, and indeed the only appropriate, remedy is for this Court to make absolute and peremptory its Preliminary Writ of Prohibition, directing respondent to dismiss with prejudice TIF’s condemnation action.

#### I. Availability of Writ Relief

A. Respondent’s Judgment of Condemnation is not Appealable. The Court is well-aware that the July 13, 2005, Judgment of Condemnation is not appealable because it is an

interlocutory order. State ex rel. Union Electric Co. v. Godfrey, 673 S.W.2d 14, 16 (Mo. 1984); Norfolk & Southwestern Railway Co. v. Greening, 458 S.W.2d 268, 270 (Mo. 1970). The courts of this State have long recognized prohibition as the appropriate and requisite mechanism to obtain review of the propriety of an order of condemnation. State ex rel. United States Steel v. Koehr, 811 S.W. 385, 388 (Mo. 1991); State ex rel. Devanssay v. McGuire, 622 S.W.2d 323, 325.26 (Mo. App., E.D., 1981). This Court summarized the state of the law in this regard in State ex rel. United States Steel, 811 S.W. 2d at 385, stating that prohibition will lie where condemnation “proceedings are unauthorized, [because] the court lacks subject matter jurisdiction.” Id. at 388.

B. BWA will suffer irreparable harm if the Condemnation Proceedings Continue. Respondent simply did not have authority to condemn this land. Nonetheless, BWA would have lost its right to the possession and use of its real estate as soon as the commissioners appointed pursuant to respondent’s Judgment of Condemnation tendered their report to respondent, and TIF paid the award into the trial court registry, absent this Court’s Preliminary Order in Prohibition. As the Eastern District of the Court of Appeals noted in discussing the availability of prohibition under similar circumstances, “[i]f the trial court lacks jurisdiction to entertain the condemnation proceeding the damage to relators from the destruction of their property prior to appeal may well be beyond redress and would result in injustice.” Devanssay, 622 S.W.2d at 326. The risk that TIF will destroy the improvements on BWA’s property, and otherwise impair the use and value of this property to BWA,

remains unless the Preliminary Order is made peremptory and absolute. An appeal from the final judgment, following litigation over the issue of damages, simply is not an adequate remedy here, or an appropriate substitute for the extraordinary writ.

## II. Standard of Review

A. Prohibition restrains trial court actions in excess of jurisdiction. Prohibition lies to restrain the exercise of judicial authority that is in excess of the authority granted by the Legislature. A writ of prohibition shall be granted “to prevent usurpation of judicial power.” **§531.010, RSMo.; see State ex rel. Vogel v. Campbell, 505 S.W.2d 54, 57 (Mo. 1974); State ex rel. Picerno v. Mauer, 920 S.W.2d 904, 912 (Mo. App., W.D., 1996)** (purpose of writ to prevent usurpation of judicial power). Prohibition is appropriate here because the Legislature granted the City Council and TIF no more five (5) years within which to “take” property under ordinances such as Ordinance No. 99105, which authorization lapsed over one (1) year ago, and because the City Council never authorized TIF to acquire relator’s property by condemnation.<sup>2</sup>

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<sup>2</sup> It should be noted that TIF suggests that this Court is somehow limited in its consideration of the issues relevant to respondent’s authority to condemn BWA’s property to the question of whether the five-year grant to TIF of the State’s power of eminent domain pursuant to **§99.810.1(3), RSMo.**, had lapsed. **See Suggestions in Support of TIF Commission’s Motion to Clarify or Dismiss the Preliminary Writ at pp. 3-4, fn. 1 & 2. Rule 84.22**, contrary to TIF’s characterization of it, does not so provide. Likewise, the

B. The dispositive facts are not disputed. TIF admits it is proceeding under the purported authority of Ordinance No. 99105 and that the ordinance was enacted under the authority of §99.810.1(3), RSMo. **See Petition for Writ of Prohibition at ¶¶ 3, 5; Answer to Petition for Writ of Prohibition at ¶ 3.** TIF and BWA disagree only on the legal effect of the Ordinance and the timing of the “acquisition” of BWA’s property. Thus, the question of the respondent’s jurisdiction is purely a question of law which this Court may determine on a Writ of Prohibition. **State ex rel. White v. Terte, 293 S.W.2d 6, 12 (Mo. App., W.D., 1956).**

### III. TIF’s Legislative Grant of Authority to Condemn Has Expired

As noted above, this Court has stated, “[t]he power of government to condemn private property is a frightening power. It allows government to deprive landowners of the enjoyment and use of their property against their wishes.” **Keeven, 895 S.W.2d at 589.** Because of the awesome, indeed fearsome, nature of this power, courts “properly read condemnation authority narrowly, limiting the government to taking only property that the law clearly and expressly permits the government to take for the narrow purposes the law clearly and expressly or by necessary implication permits.” **Id.**

The power of eminent domain is an element of the State sovereignty, and in Missouri

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authorities to which TIF directs the Court’s attention - - **State ex rel. Nixon v. Blunt, 135 S.W. 3d 416 (Mo. 2004), and Derfelt v. Yocum, 692 S.W. 2d 300 (Mo. 1985)** - - fail altogether to support this notion.

it naturally inheres in the State rather than in municipalities such as Kansas City. **See State ex rel. Missouri Cities Water Co. v. Hodge, 878 S.W.2d 819, 820 (Mo. 1994).** Moreover, it is a power the exercise of which is “in derogation of common law.” **City of Caruthersville v. Faris, 146 S.W.2d 80, 86 (Mo. App., S.D., 1940).** It is also an authority “in derogation of the right of the citizen.” **Southwestern Bell Telephone Co. v. Newingham, 386 S.W.2d 663, 665 (Mo. App., S.D., 1965).** These considerations, together with the operation and effect of the exercise of this fearsome power, require that statutes delegating the legislative function be “strictly construed.” **Hodge, 878 S.W.2d at 821; see also Rippetto v. Thompson, 216 S.W.2d 505, 507 (Mo. 1949).**

Here, of course, the State has determined to delegate to municipalities the power to condemn private property through commissions established pursuant to the **Tax Increment Financing Allocation Act, §§99.800-.865, RSMo.** Specifically, the Legislature authorizes a “municipality,” “[b]y ordinance,” to “approve redevelopment plans and redevelopment projects, and designate redevelopment project areas.” **§99.820.1(1), RSMo.**

Further, the Legislature has delegated to municipalities such as Kansas City the power, “[p]ursuant to a redevelopment plan,” to “acquire by . . . eminent domain . . . land and other property[.]” **§99.820.1(3), RSMo.** On its face, the statute requires that the relevant municipality “by ordinance” define the area of the “redevelopment project” within which the power of condemnation may be exercised. **Id.**

The Kansas City City Council adopted such an ordinance on September 2, 1999, with

an effective date of September 12, 1999: Ordinance No. 991015. **Exhibit “D” (App. A-43 - A-52)**. TIF admits that its Petition in Condemnation was filed pursuant to Ordinance No. 991015. **Answer to Petition for Writ of Prohibition at ¶ 3**. As noted above, that Petition was filed on September 13, 2004, five years after the adoption of the Ordinance. **Petition for Writ of Prohibition at ¶ 3; Answer to Petition for Writ of Prohibition at ¶ 3**.

On the very day TIF acted to file its Petition in Prohibition, however, its authority to proceed under Ordinance No. 991015 lapsed and expired. Indeed, the plain language of **§99.810.1(3), RSMo.**, prohibited respondent from entering any Judgment of Condemnation after September 2004. In relevant part, the statute provides:

no ordinance approving a redevelopment project shall be adopted later than ten (10) years from the adoption of the ordinance approving the redevelopment plan under which such project is authorized and provided that no property for a redevelopment project shall be acquired by eminent domain later than five (5) years from the adoption of the ordinance approving such redevelopment project.

**Id. (emphasis added).**

Under well-settled Missouri law, the date a condemnor “acquires” property through exercise of eminent domain (often called the date of “taking”) is the date on which the condemnor pays the amount of the commissioner’s award into court. **Mo. Const. Art. I, §26** (“until the same shall be paid to the owner, or into court for the owner, the property shall not

be disturbed or the proprietary rights of the owner therein divested”); **State ex rel. Missouri Highway Commission v. Starling Plaza Partnership**, 832 S.W.2d 518, 520 (Mo. 1992) (“The date of the taking is the date upon which the condemnor pays the commissioners’ award into court.”); **State ex rel. State Highway Commission v. Deutschman**, 142 S.W. 2d 1025, 1028 (Mo. 1940) (“title passes” to condemnor on date commissioners’ award is paid).

The Legislature is presumed to legislate with knowledge of existing law. **Greenbriar Hills Country Club v. Director of Revenue**, 47 S.W. 3d 346, 352 (Mo. 2001). Indeed, this Court has already held directly that the General Assembly was aware of the existing state of the law of county sales taxes when it enacted §§99.800 - .865, RSMo. **County of Jefferson v. Quiktrip Corporation**, 912 S.W. 2d 487, 490 (Mo. 1995). And, this Court has declared that the Legislature is presumptively aware of this Court’s prior decisions regarding the construction and operation of statutory limitations periods. **Butler v. Mitchell - Hugeback, Inc.**, 895 S.W. 2d 15, 19-20 (Mo. 1995). Moreover, “[w]hen the legislature enacts a statute referring to terms which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action.” **Citizens Electric Corporation v. Director of Revenue**, 766 S.W. 2d 450, 452 (Mo. 1989).

The definition of when property is “acquired” or “taken” has been in the Missouri Constitution since as early as 1875. Had the Legislature intended the interpretation and result TIF successfully urged before respondent - - that TIF need only commence

condemnation proceedings within five (5) years of the adoption of the relevant Ordinance, as with a traditional limitations period - - the Legislature could easily have so stated. The Legislature knows how to enact a traditional statute of limitations. **Butler, 895 S.W. 2d at 19-20.**

In the context of an action for condemnation, however, the word “acquire” has a precise meaning that is quite distinct from the initiation of the legal process during which, after several conditions precedent are met, the condemning authority may ultimately “acquire” the property. The General Assembly chose to use the word “acquire” in enacting **§99.810.1, RSMo.**, with full knowledge of the meaning attached to that word by the courts of this State. **County of Jefferson, 912 S.W. 2d at 490; Citizens Electric Corp., 766 S.W. 2d at 452.** “Acquire” means, in this context, “take title to,” again by payment of the commissioners’ award into the Court registry.

TIF and respondent considered the five-year period specified in **§99.810.1, RSMo.**, to be essentially a limitations period, which could be met and satisfied merely by filing a Petition for Condemnation before the statute “ran out.” **See Suggestions in Opposition to Application for Writ of Prohibition.** Even apart from the question of proper statutory construction, this is simply wrong. Unlike a conventional statute of limitations, **§99.810.1, RSMo.**, is part of a delegation and grant of the State’s legislative power and authority to an entity that otherwise would not have such power and authority. **See Hodge, 878 S.W.2d at 820-21.** The State authorizes Kansas City (and in turn TIF), to “acquire” property through

the exercise of the sovereign power of eminent domain, but only if the power is exercised - - and the property “acquired” - - before the statutory grant of authority terminates. And, again, because of the very nature of the condemnation power, respondent should have “strictly construed” the scope of its delegation by the State to TIF. **Id.** By treating the **§99.810.1, RSMo.**, five-year period as a mere limitations period, respondent failed to honor this requirement, and failed to recognize that the statutory grant of TIF’s authority to proceed in condemnation contained both a beginning point and a point at which that authority evaporated. Once TIF’s grant of authority lapsed, respondent was without jurisdiction to entertain any further proceedings, or take any action, with respect to condemnation of BWA’s property.

At bottom, the “taking” (“acquisition”) of BWA’s property, now would be and is *ultra vires* because it would violate **§99.810.1(3), RSMo.** Respondent lacked subject matter jurisdiction to enter his Judgment of Condemnation because TIF’s power to condemn property under Ordinance No. 99105 expired five (5) years after it was adopted. The Ordinance was adopted in September 1999; the authorization for TIF to proceed lapsed in September 2004.

The limited, five-year authorization for acquisition of property under any particular ordinance makes sense. Redevelopment plans are required to make detailed findings of fact regarding existing conditions in a proposed project area. **§99.810, RSMo.** The City Council acts as a legislature to make findings of fact and adopt projects through ordinances based upon those detailed findings of fact. “Such a finding shall include, but not be limited to, a

detailed description of the factors that qualify the redevelopment area or project pursuant to this subdivision and an affidavit, signed by the developer or developers and submitted with the redevelopment plan, attesting that the provisions of this subdivision have been met[.]” **§99.810.1(1), RSMo.** The plan also must be found to comply with the “comprehensive plan for the development of the municipality as a whole.” **§99.810.1(2), RSMo.** Each of these required elements is fact-dependent and must be legislatively found to exist before adoption of the ordinance.

The facts that qualify a redevelopment project for TIF funding include that: “on the whole [it] is a blighted area, a conservation area, or an economic development area, and has not been subject to growth and development through investment by private enterprise and would not reasonably be anticipated to be developed with the adoption of tax increment financing.” **§99.810.1(1), RSMo.** The Missouri Legislature naturally anticipated that these facts could and would change within a five-year period. Essentially, the State Legislature opened a five-year window for condemnation based on the required factual findings in an ordinance to prevent imprudent takings by eminent domain after the facts justifying a condemnation had changed.

Although not required for this analysis, the Court is entitled to take judicial notice that exactly this sort of change has happened here. Downtown Kansas City has continued to evolve since Ordinance No. 99105 was passed over six (6) years ago. Major changes have occurred in the vicinity of BWA’s real estate. The Legislature reasonably required that the City Council of Kansas City take a fresh look at any project after five (5) years have elapsed

before taking property by eminent domain. In so mandating, however, it deprived respondent of jurisdiction to order the condemnation of any more property based on Ordinance No. 991015 after September 2004.

The authority and power delegated by the State to Kansas City, and in turn delegated to TIF, to proceed in condemnation under Ordinance No. 991015 has now long-since lapsed and expired. Respondent had no jurisdiction, therefore, to enter his July 2005 Judgment of Condemnation in the underlying matter; indeed, he lost jurisdiction to do so at virtually the same moment TIF filed its Petition in Condemnation. This Court should thus make its Preliminary Order of Prohibition absolute and peremptory, directing respondent to dismiss TIF's condemnation proceeding with prejudice.

II

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING MATTER OTHER THAN DISMISSING THE PETITION IN CONDEMNATION BECAUSE THE TAX INCREMENT FINANCING COMMISSION WAS NEVER PROPERLY AUTHORIZED BY THE KANSAS CITY CITY COUNCIL TO CONDEMN RELATOR'S REAL PROPERTY IN THAT THE PROPERTY AREA DESCRIBED IN THE CONDEMNATION PETITION IS NOT WITHIN THE PROPERTY AREA DESCRIBED AS A "CONSERVATION AREA" IN ORDINANCE NO. 991015, THE LEGISLATION CLAIMED BY THE TAX INCREMENT FINANCING COMMISSION TO AUTHORIZE THE CONDEMNATION PROCEEDINGS**

## BEFORE RESPONDENT.

As noted above, the courts of this State have wisely demanded “strict compliance” with the requirements and procedures attending an involuntary acquisition of private property by the government. Compliance by TIF, “strict” or otherwise, with the statutory framework under which it is permitted to proceed in condemnation mandates that the property to be condemned be authorized and approved for condemnation by the City Council. **§99.820.1, RSMo.** (a “municipality” may, “[b]y ordinance,” designate redevelopment project areas). That authorization is wholly absent here. TIF’s initial and Amended Petitions for Condemnation describe BWA’s property to be condemned, of course, but that property is not within the “redevelopment area” defined by the City Council in Ordinance No. 991015. **Compare Exhibit “B” at pp. 14-15 (App. at A-28 - A-29), and Exhibit “C” at pp. 12-13 (App. at A-41 - A-42) with Exhibit “D” at pp. 2-7 (App. at A-45 - A-50).** Thus, the property ordered condemned by respondent, **see Exhibit “A” at pp. 4-5 (App. at A-4 - A-5),** was likewise never authorized or approved by the City Council of Kansas City as property subject to the exercise of this delegated power of eminent domain.

It is difficult to imagine a more fundamental defect in respondent’s jurisdiction than the complete absence of authorization by the condemnor to proceed in condemnation. Much less significant irregularities have been held to deprive a trial court of condemnation jurisdiction. In **State ex rel. Terrell v. Nicholls, 719 S.W.2d 862 (Mo. App., E.D., 1986),** for example, the Eastern District of the Court of Appeals made absolute its writ of prohibition where the condemnor failed to strictly comply with a requirement that certain

notice be provided to land-owners of details of the redevelopment plan. **Id. at 864-66.** And, in **State ex rel. Gove v. Tate, 442 S.W.2d 541 (Mo. 1969)**, this Court held that prohibition should lie where a municipality purported to authorize a condemnation proceeding by resolution rather than by Ordinance. **Id. at 542-43.**

As TIF was never properly authorized to bring this condemnation action against BWA *ab initio*, respondent had no jurisdiction to enter his Judgment of Condemnation. Therefore, this Court should make its Preliminary Order of Prohibition absolute and peremptory, and direct respondent to dismiss the underlying matter with prejudice.

### III

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION IN THE UNDERLYING ACTION OTHER THAN DISMISSING THE PETITION IN CONDEMNATION BECAUSE THREE (3) ADDITIONAL PROCEDURAL AND SUBSTANTIVE DEFECTS ASSOCIATED WITH THE CONDEMNATION PROCEEDINGS TOGETHER AND/OR SEPARATELY DEPRIVE RESPONDENT OF JURISDICTION IN THAT (A) THE TAX INCREMENT FINANCE COMMISSION NEVER MADE ANY GOOD FAITH OFFERS TO PURCHASE RELATOR'S PROPERTY PRIOR TO COMMENCING CONDEMNATION PROCEEDINGS, BUT ONLY OFFERS CONDITIONED ON CERTAIN INDEMNIFICATION REQUIREMENTS; (B) THE TAX INCREMENT FINANCING COMMISSION OMITTED ONE RECORD OWNER FROM THE AMENDED PETITION IN CONDEMNATION; AND, (C) THE**

**KANSAS CITY CITY COUNCIL FAILED IN TERMS TO  
FIND “AT LEAST THREE FACTORS” PRESENT  
AUTHORIZING DESIGNATION OF PROPERTY AS A  
“CONSERVATION AREA” AS REQUIRED BY §99.805(3),  
RSMO., IN ORDINANCE NO. 991015.**

At least three (3) additional, significant defects exist with regard to TIF’s proceedings in condemnation before respondent, again with the effect that respondent had no jurisdiction to enter his Judgment of Condemnation and has no jurisdiction to entertain further proceedings in the condemnation action.

First, TIF never made good faith offers to purchase BWA’s property prior to initiating the condemnation proceedings. As the Court is aware, the inability of the parties to a condemnation suit to agree on a purchase price for the property at issue is a jurisdictional prerequisite for a condemnation proceeding as provided in **§523.010.1, RSMo.** See City of Columbia v. Baurichter, 713 S.W.2d 263, 266 (Mo. 1986). This is generally referred to as the “negotiation” requirement. “Unless the condemnor complies with the negotiation requirement of the authorizing statute, the trial court has no jurisdiction to hear a condemnation petition.” Id.; see State ex rel. Weatherby Advertising Co. v. Conley, 527 S.W.2d 344, 336 (Mo. 1975).

Where the condemning authority purports to make an offer that is conditional on something other than acceptance by the property owner, the jurisdictional requirement of good faith negotiations is not met. State ex rel. Missouri State Highway Commission v.

**Pinkley, 474 S.W.2d 46, 49-50 (Mo. App., E.D., 1971)** (offer conditioned on acceptance by Highway Commission); **see also State ex rel. Missouri Highways & Transportation Commission v. Black, 702 S.W.2d 525, 526 (Mo. App., E.D.,1985)** (offer was merely an option in favor of Highway Commission, an “offer to make an offer”).

Here, TIF mailed letters to various defendants in the underlying action - - Theodora D. Carpenter, BWA, Dale E. Fredericks, and Carol J. Fredericks - - in which TIF offered to pay \$164,260.00 for the property upon the condition that those defendants “indemnify and hold harmless” TIF and its agents and employees “for any claims, loss, or damage” during continued occupancy of the property. **See Exhibits “E,” “F,” and “G” attached to Petition for Writ of Prohibition (App. A-15 - A-29)**. These “offers,” conditional on the face of each one, completely fail to comply with the jurisdictional requirement of **§523.010.1, RSMo**.

Second, TIF omitted at least one (1) record owner of BWA’s property as a party-defendant in the Amended Petition, The Dale E. Fredericks IRA Rollover Account. **Exhibit “C” at p. 1-3 (App. A-30 - A-32)**. The IRA Rollover Account was and is a necessary party to the underlying action, and TIF’s failure in this regard is directly contrary to the requirements of **Rule 86.03 and Rule 86.04**. Because of the awesome nature of the power of eminent domain, this procedural defect is fatal to respondent’s jurisdiction.

Finally, the City Council of Kansas City failed in Ordinance No. 991015 - - the legislative authorization pursuant to which TIF was purporting to act - - to find in terms that “at least three factors” were present (back in 1999) as to the property are a described in the

Ordinance to justify the designation of that property as a “conservation area” as required by **§99.805 (3), RSMo.** By its Ordinance, the City Council in terms found only that “one or more . . . factors” may be present. **See Exhibit “D” at p. 9 (App. A-52).** Again, where an exercise of the awesome and sovereign power of eminent domain is attempted or undertaken, strict compliance with and adherence to the legislative mandates is necessary. The foregoing flaws, omissions, and deficiencies oust respondent of jurisdiction entirely.

Again, therefore, this Court should make its Preliminary Order of Prohibition absolute and peremptory.

### **CONCLUSION**

Relator respectfully asks this Court to make its Preliminary Order of Prohibition

absolute and peremptory, directing respondent to refrain from taking any acts in furtherance of the Judgment of Condemnation other than dismissing the Petition in Condemnation with prejudice forthwith.

Respectfully submitted,

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