
No. SC88453

IN THE SUPREME COURT FOR THE STATE OF MISSOURI

STATE OF MISSOURI ex rel.
AMBASSADOR PROPERTIES, L.L.C. and KARL THOMAS,
Relators,

v.

HONORABLE THOMAS C. CLARK, JUDGE,
Circuit Court of Jackson County, Missouri,
Respondent,

HOUSE RESCUE CORPORATION,
A Missouri Not-for-Profit Corporation,
Real Party in Interest.

On Petition from the Circuit Court of
Jackson County, Missouri, at Kansas City
Case No.: 04CV225744

RELATORS' STATEMENT, BRIEF, AND ARGUMENT

JAMES S. BURLING, CSB No. 113013 CYNTHIA CLARK CAMPBELL

Pro Hac Vice

No. 25772

R.S. RADFORD, CSB No. 137533

Campbell Law Firm

Pro Hac Vice

Main Mark Building

Pacific Legal Foundation

1627 Main Street, Suite 420

3900 Lennane Drive, Suite 200

Kansas City, Missouri 64108

Sacramento, California 95834

Telephone: (816) 221-7007

Telephone: (916) 419-7111

Facsimile: (816) 221-4769

Facsimile: (916) 419-7747

E-mail: ccclawfirm@sbcglobal.net

E-mail: jsb@pacifical.org

Counsel for Relators State of Missouri ex rel.
Ambassador Properties, L.L.C. and Karl Thomas

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	2
A. Procedural History	2
B. Description of the Statute	6
1. § 447.622 RSMo. (Authorizing Temporary Possession)	7
2. § 447.620(4) RSMo. (Nuisance); § 99.320 RSMo. (Blight)	8
3. § 447.632 RSMo. (Inability to Cure)	11
4. §§ 447.625, 447.638 RSMo. (Regaining Possession)	12
5. § 447.640 RSMo. (Confiscation of Fee Title Without Compensation)	14
6. The Provisions of the Missouri Abandoned Housing Act and Missouri Statutes Section 447.638 in Particular Provide No Meaningful Relief to Karl Thomas	15
POINTS RELIED UPON	17
A. Substantive Due Process	17
B. Procedural Due Process Violation	18

	Page
C. Takings Clause Violation	18
D. Public Use Clause Violation	19
E. Liability Under 42 U.S.C. § 1983	19
SUMMARY OF ARGUMENT	20
ARGUMENT	22
I. THIS COURT HAS JURISDICTION TO ISSUE THE WRIT	22
II. THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO KARL THOMAS	25
A. Karl Thomas Has an Equitable Interest in the Property, Sufficient to Challenge the Constitutionality of the Missouri Abandoned Housing Statute and Sufficient to Seek Remedies Against House Rescue for the Interference with That Interest	25
B. The Statute Violates the Missouri and United States Constitutions' Due Process Clauses	27
C. The Statute Violates Procedural Due Process as Well	31
D. The Failure to Notify the Owners Is an Independent Violation of Due Process	33

	Page
E. The Statute Takes Private Property Without the Payment of Just Compensation	39
F. The Statute Effects the Taking of Property for a Private Use	43
G. The Statute Cannot Be Rescued by the Missouri Constitution’s Redevelopment Clause	50
H. The Effect of This Statute Would Work a Violation of 42 U.S.C. § 1983	52
CONCLUSION	57
CERTIFICATE OF COMPLIANCE	59

TABLE OF AUTHORITIES

	Page
Cases	
<i>Armstrong v. United States</i> , 364 U.S. 40 (1960)	18, 39
<i>Betts v. Brady</i> , 316 U.S. 455 (1942), <i>overruled on other grounds</i> ,	
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963)	18,28-29
<i>Brewer v. Trimble</i> , 902 S.W.2d 342 (1995)	31-32, 38, 49
<i>Byrom v. Little Blue Valley Sewer Dist.</i> , 16 S.W.3d 573 (Mo. 2000)	42
<i>Carey v. Piphus</i> , 435 U.S. 247 (1978)	31-32, 38, 49
<i>Chicago, Burlington & Quincy R.R. Co. v. City of Chicago</i> ,	
166 U.S. 226 (1897)	19, 39
<i>Citizens' Sav. & Loan Ass'n v. City of Topeka</i> ,	
87 U.S. (20 Wall.) 655 (1874)	44
<i>City of Kansas City v. Kindle</i> , 446 S.W.2d 807 (Mo. 1969)	47-48
<i>Clay County ex rel. County Comm'n of Clay v. Harley and</i>	
<i>Susie Bogue, Inc.</i> , 988 S.W.2d 102 (Mo. Ct. App. 1999)	18, 40

	Page
<i>Conseco Fin. Servicing Corp. v. Missouri Dep't of Revenue,</i> 195 S.W.3d 410 (Mo. 2006)	18, 36
<i>Covey v. Town of Somers,</i> 351 U.S. 141 (1956)	35
<i>Crum v. Missouri Dir. of Revenue,</i> 455 F. Supp. 2d 978 (W.D. Mo. 2006)	35
<i>Daniels v. Williams,</i> 474 U.S. 327 (1986)	17, 27-28
<i>Dickey v. Tennison,</i> 27 Mo. 373, 1858 WL 5919 (1858)	19, 46-47
<i>Dykes v. Hosemann,</i> 743 F.2d 1488 (11th Cir. 1984)	54-55
<i>First English Evangelical Lutheran Church of Glendale v. County</i> <i>of Los Angeles,</i> 482 U.S. 304 (1987)	32, 40-41, 49
<i>Hawaii Housing Authority v. Midkiff,</i> 467 U.S. 229 (1984)	19, 44
<i>Jones v. Flowers,</i> 547 U.S. 220, 126 S. Ct. 1708 (2006)	18, 33-34
<i>Kaiser Aetna v. United States,</i> 444 U.S. 164 (1979)	40
<i>Kamo Elec. Co-op., Inc. v. Cushard,</i> 416 S.W.2d 646 (Mo. Ct. App. 1967)	41
<i>Kelo v. City of New London, Conn.,</i> 545 U.S. 469 (2005)	19, 45-46
<i>Lane v. State Comm. of Psychologists,</i> 954 S.W.2d 23 (Mo. Ct. App. 1997)	18, 28, 30

	Page
<i>Lingle v. Chevron, U.S.A., Inc.</i> , 544 U.S. 528 (2005)	29, 49
<i>Loretto v. Teleprompter Manhattan CATV Corp.</i> , 458 U.S. 419 (1982)	18, 40
<i>Lugar v. Edmondson Oil Co. Inc.</i> , 457 U.S. 922 (1982)	19, 52-53
<i>Madisonville Traction Co. v. St. Bernard Mining Co.</i> ,	
196 U.S. 239 (1905)	44
<i>Masterson v. Roberts</i> , 78 S.W.2d 856 (Mo. 1934)	17
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	31
<i>Mottl v. Missouri Lawyer Trust Account Found.</i> ,	
133 S.W.3d 142 (Mo. Ct. App. 2004)	55-56
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950) . . .	18, 34-35
<i>Olson v. United States</i> , 292 U.S. 246 (1934)	42
<i>Pa. Coal Co. v. Mahon</i> , 260 U.S. 393 (1922)	21
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001)	42
<i>Robinson v. Hanrahan</i> , 409 U.S. 38 (1972)	35
<i>Ross v. Ford Motor Credit Co.</i> , 867 S.W.2d 546 (Mo. Ct. App. 1993)	55
<i>Seafield v. Bohne</i> , 69 S.W. 1051 (Mo. 1902)	47

Shapiro v. Columbia Union Nat’l Bank and Trust Co.,
576 S.W.2d 310 (Mo. 1978) 52

State ex rel. General Motors Acceptance Corp. v. Brown, 48 S.W.2d 857 (Mo. 1932) 23-24

State ex rel. Heddens v. Rusk, 139 S.W. 199 (Mo. 1911) 16

State ex rel. Myers v. Shinnick, 19 S.W.2d 676 (Mo. 1929) 23

State ex rel. Neu v. Waechter, 58 S.W.2d 971 (Mo. 1933) 23

State ex rel. United Rys. Co. v. Wiethaupt,
133 S.W. 329 (Mo. 1910) 41, 47, 57

State v. Barnett, 628 S.W.2d 917 (Mo. Ct. App. 1982) 16

State v. Case, 140 S.W.3d 80 (Mo. Ct. App. 2004) 18, 28

State, on Inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City, Mo., 270 S.W.2d 44 (Mo. 1954) 44

Tierney v. Planned Indus. Expansion Authority of Kansas City,
742 S.W.2d 146 (Mo. 1987) 9

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829) 19, 44-45

Williams v. City of St. Louis, 783 F.2d 114 (8th Cir. 1986) 19, 54

Page

Wyatt v. Cole, 504 U.S. 158 (1992) 19, 53-54

Constitutions

U.S. Const. amend. V 27, 39, 43

U.S. Const. amend. XIV 27

Mo. Const. art. 1, § 10 27

Mo. Const. art. 1, § 26 39-40

Mo. Const. art. 1, § 28 43, 45

Mo. Const. art. 5, § 3 1

Mo. Const. art. 5, § 4 1

Mo. Const. art. 6, § 21 50

Statutes

42 U.S.C. § 1983 5, 19-22, 52, 55-56

§ 99.320 RSMo. 8-9

§ 99.320(3) RSMo. 9

§ 141.260(1) RSMo. 8

§ 447.620 RSMo. 3, 51

§ 447.620, *et seq.* RSMo. *passim*

	Page
§ 447.620(4) RSMo.	8-9
§ 447.620(5) RSMo.	48
§ 447.622 RSMo.	7, 11, 41
§ 447.625(5) RSMo.	12-13
§ 447.630 RSMo.	41
§ 447.632 RSMo.	11, 41
§ 447.633 RSMo.	41
§ 447.634 RSMo.	41
§ 447.638 RSMo.	13, 15
§ 447.640 RSMo.	7, 14, 41-42
§ 473.663 RSMo.	3
§§ 529.010 - 529.100 RSMo.	1
§§ 700.525-700.541 RSMo. (1999)	36

Rules

Missouri Supreme Court Rule 84.22-84.24	1
Missouri Supreme Court Rule 84.24(i)	2
Missouri Rule of Civil Procedure 94	1-2

Miscellaneous

Burling, James S., *Can the Existence of Value in Property Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed, in Takings Sides on Takings Issues: Public and Private Perspectives* (Thomas Roberts ed., 2002) 51

Davis, Russell J., *Private Person’s Enforcement of Lien Through Self-Help as an Act “Under Color of State Law” Within Meaning of 42 U.S.C. § 1983*, 32 A.L.R. Fed. 431 (1977) 56

Garnett, Nicole Stelle, *The Public-Use Question as a Takings Problem*, 71 Geo. Wash. L. Rev. 934 (2003) 45

Sandefur, Timothy, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of “Public Use,”* 32 Sw. U. L. Rev. 569 (2003) 45

JURISDICTIONAL STATEMENT

This is a Petition for Writ of Mandamus pursuant to Missouri Rule of Civil Procedure 94 and Missouri Supreme Court Rule 84.22 - 84.24.

This case involves a challenge to the constitutionality of the Missouri Abandoned Housing Act, § 447.620, *et seq.* RSMo. *See* App. at Ex. I. This Court has jurisdiction under the Missouri Constitution, Article V, § 3 (jurisdiction to hear questions of validity of statutes) and Article V, § 4 (authority of Supreme Court over lower courts) as well as §§ 529.010 to 529.100 RSMo. (writs of mandamus).

Relators' challenge stems from a June 9, 2005, order from the Circuit Court of Jackson County that took from Karl Thomas and Ambassador Properties, L.L.C., possession of real property located in Kansas City, Missouri, and gave that right of possession to Real Party in Interest, House Rescue Corporation. Appendix at A-6, Ex. B, Thomas's Statement of Uncontroverted Facts ¶¶ 8 and 10 and Appendix at A47-48 (Court Order). Relators intervened and moved to have that order rescinded but were rebuffed by the trial court. Appendix at A 145, Exhibit D, Order of June 5, 2006, ¶ 2. Relators next sought to have the trial court grant a motion for summary judgment, which was denied. App. at A167, Exhibit G, Order of December 15, 2006.

On April 13, 2007, Relators filed a Petition for Writ of Mandamus pursuant to Missouri Rule of Civil Procedure 94 accompanied by Suggestions in Support. On May 29, 2007, this Court issued an Alternative Writ of Mandamus commanding

Respondent, The Honorable Thomas C. Clark, to file a written return on the petition. On June 28, 2007, House Rescue filed an Answer to the Petition for Writ of Mandamus. Pursuant to Rule 84.24(i), Relators file this brief.

STATEMENT OF FACTS¹

Petitioners Karl Thomas and Ambassador Properties (Thomas) bring this Petition for Writ of Mandamus seeking this Court to order the trial court to (1) find the Missouri Abandoned Housing Act, § 447.620, *et seq.*, RSMo. to be unconstitutional, (2) rescind the order of possession granted by the Circuit Court to House Rescue for the subject property, and (3) to set trial for a determination of the damages incurred by Thomas for the loss of the use of his property caused by the unlawful possession by Real Party in Interest House Rescue Corporation.

A. Procedural History

This case concerns property located at 3120 Cypress Avenue, Kansas City, Missouri, recorded as “Knoche Park, Lot 53, Blk. 2.” *See* App. at A1, Exhibit A, Petition for Temporary Possession of Real Property for Rehabilitation and for Court

¹ For the Court’s convenience, this Statement of Facts is largely reproduced and edited from Relators Suggestions in Support of Karl Thomas and Ambassador Properties’ Petition for Writ of Mandamus Pursuant to Rule of Civil Procedure 94. The Argument section is original.

Administrator's Deed, filed in *House Rescue Corporation v. Charles Laspy*, No. 04CV225744. *See also* App. at A11-A12, Quitclaim Deed, attached as Exhibit A to Exhibit B—Defendant Intervenors' and Counterclaim Plaintiffs' Statement of Uncontroverted Facts (Thomas's Statement of Uncontroverted Facts).

On August 4, 2004, the House Rescue Corporation, plaintiff, counterclaim-defendant, and real party in interest, filed a Petition for Temporary Possession of Real Property for Rehabilitation and for Court Administrator's Deed. *See* App. at A1-A4, Exhibit A. In that petition, House Rescue sought possession of the subject property pursuant to Missouri's Abandoned Housing Act, § 447.620 RSMo. At that time, however, the defendant and former owner of the property, Charles Laspy, was deceased. *See* App. at A5, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 3. On August 23, 2004, House Rescue filed a Notice of Lis Pendens with the Recorder of Deeds notifying third parties that the property was subject to litigation. *See* App. at A6, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 7. Because House Rescue did not locate the heirs and did not undertake a determination of heirship pursuant to 473.663 RSMo., the notice was not served on the heirs of Charles Laspy (Teresa Nelson and Curtis Laspy) and on November 22, 2004, the trial court ordered service by publication. *See* App. at A6, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶¶ 8 and 10 and App. at A47-A48 (Court Order).

Teresa Nelson and Curtis Laspy, the heirs of Charles Laspy, signed a quit-claim deed on November 23, 2004. *See* App. at A6, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 9 *and* App. at A11-A12, Exhibit A thereto (quitclaim deed showing Ambassador Properties as grantee). There is a dispute as to whether one of the heirs, Curtis Laspy, properly signed the deed and whether the grantee on the deed, Ambassador Properties, existed at the time the deed was conveyed. *See* App. at A92, Exhibit C, Factual Statement, contained within Plaintiff's Response to Motion for Summary Judgment and Motion for Judgment on the Pleadings ¶¶ 9 and 13. However, Thomas asserts that these disputed facts are not material to the case for reasons discussed below.

Karl Thomas LLC, a limited liability corporation owned by Karl Thomas, paid on February 18, 2005, \$22,000 to Brent Barber, an intermediary, for this and one other property. *See* App. at A7, A32-A33, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 11. *But see* App. at A92, Exhibit C, House Rescue's Response ¶ 11 noting the check was not from Thomas but Karl Thomas LLC. Karl Thomas paid delinquent taxes of \$2,917.67 on the property on August 15, 2005. *See* App. at A7, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 14. Thomas began rehabilitation work on the property. *Id.* ¶ 15 *and* App. at A56-A62, Exhibit H attached to Exhibit B (photographs of work). (House Rescue disputes whether receipts for the work properly reflects work on the property. *See* App. at A93,

Exhibit C, Plaintiff's Response ¶ 15. Thomas asserts that these receipts are accurate, but in any event this is not a material fact and Thomas does not rely on the receipts for purposes of this petition.)

On June 9, 2005, the trial court issued an Order Granting Temporary Possession of Real Property to House Rescue. *See* App. at A7, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 12.

On January 5, 2006, the trial court granted Thomas's Motion to Intervene. *See* App. at A145, Exhibit D, Order of January 5, 2006 ¶ 2.

Also on January 5, 2006, the trial court denied Thomas's Motion to Rescind Order of Possession and to Dismiss. *See* App. at A146, Exhibit D, Order of January 5, 2006 ¶ 4.

On February 8, 2006, Thomas filed an Answer and Counterclaim. *See* App. at A147, Exhibit E, Defendant-Intervenors' and Counterclaim Plaintiffs' Answer to Petition for Possession of Real Property and for Rehabilitation of Property and Court Administrator's Deed and Counterclaim for Declaratory and Injunctive Relief and Damages (duplicative exhibits not included). This counterclaim asserts that the actions of House Rescue pursuant to the Missouri Abandoned Housing Act constitute violations of the Takings and Due Process Clauses of the Missouri and United States Constitutions as well as a violation of 42 U.S.C. § 1983.

On August 7, 2006, the trial court denied House Rescue's Motion to Dismiss Counts I through V of Thomas's Counterclaim. *See App. at A165, Exhibit F, Order of August 7, 2006.*

On October 5, 2006, Thomas filed a Motion for Summary Judgment or in the Alternative, a Motion for Judgment on the Pleadings. This was denied by the Trial Court on December 15, 2006. *See App. at A167, Exhibit G, Order of December 15, 2006.*

As a result of this litigation, Karl Thomas has ceased rehabilitation efforts resulting in a notice of code violations. *See App. at A8, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 16.*

House Rescue claims it has spent about \$10,000 in rehabilitation of the subject property. *Id. ¶ 17.*

B. Description of the Statute

The statute purporting to allow the ouster of Thomas from his property allows no opportunity to cure any alleged defects in the property and provides for no payment of just compensation. *See App. at Ex. I.* All this occurs outside the normal chain of title, throwing doubt upon land titles throughout the state.

House Rescue is relying upon provisions of the recently adopted Missouri Statute, § 447.620, *et seq.*, RSMo. for its authority to oust Thomas from his property and for the ultimate ability to take fee simple title without compensation to Thomas.

See App. at A6-A7, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶¶ 2 and 12 and App. at A46, Order Granting Temporary Possession of Real Property to Plaintiff for the Purpose of Rehabilitation, dated June 9, 2005, at 1, attached as Exhibit G to Thomas's Statement of Uncontroverted Facts. This is indeed a remarkable statute, without any known counterpart in any other state.

1. § 447.622 RSMo. (Authorizing Temporary Possession)

The heart of the statute is located at § 447.622 RSMo. It states in full:

Any organization may petition to have property declared abandoned pursuant to the provisions of sections 447.620 to 447.640 and for temporary possession of such property, if:

- (1) The property has been continuously unoccupied by persons legally entitled to possession for at least six months prior to the filing of the petition;
- (2) The taxes are delinquent on the property;
- (3) The property is a nuisance; and
- (4) The organization intends to rehabilitate the property.

The provision that property need be unoccupied for only six months in order to qualify as being abandoned is astonishing. Rental properties are often unoccupied for several months between rentals; persons doing major remodeling projects on their own homes sometimes move out for several months; some jobs and military service

commitments require people to leave their homes for months at a time, and retired persons may visit their children or take vacations lasting many months. And, as this case painfully demonstrates, when a home's occupants die, there may be a period of several years before the home becomes occupied again. In all these circumstances, the time element of the abandonment criterion would be met.

For "taxes to be delinquent" a person theoretically could be a day late on taxes when the petition is filed; yet under Missouri law, no foreclosure can occur against property for back taxes until the late taxes are "due and unpaid for a period of at least two years after the date on which, if a general tax bill, it became delinquent." § 141.260(1) RSMo. In other words, while years must elapse before the City can foreclose on property for back taxes, there is no minimum time for an owner to lose his property once taxes are delinquent for even a day. Assuming that the late Mr. Laspy, his heirs, or Karl Thomas were behind in the taxes as alleged by Plaintiff, that delinquency has now been corrected. *See* App. at A7, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶¶ 14, and App. at A52, Exhibit H to that Statement (Affidavit to Dismiss ¶¶ 7-8).

2. § 447.620(4) RSMo. (Nuisance); § 99.320 RSMo. (Blight)

The third criterion, that property be a nuisance, is also deficient. First, House Rescue's petition provides no detail or explanation as to why Thomas's property is a nuisance other than to say "because of its physical condition and the blight it causes

on the surrounding area.” See App. at A2, Exhibit A, Petition for Temporary Possession ¶ 8. But the “physical condition” is never described beyond this conclusory statement. Moreover, the term “nuisance” in the statute is vague and overbroad. “Nuisance” is defined in § 447.620(4) RSMo. to include, among other things, “any property which constitutes a blight” or any property that “is in violation of the applicable housing code such that it constitutes a substantial threat to the life, health, or safety of the public.” The first test, “any property which constitutes a blight” is most problematic. Under Missouri redevelopment law, substantial portions of the urban core have been declared blighted under § 99.320 RSMo. Under that statute, to be blighted, a home need only be in a neighborhood with one or more generic factors such as “inadequate street layout, . . . deterioration of site improvements, improper subdivision or obsolete platting” which constitutes merely an “an economic or social liability.” § 99.320(3) RSMo. Perfectly fine property may be within a blight zone: “a blighted area may include parcels which are not themselves blighted if these parcels are necessary to provide a tract of sufficient size or accessibility to attract redevelopers.” *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146, 151 (Mo. 1987) (en banc). Thus, the statute here may authorize the taking of “blighted” property that actually has no indicia of blight simply because taking that property is necessary to facilitate the redevelopment of the neighborhood. While that might be justifiable on a

neighborhood scale for a large redevelopment project, it makes no sense to allow a private organization to take a private home without compensation just because it is in a blight zone.

The second independent justification for “nuisance,” that there be a code violation that constitutes a “substantial threat” sounds ominous, but it is not. A home being rehabilitated might have its plumbing temporarily removed, the electrical wires may be exposed, or any number of transitory and hazardous conditions might exist. All of them could constitute a substantial threat to someone attempting to live in the home during the remodeling (which is why, of course, such homes are often unoccupied during such work). But such conditions do not necessarily have anything to do with property being “abandoned” in the common understanding of that word. And such conditions do not justify the forfeiture of the property.

In this case, Karl Thomas was in the process of rehabilitating his house at 3120 Cypress when he was stopped because of this litigation. Subsequent to being stopped, he was cited for various code violations. *See* App. at A8, Exhibit B, Statement of Uncontroverted Facts ¶ 16, App. at A53, Exhibit H to Exhibit B, Affidavit to Dismiss ¶ 13. Since he was ousted of possession, he has been threatened by the City of Kansas City with civil and criminal penalties arising from the condition of the property—conditions over which he has no control because of this Court’s order of possession. *See* App. at A40-A44, letters from the City of Kansas City to

Ambassador Properties, L.L.C., and Karl Thomas, dated March 29, 2006. But, because House Rescue’s petition is so vague, there is no way to discern what the basis of House Rescue’s allegation of nuisance might have been at the time the petition was filed. Beyond the conclusory one-sentence allegation of a nuisance in House Rescue’s Petition for Temporary Possession, there is not a single iota of proof or elaboration of why there might be a nuisance. Faced with such a patent failure to support a key component of the statutory “right” to take possession, the trial court should have *sua sponte* dismissed the petition. But, faced with no opposition from the unnotified owner or heirs, the court gave possession of the house to House Rescue instead. To take a home on the basis of a conclusory allegation is neither fair nor just.

3. § 447.632 RSMo. (Inability to Cure)

Quite apart from the ease with which an organization can obtain possession of a person’s private property under § 447.622 RSMo., what is even more troubling is the inability to cure. § 447.632 RSMo. states in relevant part:

The court shall grant the organization’s petition if the court finds that the conditions alleged by the plaintiff as specified in section 447.622 *existed at the time the verified petition was filed in the circuit court*

(Emphasis added.)

Thus, even if the conditions spelled out in the statute were cured the day after a petition for possession is filed, that would not have an impact, under the statute, on the ability of the organization to oust the owner of possession. For example, a Lis Pendens was filed in this case on August 23, 2004. *See* App. at A6, Statement of Uncontroverted Facts ¶ 7 and App. at A25 (Notice of Lis Pendens). On August 30, 2004, a Petition for Temporary Possession was filed, *see* App. at A7, Statement of Uncontroverted Facts ¶ 12 and App. at A1 (Petition), resulting in an Order Granting Temporary Possession on June 9, 2005. *See* App. at A47 (Order). However, even if Mr. Charles Laspy himself returned from the grave on August 31, 2004, and cured all tax liens, fixed whatever code defects might be alleged to exist (which were not specified in the petition), and moved back into his home, that would not stop the ouster from going forward.

4. §§ 447.625, 447.638 RSMo. (Regaining Possession)

Theoretically, a defendant in Thomas's position would be able to regain possession of the property, but only if he agrees to carry out whatever rehabilitation plan that the organization created, and only after paying to the organization whatever costs it incurred. Section 447.625(5) states:

The owner may file a motion for restoration of possession of the property prior to the completion of rehabilitation. The court shall determine whether to restore possession to the owner and proper

compensation to the organization in the same manner as in section 447.638.

Section 447.638 reads in relevant part:

The owner may petition the circuit court for restoration of possession of the property and, upon due notice to the plaintiff organization, for a hearing on such petition. At the hearing, the court shall determine whether the owner has the capacity and the resources to complete rehabilitation of the property if such work has not been completed by the organization. . . . If the court determines that the rehabilitation work has been completed by the organization or that the owner has the capacity and the resources to complete the rehabilitation, the court shall then determine proper compensation to the organization for its expenditures, including management fees, based on the organization's reports to the court. . . . After the owner pays the compensation to the organization as determined by the court, the owner shall resume possession of the property, subject to all existing rental agreements, whether written or verbal, entered into by the organization.

In other words, the only way for an owner to regain possession is for the owner to agree to pay for whatever rehabilitation costs and management expenses have been incurred by the organization, to complete whatever rehabilitation plan the

organization showed to the court, and to be subject to whatever liabilities and rental agreements that the organization entered into, no matter how disadvantageous. Thus, as a practical matter, once the possession of property is lost, it will be virtually impossible for an owner to regain possession, and then only upon the payment of a king's ransom. Thus, the relief provided by § 447.620, *et seq.*, RSMo. provides no adequate remedy at law to Thomas.

5. § 447.640 RSMo. (Confiscation of Fee Title Without Compensation)

The final shock of this statute is that once the organization completes its rehabilitation plan, it may gain fee simple title to the property *without the necessity of paying any compensation whatsoever to the original owner or preexisting lienholders (except for taxes)*. As § 447.640 RSMo. states:

If an owner does not regain possession of the property in the one-year period following entry of an order granting temporary possession of the property to the organization, the organization may file a petition for judicial deed and, upon due notice to the named defendants, an order may be entered granting a quitclaim judicial deed to the organization. *A conveyance by judicial deed shall operate to extinguish all existing ownership interests in, liens on, and other interest in the property, except tax liens.*

(Emphasis added.) In other words, mortgage holders, lien holders, and, worst of all, the owner of the fee, receive nothing when a third party takes fee simple ownership of their property.

**6. The Provisions of the Missouri Abandoned Housing Act
and Missouri Statutes Section 447.638 in Particular
Provide No Meaningful Relief to Karl Thomas**

The trial court apparently believes that Thomas should seek relief under 447.638 RSMo. *See* App. at A146, Exhibit D, Order of January 5, 2006 ¶ 4 (Thomas is “invited to file appropriate pleadings with the Court pursuant to Mo Rev Stat 447.638 to address these issues.”). But, as shown above, Section 447.638 provides no meaningful relief because, under the terms of that statute, Thomas can regain possession of his house only if he agrees to be liable to pay House Rescue’s rehabilitation costs—estimated by House Rescue to be \$10,000 and only if he agrees to be subject to whatever contracts and obligations were incurred by House Rescue.

Forcing Thomas to go to trial, therefore, will in and of itself cause irreparable injury to Thomas: he will either lose his property or he will be forced to pay to House Rescue the costs it has incurred to date (claimed to be \$10,000, *see* App. at A8, Exhibit B, Thomas’s Statement of Uncontroverted Facts ¶ 17) while at the same time be subject to whatever obligations House Rescue has incurred on the property. Furthermore, a trial under the Missouri Abandoned Housing Act will not provide

Thomas with an opportunity to vindicate his claims that his rights under the Missouri and United States constitutions have been violated. Thomas's right to keep his property without paying a ransom for it will have been lost without any further recourse. Only by intervention by this Court in this Mandamus action, may Karl Thomas's constitutional rights be preserved. Moreover, Thomas will continue to be liable civilly and criminally for the present deteriorated state of the property. *See* App. at A40-A44, letters from the City of Kansas City to Ambassador Properties, L.L.C., and Karl Thomas, dated March 29, 2006.

The law does not require resort to a futile and useless act. *See, e.g., State v. Barnett*, 628 S.W.2d 917, 920 (Mo. Ct. App. 1982) ("The law does not compel the undertaking of a useless act for the lone aim of complying with a technical requirement."), *State ex rel. Heddens v. Rusk*, 139 S.W. 199, 203 (Mo. 1911) ("Now, equity does not do or require to be done that which is useless or futile. The legal maxim is: The law does nothing vainly; commands nothing vainly.").

This statute is breathtaking in its assault on settled constitutional principles, not to mention basic notions of justice and fairness. A private organization can gain possession of valuable private property against the will of the owner, saddle that property with liens and rental agreements of its own, and then upon the completion of a rehabilitation plan, take unencumbered fee title to the property without any

requirement to pay compensation to the original owners—no matter how valuable the property is in comparison to the rehabilitation work.

Many years ago, the Missouri Supreme Court held: “There is no constitutional way for divesting man’s title except by his own act or default.” *Masterson v. Roberts*, 78 S.W.2d 856, 861 (Mo. 1934). As will be shown next, this statute is unconstitutional on its face and as applied to Karl Thomas.

POINTS RELIED UPON

Relators, Ambassador Properties, L.L.C., and Karl Thomas, seek the following relief: This Court must order the trial court to find the Missouri Abandoned Housing Act, § 447.620, *et seq.*, RSMo. to be unconstitutional and rescind the order of possession granted by the Circuit Court to House Rescue for the subject property. Relators have an equitable interest in their property and are entitled to relief because of several constitutional infirmities in the Act:

A. Substantive Due Process

Relators allege that the Act violates the Due Process Clauses of the Missouri and federal Constitutions under substantive due process doctrine because it is arbitrary and capricious, constitutes an uncompensated taking of property without the payment of compensation, effects remedies to perceived problems that are extraordinarily disproportionate and draconian, and is truly irrational.

Daniels v. Williams, 474 U.S. 327, 331 (1986).

State v. Case, 140 S.W.3d 80, 88 (Mo. Ct. App. 2004).

Lane v. State Committee of Psychologists, 954 S.W.2d 23, 24-25 (Mo. Ct. App. 1997).

Betts v. Brady, 316 U.S. 455, 462 (1942).

B. Procedural Due Process Violation

Relators are further entitled to this relief because the Act violates the procedural due process rights of affected landowners such as relators.

Jones v. Flowers, 547 U.S. 220, 126 S. Ct. 1708 (2006).

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Conseco Fin. Servicing Corp. v. Missouri Dep't of Revenue, 195 S.W.3d 410, 417 (Mo. 2006).

C. Takings Clause Violation

Relators are further entitled to relief because the act is unconstitutional under the Takings Clauses of the Missouri and federal Constitutions because it takes private property without the payment of just compensation.

Clay County ex rel. County Comm'n of Clay v. Harley and Susie Bogue, Inc., 988 S.W.2d 102, 107 (Mo. Ct. App. 1999).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

Armstrong v. United States, 364 U.S. 40, 49 (1960).

Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).

D. Public Use Clause Violation

Relators are further entitled to relief because the act is unconstitutional because it takes private property for private use in violation of Public Use Clauses of the state and Federal Constitutions.

Kelo v. City of New London, Conn., 545 U.S. 469 (2005).

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984).

Dickey v. Tennison, 27 Mo. 373, 1858 WL 5919, at *2 (1858).

Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829).

E. Liability Under 42 U.S.C. § 1983

Relators further seek an order that requires the trial court to find House Rescue liable for damages suffered by Relators and to set trial for a determination of the damages incurred by Thomas for the loss of the use of his property caused by the unlawful possession by Real Party in Interest House Rescue Corporation. House Rescue is acting under color of state law and is liable under 42 U.S.C. § 1983.

Wyatt v. Cole, 504 U.S. 158, 162 (1992).

Williams v. City of St. Louis, 783 F.2d 114 (8th Cir. 1986).

Lugar v. Edmondson Oil Co. Inc., 457 U.S. 922 (1982).

SUMMARY OF ARGUMENT

This Court has jurisdiction to issue a writ of mandamus that requires the trial court to allow Thomas to regain possession of his property and to recover any damages Thomas can prove at trial.

House Rescue is in the business of seizing private property where the owners are difficult to find, dead, or otherwise in challenged circumstances. *See* App. at A129, Affidavit of Filbert Harris ¶ 2, attached as Exhibit 4 to Exhibit C, House Rescue’s Response, stating he has “worked extensively with Patrick Reavey . . . in pursuit of abandoned houses under the Missouri Abandoned Housing Act.” House Rescue’s ability to vacuum up abandoned housing in Missouri, however, must be constrained by the Constitutions of the United States and Missouri. That House Rescue enjoys the patina of non-profit status does not excuse its seizure of private homes without adequate notice and without payment of damages to the injured owners. Even if one were to assume the cost-free seizure of private homes was a noble cause that does not obviate the Constitution. Order must be imposed on what appears to be a wild-west free-for-all (or at least free for non-profits) where an entity like House Rescue can rummage through property titles in order to acquire valuable real estate at no cost and with no payment to the owners or other lien-holders.

As the United States Supreme Court put it many years ago:

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

The statute relied upon by plaintiff in its petition, § 447.620, *et seq.*, RSMo. violates the substantive due process rights under the federal and state Constitutions of all affected landowners, including Karl Thomas, because it is arbitrary and capricious, constitutes an uncompensated taking of property without the payment of compensation, effects remedies to perceived problems that are extraordinarily disproportionate and draconian, and is “truly irrational.” The act violates the procedural due process rights of all affected landowners. The act is unconstitutional under the Missouri and federal Constitutions because it takes private property without the payment of just compensation. The act is unconstitutional because it takes property for private use in violation of the state and federal Constitutions. The violations of the state constitution effected by the act cannot be redeemed by the state constitution’s embrace of redevelopment because the act does not conform to constitutional redevelopment standards. Persons confiscating private property under the act do so under color of state law and in violation of 42 U.S.C. § 1983.

ARGUMENT

I

THIS COURT HAS JURISDICTION TO ISSUE THE WRIT

This Court has jurisdiction to issue a writ of mandamus under the unusual circumstances of this case where the relator will suffer unnecessary and certain injury unless the trial court is instructed on the unconstitutionality of the Abandoned Housing Act and is instructed to allow relator to regain possession of his property and to recover whatever damages relator can prove at trial. Real party in interest, House Rescue, has asserted in its Answer to Thomas's Petition for Writ of Mandamus that this Court may not entertain the constitutional challenge to the Abandoned Housing Act in a writ of mandamus because it would entail "adjudication" not "execution." House Rescue's Answer ¶ 2. House Rescue is in error. This Court has jurisdiction to decide the constitutional questions raised by relators and to compel the trial court to act accordingly for several reasons. First, there is no other forum for doing so, as the trial court and lower appellate courts have declined to rule on the constitutionality of the statute. In fact, as noted above, the trial court has suggested that relators either (1) submit to the procedures of the Abandoned Housing Act, a course of action that would cause irreparable injury to relators with no avenue of relief, or (2) file an

appeal of a denial of summary judgment, a procedure that is not available under Missouri court rules.

More importantly, this Court has found that it may consider a writ of mandamus when constitutional questions are raised. Thus in *State ex rel. Neu v. Waechter*, 58 S.W.2d 971, 975 (Mo. 1933), this Court, on considering whether a preemptory writ of mandamus was proper, held, after finding that constitutional questions had been raised: “It follows, therefore, that our writ was properly issued so far as any jurisdictional question is concerned.” And in *State ex rel. Myers v. Shinnick*, 19 S.W.2d 676, 676 (Mo. 1929), this Court noted that “[t]he presence of certain constitutional questions determines our appellate jurisdiction.”

This Court has also ruled that in a case like this one, where a trial court improperly refused to hear the merits of a litigants claims, a writ of mandamus is proper:

Litigants are entitled to a speedy determination of their cause on its merits, consistent, of course, with justice and orderly administration of the business of the court. Where, as here, a litigant has been denied a hearing of his cause on the merits, because of a misconstruction of law, neither the law nor rule 32 compels him to seek relief by appeal, when a speedy and more adequate remedy is open to him by writ of mandamus. Speaking to this question in *State ex rel. v. Homer*, 249 Mo.

58, 73, 74, 155 S.W. 405, 409, this court en banc said: “Nor would an appeal or writ of error afford any substantial or effectual remedy in a case of this sort. Were an appeal taken in an instance like the present, there would have been nothing to pass upon, no error to correct; for no trial had occurred. It is not the intention of the law to permit a cause to be bandied about like a shuttlecock from court to court without affording a more effective and prompt relief than would be afforded by an appeal or writ of error.”

State ex rel. General Motors Acceptance Corp. v. Brown, 48 S.W.2d 857, 860 (Mo. 1932). This Court continued that even if there were a legitimate question on whether the alternative writ of mandamus had been properly granted, interests of justice required that it remain before the Supreme Court.

Besides, where the alternative writ is once issued, it has been the rule of this Court to follow the case to the end, especially so where the facts warrant judicial interference. *State ex rel. Nolen v. Nelson*, 310 Mo. 526, 275 S.W. 927, 928; *State ex rel. Duraflor v. Percy*, 325 Mo. 335, 29 S.W.2d 83.

Id.

II

THE STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO KARL THOMAS

A. Karl Thomas Has an Equitable Interest in the Property, Sufficient to Challenge the Constitutionality of the Missouri Abandoned Housing Statute and Sufficient to Seek Remedies Against House Rescue for the Interference with That Interest

As a preliminary matter, it should be clear that Thomas has an equitable interest in the property. House Rescue has disputed this. See, for example, App. at A103-A105, Exhibit C, House Rescue's Response wherein House Rescue asserts that there are deficiencies in Karl Thomas's title to his property, such that he cannot maintain this litigation. However, based on the recorded deed, Karl Thomas has an equitable interest in the property and this Court need not resolve whether there were deficiencies in the recording. House Rescue's allegations of technical errors relating to the deed are simply not material to the resolution of this case. House Rescue is claiming an interest in the property based upon a statute that Thomas argues is unconstitutional. It is House Rescue, and not Karl Thomas, that has no interest in the property.

There are two strands to House Rescue's claim that Karl Thomas does not have an interest in the property. First, that there are alleged deficiencies in the deed (signature allegedly not notarized, deed allegedly filed after signed, name of Ambassador Properties allegedly inserted later). Second, House Rescue claims it has a superior interest because of its proceedings under the Missouri Abandoned Housing statute.²

As for the first strand, at most that would be a matter for a quiet title action between the heirs, Karl Thomas and Brent Barber.³ No such action has been filed and no such cause of action is part of this litigation. None of that, however, detracts from Karl Thomas having an equitable interest in the property sufficient to maintain this litigation. It is undisputed that Thomas's corporation's name is on the deed, that Thomas directly or indirectly paid thousands of dollars for the property, and that he paid back taxes of \$2,917.67. *See, e.g.*, App. at A7, Exhibit B, Thomas's Statement of Uncontroverted Facts ¶ 14. Karl Thomas indisputably has an equitable interest in the property.

² In a case like this, without a determination of heirship, the procedure will cause clouds upon titles.

³ And, presumably, House Rescue if it can prove a legal interest in the property based upon the operation of a lawful statute.

As for the second strand—that House Rescue has obtained a legal interest in the property superior to Thomas’s—that can be resolved purely as a matter of law. In particular, if the trial court is ordered to determine that the Missouri Abandoned Housing statute is unconstitutional, then House Rescue’s interest must fail. In short, there are no genuine issues of material fact that prevent the trial court from reaching the merits of Thomas’s motion for summary judgment.

B. The Statute Violates the Missouri and United States Constitutions’ Due Process Clauses

Article 1, Section 10, of the Missouri Constitution reads: “[N]o person shall be deprived of life, liberty or property without due process of law.” The Fifth Amendment to the United States Constitution reads in relevant part that no person may “be deprived of . . . property, without due process of law.” The Fourteenth Amendment, of course, made the Due Process Clause applicable to the states: “[N]or shall any state deprive any person of . . . property, without due process of law.”

According to the United States Supreme Court:

Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property. *E.g., Davidson v. New Orleans*, 96 U.S. 97, 24 L.Ed. 616 (1878) (assessment of real estate)

Daniels v. Williams, 474 U.S. at 331. As the Missouri Court of Appeals more recently said, “[f]undamentally unfair state action is a violation of substantive due process.” *State v. Case*, 140 S.W.3d at 88. In 1997, that court explained:

Substantive due process requires the state action which deprives one of life, liberty or property, be rationally related to a legitimate state interest. To assert a substantive due process claim one must establish that the government action complained of is “truly irrational,” more than arbitrary, capricious, or in violation of state law.

Lane v. State Comm. of Psychologists, 954 S.W.2d at 24-25 (citation omitted).

In a more extended discussion of substantive due process principles, the United States Supreme Court explained:

The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in

other circumstances, and in the light of other considerations, fall short of such denial.

Betts v. Brady, 316 U.S. at 462, *overruled on other grounds*, *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court has also explained that a governmental action that fails to substantially advance a legitimate governmental interest may violate principles of substantive due process. *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 540-41 (2005).

In the context of the present statute, any application of the statute to a Missouri property owner would violate principles of substantive due process. There is no question that a fundamental property interest is at stake: the right to own and possess private property, and the right to be compensated if that right is taken away. Anyone who is made the victim of this statute would be losing a fundamental right in the ownership of property.

There is also no justification for the draconian reach of this statute. If the State is concerned about back taxes, it can seek foreclosure—while giving the owner an opportunity to cure. But to give the property to an unrelated private organization while providing the owner no opportunity to cure back taxes boggles the mind.

If the State is concerned about nuisance-like conditions, it can notify the owner of what the conditions are and require the owner to cure those conditions within a

reasonable period of time.⁴ The state could even take over and abate the nuisance itself if the nuisance was severe enough and the owners could not be found.

Finally, if the state is concerned about adverse impacts that occur to unoccupied structures (such as drug dealer invasions and the like), then it can require homeowners to take security measures to prevent such actions. The state might impose stiffer penalties on criminals that use unoccupied buildings for nefarious purposes. But allowing a private entity to seize property simply because it is unoccupied and *might* (and more likely might not) cause a problem because of the actions of third party criminals is exceedingly disproportional. In short, this statute is “truly irrational.” *See Lane*, 954 S.W.2d at 24-25. Indeed, it shocks the conscience to think that the State would countenance the uncompensated expropriation of private property to remedy what could be minor ills.

On its face, this statute violates substantive due process. And, as applied to Karl Thomas, the statute is equally violative of his substantive due process rights. Karl Thomas is no longer behind in his taxes. Prior to being told to cease work on the property as a result of this litigation, he had never received any notice of building violations. He has never been notified that criminals have used his property for evil

⁴ Because House Rescue’s complaint is so vague, it is impossible to know why it is alleged to be a nuisance. *See App. at A1, Petition* ¶ 8.

purposes. In short, the impact that his unoccupied home has on the community cannot justify its uncompensated seizure by a private organization. The loss of his property would violate his substantive due process rights.

The proper remedy for a due process remedy is invalidation of the ordinance and payment of any actual damages (which can be proven at trial). *See, e.g., Carey v. Phipus*, 435 U.S. 247, 259 (1978), and *Brewer v. Trimble*, 902 S.W.2d 342, 346 n.4 (1995). This substantive due process violation requires the relief called for in Counts III, IV, VI, and VII of Thomas's Counterclaim, App. at A147-A163, and this Court should order the trial court to rule accordingly.

C. The Statute Violates Procedural Due Process as Well

Regarding procedural due process, the specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, the private interest is fundamental: the ownership of private residences, such as the home owned by Karl Thomas, and the right to be compensated if the property is taken. Second, the risk of an unlawful and

unconstitutional uncompensated deprivation is not a risk: it is a certainty. Third, as noted above, there is no opportunity for a landowner to cure any problems (such as back taxes or a code violation) before the property can be taken. There are also no meaningful post-deprivation procedures that will allow an owner to reacquire the property without being liable to the *taker*. There is also no post-deprivation remedy that would provide just compensation to the property's owner. Lastly, the government's interest in ensuring that private property is acquired by private organizations is minimal compared to the impact upon the victims of the statute. In short, this statute is as clear a procedural due process violation as can exist.

The proper remedy for a due process violation is invalidation of the ordinance and payment of any actual damages (which can be proven at trial). *See, e.g., Carey v. Piphus*, 435 U.S. at 259, and *Brewer v. Trimble*, 902 S.W.2d at 346 n.4. *See also First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (damages for temporary takings caused by invalid statute). This substantive due process violation requires this Court to order the trial court to grant the relief called for in Counts III, IV, VI, and VII of Thomas's Counterclaim—finding the statute unconstitutional and ordering an appropriate remedy.

D. The Failure to Notify the Owners Is an Independent Violation of Due Process

An independent ground exists for finding the actions taken in this case violate the United States Constitution. In this case, neither the heirs to Charles Laspy nor Karl Thomas ever received actual notice that they were about to lose their property to House Rescue. The forfeiture of property without adequate notice is a violation of the Due Process Clause in the United States Constitution.

In its last term, the United States Supreme Court took the unprecedented step of striking down a forfeiture statute where failed notice by certified mail and notice by publication was deemed a violation of procedural due process. In *Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708 (2006), a divorced husband had been responsible for paying the mortgage and taxes on the former marital home, now occupied exclusively by his former wife. When the mortgage had been paid in full, the husband failed to realize that the impound account for the payment of taxes was no longer in operation; he failed to pay property taxes on the home. *Id.* at 1712. Notice by certified mail was sent to the husband at the address of the home; it was returned to the City because the husband no longer lived at the home. *Id.* Next, notice was made by publication. *Id.* Again, the husband, not being a reader of legal notices, failed to receive notice. *Id.* It was not until the former wife received an eviction notice did either of the former spouses realize the taxes had been delinquent.

Id. at 1713. Ultimately, the United States Supreme Court held that it is a violation of procedural due process to foreclose on property when there are reasonable alternative means of providing notice. *Id.* at 1721.

The facts of that case are strikingly similar to those at bar. Notice of the litigation was never received by either the heirs to Charles Laspy or by Karl Thomas. *See* App. at A7, Exhibit B, Affidavit of Karl Thomas ¶ 12, and attached as Exhibit F to Statement of Uncontroverted Facts, App. at A32. No additional effort was made to find the heirs before irrevocable steps were taken that have divested the owners of the possessory interest in their own property. Moreover, as noted below, House Rescue has itself demonstrated that locating the heirs of Charles Laspy was not that difficult—*see* App. at A127, Declaration of Latt Copley included as Exhibit 3 to Exhibit C, House Rescue’s Response (indicating that Mr. Copley had located the heirs).

Moreover, House Rescue should have been well aware of Court precedents requiring adequate notice. There is also ample older precedent from the United States Supreme Court that suggests more should have been done in this case. That Court has required notice that is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314. As the Court explained, “when notice is a person’s due, process

which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Id.* at 315.

In *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972), the Court held that the State had failed to provide notice “reasonably calculated” to apprise the interested party of the pendency of forfeiture proceedings where “the State knew that [interested party] was not at the address to which the notice was mailed.” Here, service was never accomplished on Charles Laspy because he was dead. Similarly, in *Covey v. Town of Somers*, the Court held that compliance with a statute, including notice by mail, was inadequate under the circumstances because the town officials knew that the interested party was incompetent. 351 U.S. 141, 144-47 (1956) (citing *Mullane*, 339 U.S. at 314-15). In short, the failure of actual notice here warrants a conclusion that the procedures followed to date have violated the due process rights of the owners of the property.

Significantly, *Jones* is now the law of Missouri. See, e.g., *Crum v. Missouri Dir. of Revenue*, 455 F. Supp. 2d 978 (W.D. Mo. 2006) (analyzing and following *Jones*, but finding notice adequate). Even more telling, is the Missouri Supreme Court’s treatment of the notice required by another Missouri statute dealing with supposedly abandoned mobile homes:

Applying these standards here, to paraphrase *Jones*, we do not think that a person who actually desired to inform a homeowner or lienholder of an impending finding of abandonment and issuance of an abandoned home title not reflecting the lienholder's interest would send a single notice by regular mail to an address believed was abandoned. The notice here did not meet DOR's notice obligation as to the Wrens and Conseco under section 700.531 or its constitutional obligation to provide adequate notice to the Wrens before depriving them of their property interest in the manufactured home.

Conseco Fin. Servicing Corp. v. Missouri Dep't of Revenue, 195 S.W.3d at 417.⁵ It is difficult to imagine a case more on point than *Conseco*.

Finally, what is most startling, however, is that House Rescue has all but admitted in the trial court proceedings that it could have found and provided notice to the heirs in this and many other cases where it has, or has attempted to scoop up supposedly abandoned housing without payment. In the Affidavit of Elbert Harris,

⁵ The Abandoned Manufactured Home-Title Disposition Act (§§ 700.525-700.541 RSMo. (1999)) provided no procedures for contesting the issuance of an "abandoned home title."

attached to App. at A129, Exhibit 4 to Exhibit C to this petition (House Rescue's Response), Mr. Harris states at Paragraph 3:

[T]here are a number of real estate prospectors that monitor filings (as they are a public record) by non-profit corporations under the Missouri Abandoned Housing Act with the Circuit Court of Jackson County and with the Jackson County Recorder of Deeds, and that, upon such identification of filings, *the prospectors locate the owners or heirs of the owners* and purchase the property for a nominal value.

Id. (emphasis added). Harris continues in his affidavit to express indignation that such pejoratively termed "prospectors" have taken the business away from House Rescue by actually paying cash money to the owners! *Id.* While Thomas vehemently denies that he is a "prospector," having paid good money for the property, its taxes, and his own rehabilitation work, the real point here is that *if the "prospectors" are so easily able to find the owners or heirs then why not non-profits like House Rescue?*⁶ Taking people's property without notice is not a game and it should not be

⁶ Indeed, House Rescue provides proof that the heirs to Charles Laspy could be found. See App. at A127, Exhibit 3 to Exhibit C, House Rescue's Response, Affidavit of Latt Copley ¶ 4, "[I] located his only surviving heirs." This is another (continued...)

the business of House Rescue or anybody else when an apparently minimal effort can be employed to find the actual owners or heirs and give them notice adequate under the Due Process Clause—or better yet—offer to buy the property for fair-market value.

In short, the notice provided to the heirs of Charles Laspy and to their successor, Karl Thomas, is patently unconstitutional. If private parties in Missouri are to get away with taking over private property of others, especially others in difficult circumstances, they must go to greater lengths to notify the owners of the property.

The proper remedy for a due process remedy is invalidation of the ordinance and payment of any actual damages (which can be proven at trial). *See, e.g., Carey v. Piphus*, 435 U.S. at 259, and *Brewer v. Trimble*, 902 S.W.2d at 346 n.4. This substantive due process violation requires the relief called for in Counts III, IV, VI, and VII of Thomas’s Counterclaim. This Court should order the trial court to find that the Missouri Abandoned Housing Act violates procedural due process.

⁶ (...continued)

reason why Missouri’s laws regarding probate and determination of heirship should not be abandoned.

**E. The Statute Takes Private Property Without
the Payment of Just Compensation**

The Missouri Constitution, at Article 1, Section 26, states in part that “private property shall not be taken or damaged for public use without just compensation.” The United States Constitution likewise says “nor shall private property be taken for public use without just compensation.”⁷ U.S. Const. amend. V. The Fifth Amendment is made applicable to the states by the Fourteenth Amendment. *See Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226. The United States Supreme Court has explained the purpose of the Takings Clause:

The Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. at 49. This statute effects a taking of property in the classic sense: the owner is ousted and loses possession, third parties invade the property, and title is eventually divested from the owner. And, as noted in Part I above, there is no provision to the payment of any compensation to the owner. In

⁷ This subsection addresses the statute’s failure to pay just compensation. The next subsection will focus on the absence of “public use.”

cases where an owner is forced to submit to the invasion of his or her property by third persons, the United States Supreme Court has characterized the situation as a “physical invasion” which is a *per se* taking and therefore unconstitutional because there is no provision for the payment of just compensation. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (invasion of small portion of property by cable television cables and box a physical invasion prohibited by the Fifth Amendment); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (requirement that landowners provide public access to private waterway a prohibited physical invasion). The same holds in the Missouri courts. *See, e.g., Clay County ex rel. County Comm’n of Clay v. Harley and Susie Bogue, Inc.*, 988 S.W.2d at 107 (reciting physical invasion test when addressing whether Article 1, Section 26, of the Missouri Constitution violated).

The United States Supreme Court has also made it clear that the problem with governmental takings is usually not the take itself (provided that the “Public Use” Clause is adhered to), but that the taking occurs without compensation:

The [Takings] Clause is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 305. As stated by a Missouri Court of Appeals, it is a “fundamental concept[] that owners of private property taken or damaged for public use are entitled to ‘just compensation.’” *Kamo Elec. Co-op., Inc. v. Cushard*, 416 S.W.2d 646, 651 (Mo. Ct. App. 1967).

When the provision for compensation proves to be inadequate or illusory, the Missouri Supreme Court has had no trouble in striking down an offending statute. *See State ex rel. United Rys. Co. v. Wiethaupt*, 133 S.W. 329, 335 (Mo. 1910) (“Ordinarily, when a statute provides for the taking of private property for a public use, it provides also for the payment of the damages out of the public treasury, or by special tax bills in a district especially benefited . . .”).

In the case of § 447.620, *et seq.*, RSMo. there is no question that property will be taken—and equally no question that compensation shall *not* be paid. First, a possessory interest is taken as soon as a court grants possession to the petitioning organization. §§ 447.622, 447.632 RSMo. The legitimate owner is ejected, and the organization can proceed to make physical and legal modifications to the property without the owner’s consent. §§ 447.630, 447.634 RSMo. For this, no compensation is paid to the rightful owner for this taking (which could be considered a form of a leasehold interest). Finally, once the “rehabilitation” is completed, title is given to the usurping organization. § 447.640 RSMo. The words of this subsection are so

extraordinary they bear repeating: “A conveyance by judicial deed shall operate to extinguish all existing ownership interests in, liens on, and other interest in the property, except tax liens.” There is no hint of compensation.

Virtually all real property has *some* fair-market value. And it is axiomatic that compensation should be paid based on the fair-market value on the date of the taking—without considering the influence on the value of property caused by the project that justified the condemnation. *See, e.g., Olson v. United States*, 292 U.S. 246, 256 (1934). Thus if a property has a market value of \$250,000 on the date of “possession” under this statute, the owner must be paid the fair-market value for the possessory interests that are taken. And, if fee title is eventually transferred to the receiving organization, the full fair-market value for the fee must be paid.

The statute’s failure to provide for any compensation makes it unconstitutional on its face. The failure of any mechanism for Karl Thomas to be paid any compensation makes it unconstitutional as applied to the taking of his property. The proper remedy for a taking of private property is just compensation. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), and *Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573, 577 n.8 & n.9 (Mo. 2000). The failure to pay just compensation requires this Court to order the trial court to find that a taking has occurred without the payment of just compensation, to declare the statute unconstitutional, and to proceed to a trial to ascertain damages suffered by Thomas.

F. The Statute Effects the Taking of Property for a Private Use

Private takings are prohibited under the Constitutions of both Missouri and the United States. Article 1, Section 28, of the Missouri Constitution reads:

That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.

And, as previously noted, the United States Constitution says: “[N]or shall private property be taken for public use without just compensation.” U.S. Const. amend. V. The uncompensated takings allowed for by § 447.620, *et seq.*, RSMo. are not for public uses by public entities, but are solely for the benefit of private organizations. In this particular case, the taking is for the benefit of a nonprofit entity.

It is true that the courts have, in recent years, been solicitous of the participation of private parties in redevelopment projects that serve the public interest of clearing out slums and blight, *see, e.g., State, on Inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City, Mo.*, 270 S.W.2d 44, 51 (Mo. 1954) (en banc) (transfer of property to private owner after redevelopment not a private taking). Nevertheless, it remains unquestioned that private takings are prohibited. As the United States Supreme Court held in *Hawaii Housing Authority v. Midkiff*, 467 U.S. at 245: “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.” Indeed, over a century ago the Court repeatedly proscribed private takings from “A to B.”⁸ The requirement of “public use” has long been an essential

⁸ *See, e.g., Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-52 (1905) (“It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character”); *Citizens’ Sav. & Loan Ass’n v. City of Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) (declaring that a statute providing that “the homestead now owned by A. should no longer be his, but should henceforth be the property of B.” would be invalid because of the “limitations on [government] power which grow out of the essential nature of all free governments”); *Wilkinson v. Leland*, 27 U.S. (2 (continued...))

component to the sovereign's power of eminent domain. *See, e.g.*, Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 Sw. U. L. Rev. 569, 671 (2003). In recent years, legal scholars have called for greater judicial scrutiny of assertions of public use in order to better protect rights in private property. *See, e.g.*, Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem,* 71 Geo. Wash. L. Rev. 934 (2003). Indeed, that independent level of judicial scrutiny is already embodied in the state constitution where it states that the "question whether the contemplated use be public shall be judicially determined *without regard* to any legislative declaration that the use is public." Mo. Const. art. 1, § 28 (emphasis added).

Even the Supreme Court's most recent foray into eminent domain law did not countenance the taking of an individual parcel not part of a general redevelopment plan as contemplated in Missouri. *See, e.g., Kelo v. City of New London,* 545 U.S.

⁸ (...continued)

Pet.) at 658 ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.").

469 (2005). As Justice Kennedy put it in his concurrence: “This taking occurred in the context of a comprehensive development plan meant to address a serious city-wide depression, and the projected economic benefits of the project cannot be characterized as *de minimus*.” *Id.* at 493 (Kennedy, J., concurring). Here, there is no comprehensive redevelopment plan. Any property anywhere in the City can be taken away if there is a single code violation, it is a day behind on its taxes, and the owner has been absent for a day more than six months. And there is no evidence of any comprehensive redevelopment plan involving Karl Thomas’s property. Indeed, this case contains more of the element of potential “favoritism” that might give rise to a presumption of *invalidity*. *Id.* (“[P]rivate transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.”). *Id.*

Like the United States Supreme Court’s historical and more recent pronouncements against private takings, the Missouri Supreme Court, nearly a century and a half ago, eloquently wrote:

Our constitution provides that no private property ought to be taken or applied to public use without just compensation. Whilst this provision recognized the right of eminent domain in the state for the public use, there is nothing which sanctions the doctrine that the property of individuals may be taken for private use with or without

compensation. Such a right would be hostile to the existence of private property. If one individual could by law be compelled to transfer his property to another against his will, a great stimulant to the acquisition of wealth, which contributes so much to the prosperity of the state, would be taken away. Hence commentators on our form of government, whilst they acknowledge the right of eminent domain in the state for public use in its broadest terms, are unanimous in the opinion that private property cannot be taken for private use.

Dickey v. Tennison, 27 Mo. 373, 1858 WL 5919, at *2.

The citizens of Missouri felt so strongly about this principle that they put it directly into their constitution. And the courts of Missouri have supported this principle. In 1910 the Missouri Supreme Court held that

if private property be allowed by the county court to be taken under the guise of a pretended public use, when in fact it is only for the convenience of private persons who are willing to pay for it, “such an act would be an abuse of power and would violate a constitutional property right.”

State ex rel. United Rys. Co. v. Wiethaupt, 133 S.W. at 335 (quoting *Seafield v. Bohne*, 69 S.W. 1051, 1055 (Mo. 1902)). (Of course in this case, the private persons are not willing to pay for it.) *Accord City of Kansas City v. Kindle*, 446 S.W.2d 807,

813 (Mo. 1969) (“If the proceeding is for a public use it will be sustained; if it is for a private use the proceeding must fall because with certain exceptions not here applicable private property may not be taken for private use, with or without just compensation.”).

In the statute under consideration, there is no indicia of public use in the taking. All that is required is the acquiring private organization be a “not-for-profit” “whose purpose includes the provision or enhancement of housing opportunities in its community.” § 447.620(5) RSMo. But the “provision of housing opportunities” need not be “low-income housing” or, in fact, any type of housing for which there is a community need or shortage. It need not have a purpose any different from a private development corporation that builds homes for a business. It need not be the sole or even a primary purpose of the organization—it could be just one of many. Thus, if a qualifying not-for-profit entity had as one of its purposes providing large homes for its officers or employees, even luxury condominiums for its business managers, that would be acceptable under the terms of the statute.

There is likewise, no statutory requirement that the organization acquiring the property even put the property to housing once it acquires title. It could just as easily convert the property to administrative offices or offices for rent. Indeed, it could even tear down the home and put up a weed-strewn parking lot.

In other words, unlike the typical redevelopment laws and projects that flow from those laws, there is no requirement of public use here. The constitutional provisions that prohibit private takings cannot be defeated merely because the new private owners *might* decide to put the property someday to a public use. If the proscriptions against private takings in the Missouri and United States Constitutions are to have any meaning, this statute must be found unconstitutional on its face.

Likewise, there is no promise or even indication anywhere in plaintiff's petition that Plaintiff will actually put Karl Thomas' property to a public use or purpose. The application of the statute in this case violates the state and Federal Constitutions.

The taking for a purely private use that does not serve a public purpose fails to substantially advance a legitimate state interest and is, therefore, an independent substantive due process violation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. at 540-41. The proper remedy for a due process remedy is invalidation of the ordinance and payment of any actual damages (which can be proven at trial). *See, e.g., Carey v. Piphus*, 435 U.S. at 259, and *Brewer v. Trimble*, 902 S.W.2d at 346 n.4.

A taking of property that should be invalidated violates the Takings Clauses of the United States and Missouri constitutions and should be rescinded, with temporary takings damages paid for the period of time in which Thomas has been ousted from his property. *See First English*, 482 U.S. at 322-24. This violation of

the Takings Clauses requires this Court to order the trial court to grant the relief called for in Counts I, II, VI, and VII of Thomas's Counterclaim.

G. The Statute Cannot Be Rescued by the Missouri

Constitution's Redevelopment Clause

Article 6, Section 21, of the Missouri Constitution provides for redevelopment.

It reads:

Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.

The statute under consideration in this case does not conform to the requirements of Article 6, Section 21. First of all, the taking countenanced by § 447.620, *et seq.*, RSMo. does not encompass eminent domain because that term has *always* been

understood to require the payment of compensation—and compensation is of course required in the state and Federal Constitutions.⁹ Second, the taking of the property under § 447.620 RSMo. has no restrictions on the ultimate sale or disposition of the property. It therefore does not conform with Article 6, Section 21’s, requirement that the sale be “subject to such restrictions as may be deemed in the public interest.” As noted previously, the acquiring organization, once it acquires title, can put the property to any purpose it pleases. The statute at issue here cannot be saved from the fact that it violates the state constitution by Missouri’s redevelopment laws. Furthermore, even if the statute here did conform to Article 6, Section 21, that would not save it from its violations of the Federal Constitution.

⁹ The requirement for compensation predates the provisions of the Missouri and United States Constitutions. *See, e.g.*, discussion of common and natural law theorists on eminent domain in James S. Burling, *Can the Existence of Value in Property Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed*, in *Takings Sides on Takings Issues: Public and Private Perspectives* (Thomas Roberts ed., 2002).

H. The Effect of This Statute Would Work

a Violation of 42 U.S.C. § 1983

Title 42, Section 1983, states in relevant part:¹⁰

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To the extent that § 447.620, *et seq.*, RSMo. would allow for the taking of private property by private organizations without the payment of just compensation, the statute works to deprive rights secured by the constitution and laws of individual landowners. In this case, Real Party in Interest is acting under color of state law.

An otherwise private party is imbued with state action when it utilizes state law to deprive another private person of property. This was the holding of *Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, where the Supreme Court held that if one

¹⁰ This Court has jurisdiction to rule on § 1983 causes of action. *Shapiro v. Columbia Union Nat'l Bank and Trust Co.*, 576 S.W.2d 310, 315-16 (Mo. 1978).

private person utilizes statutory procedures to seize the property of another private person, then a claim under 42 U.S.C. § 1983 has been stated:

If the creditor-plaintiff violates the debtor-defendant's due process rights by seizing his property in accordance with statutory procedures, there is little or no reason to deny to the latter a cause of action under the federal statute, § 1983, designed to provide judicial redress for just such constitutional violations.

Id. at 934.

Moreover, the doctrine that otherwise private actors can be imbued with state action has been reinforced time and again. For example, the United States Supreme Court reiterated its holding in *Lugar* when it held:

This [state action] requirement is satisfied [if] . . . “the deprivation must be caused by the exercise of some right or privilege created by the State” . . . [and] the private party must have “acted together with or . . . obtained significant aid from state officials” or engaged in conduct “otherwise chargeable to the State.” The Court found potential § 1983 liability in *Lugar* because the attachment scheme was created by the State and because the private defendants, in invoking the aid of state

officials to attach the disputed property, were “willful participant[s] in joint activity with the State or its agents.”

Wyatt v. Cole, 504 U.S. at 162 (citations omitted). That is precisely what has happened here. House Rescue utilized a privilege “created by the State” (the Missouri statute). House Rescue obtained the “significant aid” of the courts in doing so.

Likewise, in *Williams v. City of St. Louis*, 783 F.2d 114, the Eighth Circuit held that an act is under color of state law when state power is granted to a private person—in that case a redevelopment agency. The court stated:

Pursuant to state law, the City delegated its authority to set housing standards for residential properties and its power of eminent domain to MMCRC. This delegation under state law of powers possessed by virtue of state law and traditionally exercised by the City satisfies us that the City’s action here is under color of state law.

Id. at 117.

Likewise, the Eleventh Circuit found state action in the utilization of a state authorized dependency adjudication before a state trial court judge: “Furthermore,

private attorneys alleged to have conspired with immune state officials may be held liable under § 1983” in seizing the private automobile of a private party. *Dykes v. Hosemann*, 743 F.2d 1488, 1499 (11th Cir. 1984).¹¹

Missouri courts are in accord in holding potential Section 1983 liability in putative private actors. In *Ross v. Ford Motor Credit Co.*, 867 S.W.2d 546 (Mo. Ct. App. 1993), the court found that Ford Motor Credit might potentially be liable under Section 1983, “[i]f the State, by an unconstitutional law, custom, or usage, equips or aids the private person to deprive another of his constitutional rights.” *Id.* at 551.

In the trial court, House Rescue argued that *Mottl v. Missouri Lawyer Trust Account Found.*, 133 S.W.3d 142 (Mo. Ct. App. 2004), supports its assertion that it is not liable under 42 U.S.C. § 1983. That case, however, is inapposite. *Mottl* had alleged that a private attorney’s voluntary payment of interest on a lawyer’s trust account into a foundation constituted state action under 42 U.S.C. § 1983. The court rejected this contention. First, the contribution was voluntary—unlike the situation here—there was no involuntary conversion of private property. Second, the actor with control over the trust account in *Mottl* was the attorney’s *client*, making the allegation of state action all the more tenuous: “[T]he decision to participate is in the

¹¹ Thomas does not presently allege that House Rescue’s attorneys have violated Section 1983.

hands [of] . . . ultimately the client.” 133 S.W.3d at 147. In this case, Thomas has had no choice but to “participate” because his property interest is being involuntarily taken from him. Third, in *Mottl* there was no “overt official involvement.” 133 S.W.3d at 147 n.4. Here, on the other hand, there is—the utilization of state court proceedings combined by the authority of state statutes.

Finally, in summarizing such private property seizure cases, Professor Davis notes that courts will often find that “a creditor’s self-help seizure of property did constitute action under color of state law where they have determined that a state statute was the sole legal authority for the creditor’s actions” or “where a statute provides for a self-help remedy which was not available to creditors at common law.” Russell J. Davis, *Private Person’s Enforcement of Lien Through Self-Help as an Act “Under Color of State Law” Within Meaning of 42 U.S.C. § 1983*, 32 A.L.R. Fed. 431 (1977).

In short, that House Rescue is acting under color of state law for purposes of Section 1983 liability follows well-established law in this jurisdiction and throughout the United States.

It is, therefore, appropriate for this Court to order the trial court to find that House Rescue is in violation of 42 U.S.C. § 1983 and hold trial solely for the determination of damages.

CONCLUSION

The Missouri Supreme Court put it best when referring to another statute that purported to give private entities the right to take private property:

This act is fraught with so much danger to the rights of the citizen to his private property that its passage through the General Assembly by practically a unanimous vote can be accounted for only on the theory that the members were misled by the title and were not informed as to its contents.

State ex rel. United Rys. Co. v. Wiethaupt, 133 S.W. at 336. The rights to property exist in Missouri for the poor, the middle class, and the rich alike. Because § 447.620, *et seq.*, RSMo. violates numerous provisions of the state and Federal Constitutions, this Court must order the trial court to: (1) find the Missouri Abandoned Housing Act, 447.620, *et seq.*, RSMo. to be unconstitutional, (2) rescind the order of possession granted by the Circuit Court to House Rescue for the subject

property, and (3) to set trial for a determination of the damages incurred by Thomas for the loss of the use of his property caused by the unlawful possession by Real Party in Interest House Rescue Corporation.

DATED: July __, 2007.

Respectfully submitted,

CYNTHIA CLARK CAMPBELL
JAMES S. BURLING
R.S. RADFORD

By _____

JAMES S. BURLING

Pro Hac Vice

Pacific Legal Foundation

3900 Lennane Drive, Suite 200

Sacramento, California 95834

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-mail: jsb@pacificlegal.org

Counsel for Relators State of Missouri
ex rel. Ambassador Properties, L.L.C.
and Karl Thomas

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), I hereby certify that the foregoing RELATORS' STATEMENT, BRIEF, AND ARGUMENT is proportionately spaced, has a typeface of 13 points or more, complies with Rule 84.06(b), and contains 12,776 words.

DATED: July __, 2007.

By _____

JAMES S. BURLING

Pro Hac Vice

Pacific Legal Foundation

3900 Lennane Drive, Suite 200

Sacramento, California 95834

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

E-mail: jsb@pacifical.org

Counsel for Relators State of Missouri
ex rel. Ambassador Properties, L.L.C.
and Karl Thomas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy and a copy on a CD of the foregoing document was served by first-class U.S. mail, postage prepaid this ___ day of July, 2007, to:

The Honorable Thomas C. Clark, Judge
Jackson County Courthouse
415 East 12th Street
Kansas City, MO 64106-2706
Respondent

Patrick G. Reavey
Reavey Law, LLC
1600 Genessee, Suite 303
Kansas City, MO 64102
Counsel for Real Party in Interest

Jeremiah J. Morgan
Tarun Mehta
3500 One Kansas City Place
1200 Main Street
Kansas City, MO 64105
Counsel for Real Party in Interest

Lawrence R. Hamel
1125 Grand Boulevard, Suite 1900
Kansas City, MO 64106
Counsel for Legal Aid of Western Missouri,

and a copy was sent by U.S. Mail to:

Jay Nixon, Attorney General
Missouri Attorney General's Office
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, MO 65102

JAMES S. BURLING