
IN THE SUPREME COURT OF MISSOURI

CAUSE NO. SC88287

STATE OF MISSOURI, EX REL. JOHN & REGINA
DENNIS, ET AL., OPAL HENDERSON, AND THE
OPAL HENDERSON REVOCABLE TRUST

Relators,

v.

THE HONORABLE EVELYN M. BAKER,

Respondent.

Original Writ of Prohibition from the Circuit Court of the City of St. Louis,
Missouri

Honorable Evelyn M. Baker, Circuit Judge Division 21

Cause No. 0622-CC05527

BRIEF OF ALL RELATORS

PLEBAN AND ASSOCIATES, L.L.C
C. John Pleban, #24190
Lynette M. Petruska, #41212
2010 S. Big Bend Blvd.
St. Louis, Mo. 63117
(314) 645-6666
(314) 645-7376 (fax)

Attorneys for All Relators

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	2
POINTS RELIED ON	19
ARGUMENT	22
I. Relator is entitled to an Order prohibiting Respondent from proceeding on the LCRA’s condemnation petition because it did not have jurisdiction over the Petition in Eminent Domain in that Ordinance No. 66499 was procured by fraud, collusion and bad faith, and therefore, an unconstitutional taking for a private purpose.	23
II. Relator is entitled to an Order prohibiting Respondent from proceeding on the LCRA’s condemnation petition because it did not have jurisdiction over the Petition in Eminent Domain because Ordinance 66499 is arbitrary in that it was unsupported by any evidence that the redevelopment area was blighted within the meaning of Missouri law.	33
III. Relator is entitled to an Order prohibiting Respondent from proceeding on the LCRA’s condemnation petition because it did	

not have jurisdiction over the Petition in Eminent Domain because the LCRA failed to comply with the legal conditions precedent to pursuing a condemnation action set forth in Sections 99.450.2 and 99.430.1(4) & (7) R.S.Mo. by failing to include a sufficiently complete land use plan, a statement of the proposed method and estimated cost of the acquisition and preparation of the redevelopment area, a statement of the proposed method of financing the project, as well as failing to comply with the schedules set forth in the ordinance and failing to determine that the redeveloper was legally and financially capable of redeveloping the area.	36
IV. Relator is entitled to an Order prohibiting Respondent from proceeding on the LCRA’s condemnation petition because the circuit court erred and exceeded its jurisdiction in entering its Order of Condemnation without providing Relators the opportunity to present evidence in support of their claims/defenses that Ordinance No. 66499 was arbitrary, unconstitutional, in violation of Chapter 99 R.S.MO., and procured by fraud, collusion and bad faith to enable the taking of private property for a private purpose.	47
CONCLUSION	55
COMBINED CERTIFICATE OF COMPLIANCE AND SERVICE.....	58

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Blue v. Harrah’s North Kansas City, LLC</u> , 170 S.W.3d 466 (Mo. App. W.D. 2005)	31
<u>Centene Plaza Redevelopment Corp. v. Mint Properties, Inc.</u> Case No. ED89275 (April 24, 2007)	34-35
<u>City Center Redevelopment Corp. v. Foxland, Inc.</u> , 180 S.W.3d 13 (Mo. App. E.D. 2005)	25, 44, 46 50 & 54
<u>Herrold v. Hart</u> , 290 S.W.2d 49 (Mo. 1956)	29
<u>Kansas City v. Hyde</u> , 96 S.W. 201 (Mo. 1906)	25 & 49
<u>Maryland Plaza Redevelopment Corp. v. Greenberg</u> , 594 S.W.2d 284 (Mo. App. E.D. 1979)	23, 33, 36, 40 & 42-46
<u>SD Invs., Inc. v. Michael-Paul, L.L.C.</u> , 157 S.W.3d 782 (Mo. App. W.D. 2005)	13
<u>State v. Becker</u> , 938 S.W.2d 267 (Mo. banc 1997)	31
<u>State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis</u> , 517 S.W.2d 36 (Mo. banc 1975)	24, 32 & 35
<u>State ex rel. Broadway-Washington Assoc, LTD v. Manners</u> , 186 S.W.3d 272 (Mo. banc 2006)	22
<u>State ex rel. Dean v. Cunningham</u> , 182 S.W.3d 561 (Mo. banc 2006) ..	1
<u>State ex rel. Devanssay v. McGuire</u> , 622 S.W.2d 323 (Mo. App. E.D. 1981)	32, 37 41-42

<u>State ex rel. Lebanon Sch. Dist. R-III v. Winfrey</u> , 183 S.W.3d 232	
(Mo. banc 2006)	22
<u>State ex rel. Prudential Insur. Co. of America v. Bland</u> , 190 S.W.2d	
234 (Mo. 1945)	29
<u>State ex rel. Rantz v. Sweeney</u> , 901 S.W.2d 289 (Mo. App. S.D. 1995)	26 & 49
<u>State ex rel. Terrell v. Nicholls</u> , 719 S.W.2d 862 (Mo. App. E.D. 1986)	22, 25, 44
	45 & 55
<u>State ex rel. U.S. Steel v. Koehr</u> , 811 S.W.2d 385 (Mo. banc 1991)	24
<u>State ex rel. Weatherby Advertising Co. v. Conley</u> , 527 S.W.2d 334	
(Mo. banc 1975)	22
<u>Weaver v. Schaaf</u> , 520 S.W.2d 58 (Mo. banc 1975)	31
 <u>Constitution/Statutes</u>	
Mo. Con., Art. I, § 28	24
Mo. Con., Art. V, § 4.1	1
Mo. Con., Art. VI, § 21	24
Section 99.320(3) R.S.Mo.	33
Section 99.430.1(4) R.S.Mo.	38-39
Section 99.430.1(7) R.S.Mo.	39
Section 99.430.2 R.S.Mo.	33
Section 99.450.2 R.S.Mo.	38

OTHER

Ordinance No. 66499 10, 28 &
43-46

JURISDICTIONAL STATEMENT

Relators initially filed their Petition for Writ of Prohibition with the Missouri Court of Appeals, Eastern Division at Cause No. ED88857 on November 2, 2006, after the circuit court entered its Order of Condemnation. The Missouri Court of Appeals denied the Petition for Writ of Prohibition in an Order dated January 3, 2007. Thereafter, Relators filed their Petition for Writ of Prohibition with the Missouri Supreme Court. As a result of the Court of Appeals denial of the writ, this Court has jurisdiction over Relators' petition pursuant to Article V, § 4.1 of the Missouri Constitution. See e.g. State ex rel. Dean v. Cunningham, 182 S.W.3d 561, 564 (Mo. banc 2006).

STATEMENT OF FACTS

On or about October 28, 2004, Disper Schmitt Properties, LLC (hereinafter “Disper Schmitt”) purchased property located at 1200 South Seventh Street in the City of St. Louis, Missouri.¹ The property is adjacent to and across the street from properties owned by the Relators herein, John and Regina Dennis, et al. and Opal Henderson (hereinafter “Henderson”) through the Opal Henderson Revocable Trust. While the Dennis property is a vacant lot, the Henderson property is used to operate Henderson Auto Salvage frequently referred to as a “junkyard,” which Henderson has operated in excess of fifty (50) years at the same location in the City. No explanation has been offered as to why Disper Schmitt would purchase property located next to a junkyard to develop a “martini bar” prior to the passage of Ordinance 66499.

Since purchasing the 1200 South Seventh Street property, Disper Schmitt (primarily through Mark Disper (hereinafter “Disper”)) has engaged in a campaign to harass and oppress Henderson, a 77 year old woman, to force her to transfer her property to Disper Schmitt at well below market value. This misconduct is the

¹ Shortly before buying the 1200 South Seventh Street property, Schmitt Properties 2, LLC purchased 1141-51 South 7th Street, just outside the redevelopment area at issue herein. As set forth in more detail below, this redevelopment project was funded by Daniel Schmitt, Mark Disper, and Jonathan Dalton.

subject of a separate lawsuit filed by Henderson styled Henderson, et al. v. Disper Schmitt Properties, LLC, et al., Cause No. 0622-CC05493 (hereinafter “Henderson lawsuit”), which was filed on August 8, 2006 prior to the LCRA filing the condemnation action at issue in this proceeding. Petition Exhibit 6, pp. 112-144. The Henderson lawsuit remains pending in the Circuit Court of the City of St. Louis. The defendants in the Henderson lawsuit are represented by Winthrop Reed (hereinafter “Reed”) and Lynn Brackman (hereinafter “Brackman”) of the law firm Lewis, Rice, Fingersh, LC (hereinafter “Lewis Rice”), the firm that represents the Land Clearance for Redevelopment Authority of the City of St. Louis (hereinafter “LCRA”) in this proceeding. A Lewis Rice attorney, Jonathan Dalton (hereinafter “Dalton”) has a financial interest in the redevelopment area at issue in this proceeding. Dalton has represented Disper Schmitt throughout its efforts to obtain Henderson’s property that is the subject of the Henderson lawsuit.

Prior to filing the condemnation action herein, the LCRA presented to the Board of Aldermen of the City of St. Louis (hereinafter “Board”) Board Bill No. 253 for the blighting of the Choteau/S. 7th Street/I-55 Area (hereinafter “redevelopment area” or “area”) and the approval of a redevelopment plan. A complete copy of the proceedings of the Board regarding the passage of Board Bill No. 253, Ordinance 66499 at issue herein, was attached to Relators’ Petition for

Writ of Prohibition (hereinafter “Petition”) as Exhibit 3.² Board Bill No. 253 was presented to the Board by Alderwoman Phyllis Young (hereinafter “Young”), who has engaged in a twenty (20) year campaign designed to force Henderson and her auto salvage business from its current location in the City.

Because the LCRA successfully blocked the admission of relevant and material evidence and testimony in this case, the circuit court was not able to consider evidence as to how Board Bill No. 253 came into existence. In this case

² According to the Clerk of the Board, Exhibit 3 contained a complete copy of the proceedings before the Board regarding Board Bill No. 253, now Ordinance 66499 with the exception of one roll call vote by the Board. See Respondent’s Answer to Relators’ Petition for Writ of Prohibition (hereinafter “Answer”), Exhibit B, 122:5-19 and Petition Exhibit 3, p. 10. However, as Respondent concedes the “complete copy” of the proceeding before the Board was actually missing a page from the Blighting Study and Plan, which missing page is attached to Respondent’s Answer as Exhibit A, pp. 7-8. See also Answer, ¶ 6 and LCRA’s Suggestions in Opposition to Relators’ Petition for Writ of Prohibition (hereinafter “LCRA’s Suggestions”), p. 2, fn. 1. Missing from the Blighting Study and Plan actually considered by the Board was the **finding of blight** contained in Section A, subpart 6 of the study. Apparently, the absence of this vital finding from the bill did not create any problems for the Board because the passage of Board Bill No. 253 was a foregone conclusion before it was considered by the Board.

the LCRA did not make an independent finding of blight in an area based upon the condition of the area and then seek out a redeveloper. Rather, in March 2004, Alderwoman Phyllis Young met with an unidentified developer to discuss a redevelopment project in the Broadway, 7th Street, Choteau, 6th Street and LaSalle area of the City. As a result of this meeting, Rodney Crim (hereinafter “Crim”) (Executive Director of the St. Louis Development Corporation and LCRA) instructed Dale Ruthsatz (hereinafter “Ruthsatz”) (Director, Commercial Development for the St. Louis Development Corporation and assistant secretary of the LCRA according to Respondent (See Answer, ¶ 17)) to identify the redevelopment areas that currently existed that would impact this redevelopment project. See Appendix (hereinafter “App.”) A40. As a further result of this meeting, Young asked her “NSO” to make Henderson’s “junkyard her project for the month,” whatever that meant. *Id.*³ Thereafter, on May 27, 2004, Young sent correspondence to Ruthsatz directing him to initiate a blighting and redevelopment plan, at that time to be titled “French Market Court Redevelopment,” which was to

³ Relators could not present this and other evidence at the condemnation hearing because the circuit court prohibited Relators from obtaining discovery before the hearing at the LCRA’s request and prohibited Relators from obtaining evidence for the hearing (also at the LCRA’s request) to ensure that evidence of fraud, collusion and bad faith could not be presented to establish the invalidity of Ordinance No. 66499.

include the use of eminent domain. App A41. Significantly, no request was ever made of the LCRA to determine whether the area at issue was blighted.

On September 5, 2004, Daniel Schmitt (hereinafter “Schmitt”) of Disper Schmitt directed correspondence to Ruthsatz expressing Schmitt Properties 2 “complete support for the creation of the Ice House District and the granting of Chapter 99 Redevelopment Rights, as proposed by Ice House District Redevelopment Company, LLC.” According to Schmitt, the approval of this redevelopment area would “significantly compliment” Schmitt Properties recent purchase and proposed redevelopment of property located at 1151 S. 7th Street just outside of the proposed redevelopment area.⁴ App. A42. Therefore, it appears that the redevelopment area was proposed not to remedy blight in the area but to enhance Disper, Schmitt and Dalton’s investments in property in the area. Shortly, thereafter in correspondence dated September 8, 2004, another principal in this redevelopment project directed Ruthsatz as to the boundaries to draw for the Ice House District to exclude property that was part of another developer’s land grab. See App. A43.

On September 21, 2004, before the Board declared the redevelopment area blighted, the LCRA designated Ice House District Redevelopment Company, LLC

⁴ According to a St. Louis Business Journal article from July 31, 2006, Schmitt, Dalton and Disper spent Eight Million Dollars to redevelop this building immediately outside the redevelopment area. App. A44.

(hereinafter “Ice House”) the Redeveloper for the area through Resolution No. 04-LCRA-7748. See Petition Exhibit 4, pp. 63-65. Ice House was created for the purpose of receiving these redevelopment rights from the LCRA. As Respondent concedes, the members of Ice House are Brio Group, LLC and French Market, LLC. The members of the Brio Group are Dalton (the partner at Lewis Rice, which firm represents the LCRA and Disper Schmitt), Disper and Schmitt of Disper Schmitt.⁵ French Market consists of Fred Barrera and Matthew Librach. Answer, ¶ 3. In light of Respondent’s admission and Dalton’s affidavit that he owns a 16 2/3% interest in Ice House through Brio Group (as well as the St. Louis Business Journal article), it is unclear how Respondent can claim that neither Dalton, nor Ice House, has a financial interest in the purchase of Relators’ property, since Ice House is a for profit entity and presumably engaged in the business of redeveloping the area to make a profit. Cf. Answer, ¶ 4 and LCRA’s Suggestions, Exhibit F, ¶¶ 3 & 11.

In sharp contrast to the process actually used by the LCRA to blight the area to take Relators’ property set forth above is Ruthsatz’ testimony at the condemnation hearing as to how the blighting and condemnation process is supposed to work. According to Ruthsatz, the LCRA was set up to designate areas

⁵ While Dalton claims to have no financial interest in Disper Schmitt projects, The St. Louis Business Journal article from July 31, 2006 appears to refute this claim. Cf. LCRA’s Suggestions, Exhibit F, ¶¶ 3 & 11.

of blight in the City and outline ways of curing that blight. After an area is declared blighted, the LCRA seeks developers by advertising and when a proper developer is found, it enters into an agreement with the developer. Answer, Exhibit B, 91:1-8 & 43:5-12. According to Ruthsatz, the development proposal from Ice House was not received prior to the passage of Board Bill No. 253, which passage gave the LCRA the opportunity to seek proposals from developers. *Id.* 89:23-90:11. As set forth above, Ice House was designated as the developer, based upon a plan to redevelop portions of the area two months before Board Bill No. 253 was approved by the Board. See Petition Exhibit 4, pp. 63-65.⁶

The LCRA file ultimately produced to Relators **after** the condemnation hearing pursuant to a Sunshine Law request contains no evidence that anyone other than Ice House submitted a plan for the redevelopment of the area, which is not surprising given that the area was specifically selected for redevelopment at Ice House's request as part of the fraudulent, collusive, bad faith scheme to blight the area to enable Ice House to take the property located therein.⁷ At the

⁶ The circuit court admitted LCRA documents into evidence in support of the condemnation petition that it prohibited Relators from obtaining prior to the condemnation hearing or even for the hearing itself as impermissible discovery, to which Relators objected without success. Answer, Exhibit B, 60:5-61:19.

⁷ It is unclear whether Relators were provided a complete copy of the LCRA's file pursuant to their Sunshine Law request. For example, Ruthsatz testified at the

condemnation hearing Ruthsatz confirmed that Ice House was the only developer to present a plan to the LCRA. Answer, Exhibit B, 89:23-90-3. At the time Board Bill No. 253 was introduced, Ice House had no real plan for the redevelopment of the purportedly blighted area. At the time Ordinance 66499 was approved by the Board, Ice House sought only to spot develop the area as evidenced by Resolution No. 04-LCRA-7748, which provided a plan for the development of the northern boundary and southwest corner of the redevelopment area, leaving the majority of the property located in the center of the “blighted” area with no plan for redevelopment.⁸

While LCRA Resolution No. 04-LCRA-7748 allowed for the redevelopment of the area in phases, Board Bill No. 253 did not. The Ordinance adopting the Blighting Study and Plan provided:

condemnation hearing that the LCRA obtained appraisals of Relators’ property, which formed the basis for its offer of purchase. He could not remember who completed the appraisals but testified that they were in the LCRA file. Answer, Exhibit B, 105:7-16. No appraisals were provided to Relators as part of their Sunshine Law request.

⁸ Resolution 04-LCRA-7748 represented that Ice House #6 would be substantially completed by Spring 2006 and that “Joseph Bar” (the Disper Schmitt property at issue) would be substantially completed by early Summer, 2005. Petition, Exhibit 4, pp. 63-64. It is now April 2007 and neither project is complete.

The implementation of this Plan shall take place in a single phase initiated within approximately one (1) year of approval of this plan by ordinance and completed within approximately two (2) years of approval of this Plan by ordinance. App. A30.

As set forth above, the redevelopment of this area is nowhere near completion in excess of two years after the passage of Board Bill No. 253, apparently because Ice House does not have the financial resources to redevelop the area and never had a feasible financial plan for such redevelopment.⁹

Resolution No. 04-LCRA-7748 estimated that it would take an investment of at least **One Hundred Million Dollars** to redevelop the entire area. Petition Exhibit 4, p. 64. The only evidence of Ice House's financial ability to secure this funding produced by the LCRA after the condemnation hearing is the Developer's Statement of Experience and Qualifications submitted to it on September 9, 2004. App. A45-A53. It shows that Ice House did not have a feasible financial plan for the redevelopment of the area at the time it was approved as the redeveloper. The

⁹ Relators were prevented from questioning Disper and Dalton about the July 31, 2006 St. Louis Business Journal article that stated that plans were coming together slowly for the project and that the group was considering bringing in additional partners to fund the project because the circuit court quashed the subpoenas served upon these witnesses. See App. A43.

plan shows that of the One Hundred Million Dollars needed to redevelop the area, the redeveloper had only One Hundred Thousand Dollars in equity, or 1% of the capital needed to redevelop the area. The financial plan called for Eighty Million Dollars in loans from unidentified sources. Nonetheless, as part of the fraudulent, collusive and bad faith passage of Ordinance 66499, the Board found that there was a “feasible financial plan for the development of the Area.” App. A13. The “feasible financial plan” contained in the Blighting Study and Plan itself was that “All costs associated with the development of the Area will be borne by the Redeveloper.” App. A31. Essentially, the Ice House plan was to obtain \$99,900,000 from other sources, which certainly explains why the project has been substantially delayed to date.

Despite these obvious problems with the Blighting Study and Plan, on November 19, 2004, the Board passed Board Bill. No. 253, now Ordinance No. 66499, even though the LCRA presented no evidence or finding of blight because pages had been omitted from the Blighting Study and Plan the Board considered. The Board’s complete copy of the proceedings before it contains no evidence supporting a finding of blight as defined by Missouri law, with the exception of a vague and conclusory reference to the area being in poor to fair condition. App. A27. When asked what evidence the LCRA presented to the Board of blight, Ruthsatz responded: “The Board of Aldermen evidence was a recommendation by the LCRA Board.” Answer, Exhibit B, 97:11-14. While Ruthsatz also testified that “typically” a representative of the LCRA is present when the Alderman

presents a blighting bill to the Board and provides him or her with materials needed, there is no evidence from the Board's file of its proceedings that any evidence was actually presented to the Board in this case. Answer, Exhibit B, 101:22-25 and Petition Exhibit 3, pp. 10-62. Ruthsatz also testified that he could not recall if he testified at the public hearing on Board Bill No. 253. Answer, Exhibit B, 8:13-22. Cf. LCRA's Suggestions, p. 15 and Answer, 11, ¶ 31. Regardless of what Ruthsatz may or may not have done at the public hearing or Board hearing, the Board file is completely lacking evidence of blight.

As set forth above, the Board also passed an ordinance requiring the entire redevelopment to take place in a single phase to be completed within two years of its passage, which clearly has not occurred in this case. No evidence was presented at the condemnation hearing that the Board or the Planning Commission of the City later approved the redevelopment of the area in phases as required by Ordinance No. 66499. Petition Exhibit 3, p. 54, § H.¹⁰

¹⁰ While Respondent complains that this issue was not raised before the circuit court, Relators could not raise this issue at the condemnation hearing because the trial court denied Relators' request for a continuance to conduct reasonable discovery before the hearing on the petition at the LCRA's request. As a result, many of the documents presented at the hearing were seen by Relators for the first time at the hearing. The circuit court's denial of reasonable discovery before the hearing on the condemnation petition was the subject of a separate writ of

While Resolution No. 04-LCRA-7748 adopted on September 21, 2004 stated that the redevelopment of “Joseph Bar” and the parking lot that would be developed from Relators property would be substantially completed by early Summer, 2005, this has not occurred. Petition Exhibit 4, p. 64. Instead, as set forth above, Disper Schmitt purchased the property next to Relators on or about October 28, 2004, and thereafter embarked upon an harassment campaign to force Henderson to sell her property to Disper Schmitt at well below market value, apparently because the redeveloper cannot afford to pay market value for the property. This campaign included multiple false complaints made by both Disper and Young to various code and law enforcement agencies that Henderson was

prohibition that was filed with the Court of Appeals before the hearing on the condemnation petition. The denial of this discovery was not raised in the petition filed with this Court because the condemnation hearing had already occurred. In their motions to dismiss, Relators raised the issue that the LCRA failed to comply with State law and the ordinance itself because the redevelopers had failed to comply with the schedule contained in the ordinance. See Petition Exhibit 6, pp. 73-74. Finally, and most importantly, a court’s lack of jurisdiction may be raised any time before or after trial because jurisdiction cannot be waived. If a court is without jurisdiction over a proceeding, its judgment is null and void. SD Invs., Inc. v. Michael-Paul, L.L.C., 157 S.W.3d 782, 785 (Mo. App. W.D. 2005).

selling stolen cars, illegally dumping oils, and illegally selling gas, among other false claims. Additionally Disper pressured City officials to help him to “get rid of Henderson.” Answer, Exhibit B, 115:17-122:4. When this harassment campaign failed to force Henderson to sell, Disper Schmitt resorted to the taking of Relators property by eminent domain in further collusion with the LCRA, whose lawyers represent both the governmental entity taking the property and the redeveloper who will benefit from this taking. To this end, on May 24, 2005, the LCRA passed Resolution No. 05-LCRA-7942E, authorizing it to take Relators property by eminent domain, even though the Resolution itself conceded that the source of funds for the acquisition of this property had not been decided upon at that time, further evidencing that there was no feasible financial plan for the redevelopment of the area. Petition Exhibit 5, pp. 66-68.

Over a year later, on August 11, 2006, the LCRA filed its Petition in Eminent Domain against Relators in the Circuit Court of the City of St. Louis at Cause No. 0622-CC05527. Petition Exhibit 1, pp. 1-7. Henderson was served with the petition on August 30, 2006. The Dennises, through John Dennis, were served a copy of the petition on August 21, 2006. Two months after the petition was filed, the condemnation hearing was held, despite Relators allegations of fraud, collusion and bad faith, and request for reasonable discovery to support these claims. It remains unclear as to why the LCRA was suddenly in such a rush to complete the condemnation of the property at issue, when almost two years had passed since the property was originally blighted and a year had passed since the

property was approved from condemnation without action, except that delaying the condemnation hearing would enable Relators to secure evidence of fraud, collusion, and bad faith.

As set forth above, the LCRA was and is represented in this condemnation action by Lewis Rice, whose partner, Dalton, has a financial interest in Ice House through the Brio Group. The fact that Lewis Rice does not represent the interests of the LCRA (and/or that the LCRA is not acting in the interest of the public) but the interests of Disper Schmitt is best evidenced by Lewis Rice's offer of settlement made on December 8, 2006 after the condemnation hearing. The LCRA's offer to purchase the Henderson property was made contingent upon Henderson dismissing her separate lawsuit against Disper Schmitt, establishing that the LCRA has been and is acting in the interest of a private developer throughout this case, not as a governmental body in the public's interest. See Petition Exhibit 2, p. 8.

On September 29, 2006, Relators filed timely motions to dismiss in response to the condemnation petition, challenging the circuit court's jurisdiction on a variety of grounds, including but not necessarily limited to the blighting ordinance being arbitrary, induced by fraud, collusion and/or bad faith and that the ordinance failed to comply with the requirements of § 99.430.1 R.S.Mo. On October 6, 2006, despite Relators request for a continuance to conduct reasonable discovery to prove fraud, collusion and bad faith in the enactment of Ordinance No. 66499, the Court specifically ordered that **no** discovery would be conducted

until after the condemnation hearing was **completed**, at the LCRA's request. Petition Exhibit 7, p. 145. Ultimately, Relators' motions to dismiss were denied by the circuit court without the court hearing any evidence in support of Relators' claims of fraud, collusion and bad faith and without explanation. Petition Exhibit 9, p. 147 and Answer, Exhibit B, 26:9-24. After the circuit court denied Relators' motions to dismiss, they immediately filed Answers to the Petition in Eminent Domain. Relators' Answers also alleged fraud, collusion and bad faith in the passage of Ordinance 66499 and claimed that the ordinance was arbitrary and in violation of Missouri law. Petition Exhibit 10, pp 148-177. For the reasons set forth below, Relators were prevented from presenting evidence in support of these claims.

Prior to the condemnation hearing, Relators subpoenaed the following individuals to appear as witnesses and/or produce documents at the condemnation hearing: the custodian of records for the LCRA, the custodian of records for the St. Louis Development Corporation, the custodian of records for the Board of Aldermen (who produced Exhibit 3 attached to Relators' Petition), Crim (Executive Director of the LCRA), Dalton, Young (the Alderwoman who introduced Board Bill No. 253), and Disper in support of their claims of fraud, collusion and bad faith and that Ordinance 66499 was arbitrary and enacted in violation of § 99.430.1 R.S.Mo. Additionally, Steve Sorocko (St. Louis police detective), Johnnie Bruce (St. Louis Division of Building and Inspection), Jonathan Kennedy (Missouri Department of Natural Resources), and Alverda

Oppermann (Pollution Control Supervisor for the Metropolitan Sewer District) were subpoenaed to show that Disper and Young continued to act collusively and in bad faith after the passage of Ordinance 66499 through their harassment campaign of false reports to force Henderson from her property.

Prior to the condemnation hearing, the LCRA filed its motion to quash the subpoenas issued to the LCRA's custodian of records, Crim and Dalton, which motion was granted on October 12, 2006. Petition Exhibit 8, p. 146. As a result, Relators were denied the opportunity to produce evidence in support of their claims and defenses. Disper failed to appear for the hearing despite being served a subpoena. Nonetheless, the trial court quashed the subpoena issued to him at the LCRA's request, preventing him and Dalton from testifying as to the financial plan for the redevelopment of the area, the plans for the development of the area, Disper's harassment campaign against Henderson, Dalton's financial interests in the redevelopment area, and Disper and Dalton's undue influence over the LCRA and Board in blighting the area and seeking to condemn the property. See Respondent's Answer, Exhibit B, 32:16-35:8 and 115:17-119:13. The circuit court also prohibited Relators from presenting any evidence regarding the harassment campaign that Henderson had suffered at the hands of Disper and Young, quashing the subpoenas issued to various law and code enforcement officials. Answer, Exhibit B, 119:15-122:4.

At the conclusion of the condemnation hearing, at which only the LCRA was permitted to present evidence, the circuit court entered its Order of

Condemnation. App. A1-A3.¹¹ The Order of Condemnation made no finding as to whether Ordinance No. 66499 was arbitrary, procured by fraud, collusion and/or bad faith or complied with the requirements of § 99.430 R.S.Mo. Relators then filed their Petition for Writ of Prohibition with the Missouri Court of Appeals on November 2, 2006, challenging the jurisdiction of the circuit court to enter the Order of Condemnation and its issuance of such order without giving Relators a meaningful opportunity to be heard for the reasons set forth herein. The petition was denied by the Court of Appeals in an Order dated January 3, 2007. Petition Exhibit 12, p. 181. Relators then filed their Petition for Writ of Prohibition with this Court, which granted a preliminary writ of prohibition in an Order dated February 27, 2007.

¹¹ On two occasions, the LCRA requested that the circuit court issue its Order of Condemnation before Relators presented any evidence or even cross-examined Ruthsatz. Answer, Exhibit B, 66:5-11 and 73:3-12.

POINTS RELIED ON

- I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE IT DID NOT HAVE JURISDICTION OVER THE PETITION IN EMINENT DOMAIN IN THAT ORDINANCE NO. 66499 WAS PROCURED BY FRAUD, COLLUSION AND BAD FAITH, AND THEREFORE, AN UNCONSTITUTIONAL TAKING FOR A PRIVATE PURPOSE.**

State ex rel. Atkinson v. Planned Industrial Expansion Authority of St.

Louis, 517 S.W.2d 36 (Mo. banc 1975)

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

Kansas City v. Hyde, 96 S.W. 201 (Mo. 1906)

State ex rel. Devanssay v. McGuire, 622 S.W.2d 323 (Mo. App. E.D.

1981)

- II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE IT DID NOT HAVE JURISDICTION OVER THE PETITION IN EMINENT DOMAIN BECAUSE ORDINANCE 66499 IS ARBITRARY IN THAT IT WAS UNSUPPORTED BY ANY EVIDENCE THAT THE REDEVELOPMENT AREA WAS BLIGHTED WITHIN THE MEANING OF MISSOURI LAW.**

Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284

(Mo. App. E.D. 1979)

State ex rel. Atkinson v. Planned Industrial Expansion Authority of St.

Louis, 517 S.W.2d 36 (Mo. banc 1975)

Centene Plaza Redevelopment Corp. v. Mint Properties, Inc. Case No.

ED89275 (April 24, 2007)

III. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE IT DID NOT HAVE JURISDICTION OVER THE PETITION IN EMINENT DOMAIN BECAUSE THE LCRA FAILED TO COMPLY WITH THE LEGAL CONDITIONS PRECEDENT TO PURSUING A CONDEMNATION ACTION SET FORTH IN SECTIONS 99.450.2 AND 99.430.1(4) & (7) R.S.MO. BY FAILING TO INCLUDE A SUFFICIENTLY COMPLETE LAND USE PLAN, A STATEMENT OF THE PROPOSED METHOD AND ESTIMATED COST OF THE ACQUISITION AND PREPARATION OF THE REDEVELOPMENT AREA, A STATEMENT OF THE PROPOSED METHOD OF FINANCING THE PROJECT, AS WELL AS FAILING TO COMPLY WITH THE SCHEDULES SET FORTH IN THE ORDINANCE AND FAILING TO DETERMINE THAT THE REDEVELOPER WAS LEGALLY AND FINANCIALLY CAPABLE

OF REDEVELOPING THE AREA.

State ex rel. Devanssay v. McGuire, 622 S.W.2d 323 (Mo. App. E.D. 1981)

Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284

(Mo. App. E.D. 1979)

Section 99.430.1 R.S.Mo.

Section 99.450 R.S.Mo.

IV. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE THE CIRCUIT COURT ERRED AND EXCEEDED ITS JURISDICTION IN ENTERING ITS ORDER OF CONDEMNATION WITHOUT PROVIDING RELATORS THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR CLAIMS/DEFENSES THAT ORDINANCE NO. 66499 WAS ARBITRARY, UNCONSTITUTIONAL, IN VIOLATION OF CHAPTER 99 R.S.MO., AND PROCURED BY FRAUD, COLLUSION AND BAD FAITH TO ENABLE THE TAKING OF PRIVATE PROPERTY FOR A PRIVATE PURPOSE.

Kansas City v. Hyde, 96 S.W. 201 (Mo. 1906)

State ex rel. Rantz v. Sweeney, 901 S.W.2d 289 (Mo. App. S.D. 1995)

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

City Center Redevelopment Corp. v. Foxland, Inc., 180 S.W.3d 13

(Mo. App. E.D. 2005)

ARGUMENT

STANDARD OF REVIEW

Prohibition is an original proceeding brought to confine a lower court to the proper exercise of its jurisdiction. It is a discretionary writ that only issues "to prevent an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extra-jurisdictional power." State ex rel. Lebanon Sch. Dist. R-III v. Winfrey, 183 S.W.3d 232, 234 (Mo. banc 2006) (citations omitted). The writ is available "to afford relief at the earliest possible moment in the litigation or where to do otherwise would deprive a party of an absolute defense." *Id.* (citations omitted). In the context of a condemnation proceeding, a writ of prohibition is proper because a court lacks jurisdiction to order condemnation on the petition when the condemnor (here the LCRA) fails to comply with the conditions precedent to the exercise of condemnation by failing to comply with the statutory requirements contained in Chapter 99 R.S.Mo., with the enabling ordinance, and/or when the taking is for a private use. State ex rel. Terrell v. Nicholls, 719 S.W.2d 862, 863 (Mo. App. E.D. 1986); State ex rel. Weatherby Advertising Co. v. Conley, 527 S.W.2d 334, 341-42 (Mo. banc 1975); and State ex rel. Broadway-Washington Assoc, LTD v. Manners, 186 S.W.3d 272, 274 (Mo. banc 2006).

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE IT DID NOT HAVE JURISDICTION OVER THE PETITION IN EMINENT DOMAIN IN THAT ORDINANCE NO. 66499 WAS PROCURED BY FRAUD, COLLUSION AND BAD FAITH, AND THEREFORE, AN UNCONSTITUTIONAL TAKING FOR A PRIVATE PURPOSE.

“The dint of eminent domain is mighty. It is in derogation of the common law and traditionally reserved to the sovereign. The exercise of its power must be in strict compliance with the strictures under which it is granted.” Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284, 292 (Mo. App. E.D. 1979). In the present case, the LCRA abdicated its responsibility to act as a governmental body in the interest of the public and instead was co-opted by private developers, declaring an area blighted based upon the request of developers to divide up the area near the new Busch Stadium, rather than evidence of blight. Thereafter, the Board declared the area blighted through fraud, collusion, and bad faith, even though there was no evidence on the record of blight (even the Blighting Study and Plan attached to Board Bill No. 253 contained only a vague and conclusory finding that the property was in poor to fair condition and a self-serving finding of blight, which itself was missing from the ordinance considered by the Board). Answer, Exhibit B, subparts A(2) and A(6).

While the LCRA and Board abdicated their responsibility to act in the

public interest in this case through fraud, collusion and bad faith, this Court should not. Article I, § 28 of the Missouri Constitution is clear:

private property shall not be taken for private use with or without compensation, unless by consent of the owner, ... 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.

This Court has interpreted Article I, § 28 in conjunction with Article VI, § 21 of the Missouri Constitution to mean that the final determination of the question of whether a contemplated use for which property is sought to be taken by eminent domain is public rests upon the courts. A legislative finding of blight will generally be accepted by the courts as conclusive evidence that the contemplated use is public, unless there is an allegation and evidence that the legislative finding was arbitrary (discussed in Section II below) or was induced by fraud, collusion or bad faith. State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36, 45 (Mo. banc 1975). Even the LCRA concedes that the Board's finding of blight is not binding upon the reviewing court when it is arbitrary or induced by fraud, collusion or bad faith. See LCRA's Suggestions, p. 8, citing State ex rel. U.S. Steel v. Koehr, 811 S.W.2d 385, 389 (Mo. banc 1991).

In a condemnation action, the court must initially determine whether the

condemnation is authorized by law, specifically whether there is: constitutional, statutory or ordinance authority for the exercise of eminent domain; the taking is for a public use; and the condemning authority has complied with the conditions precedent to bringing the action. City Center Redevelopment Corp. v. Foxland, Inc., 180 S.W.3d 13, 15 (Mo. App. E.D. 2005). If the condemnation is not authorized by law for any of the reasons set forth above, a court does not have jurisdiction to order condemnation on the petition and a writ of prohibition is the appropriate relief. State ex rel. Terrell, 719 S.W.2d at 866.

This Court has long held that a reviewing court in a condemnation proceeding is not required to be a mere tool of the legislature to carry out an ordinance, but may inquire into the truth of the matter and the validity of the ordinance. Kansas City v. Hyde, 96 S.W. 201, 205 (Mo. 1906). Specifically, this Court stated in Hyde:

What protection has a citizen for his constitutional rights if the courts cannot look through a sham and see the truth, and how can the courts learn the truth if they must take the recitals in the ordinance as conclusive and reject all evidence to show the untruth? What reproach it would be to our system of jurisprudence and how humiliating it would be to the attitude of our courts if they were so powerless. But our law is not so lame and our courts not so impotent. The courts in such a case will hear the evidence and find the facts. *Id.*

At the hearing held on October 13, 2006, the court should have heard evidence and inquired into Relators' claims that Ordinance 66499 was induced by fraud, collusion, bad faith and/or that its passage constituted an unwarranted and arbitrary abuse of discretion due to the allegations made by Relators in both their motions to dismiss and answers. State ex rel. Rantz v. Sweeney, 901 S.W.2d 289, 293 (Mo. App. S.D. 1995). This is the very purpose of the first phase of a condemnation hearing. *Id.* at 291.

Additionally, as discussed in more detail in Section IV below, Relators were entitled to have access to relevant information **prior** to the condemnation hearing on the claims/defenses raised in their motions to dismiss and answers. *Id.* at 293. To deny discovery and the opportunity to present evidence was an abuse of discretion by the circuit court, which should not be repeated should this Court remand this case for further proceedings instead of ordering the dismissal of the action outright for the reasons set forth in Sections I through III herein.

It is now clear why the LCRA opposed reasonable discovery in this case before the hearing on the condemnation petition and prevented Relators from obtaining relevant and material evidence for purposes of the condemnation hearing. The LCRA's file shows that the redevelopment area was not selected for redevelopment because the LCRA independently found the area blighted and in need of redevelopment but because private developers contacted the LCRA and wanted the property, which would likely require the use of eminent domain because certain properties in the area "could be acquisition nightmares!" App.

A40. After being approached by these private developers, the LCRA did not make any effort to determine whether the area was blighted within the meaning of Missouri law but instead determined which other developers were working in the area, apparently so that developers were not making “grabs” for the same property. What actually happened leading to the passage of Board Bill No. 253 stands in sharp contrast to Ruthsatz’ testimony on behalf of the LCRA as to how the process is supposed to work. He testified that the LCRA makes a finding of blight **before** it makes an effort to locate a developer willing to redevelop the area. In fact, he testified that this was the process used in this case, despite LCRA records that refute this claim. Answer, Exhibit B, 90:23-91:8, 43:5-12, & 89:23-90:11.

After the redevelopers requested this property from the City, the LCRA prepared its Blighting Study and Plan for the redevelopment area at the direction of Young, who in correspondence dated May 27, 2004 directed the LCRA not to study the area to determine if it was blighted but to blight it and prepare a redevelopment plan to include the use of eminent domain. App. A41. While discovery was denied in this case, it appears that the plan was modified some time after August 24, 2004 (when it was purportedly completed) at the redeveloper’s request so that the former Hardees site could be removed from the proposed redevelopment area. This request was made on September 8, 2004 after the LCRA’s preparation of the Redevelopment Plan, based upon conversations with another redeveloper in the area. App. A43. The redevelopment area ultimately excluded the closed Hardees site. Cf. LCRA’s Suggestions, Exhibit A (Exhibits B

through D attached to it, which defined the project area plan) and App. A34-A36 and App. A53, which defined the original boundary for the redevelopment area. It is unclear when and how the boundary for the redevelopment area changed after the passage of Ordinance 66499, although there can be no dispute that the area did change. Ordinance 66499 prohibits the modification of the boundaries of the area without Board approval in the same manner as passage of the original Plan. App. A33. The complete record of Board Bill No. 253, now Ordinance 66499 contains no evidence that the Board voted to modify the boundary area included in what the LCRA represents is Ordinance 66499.

Further evidence of fraud, collusion and bad faith in the blighting of the area and the granting of redevelopment rights to Ice House is found in Schmitt's correspondence to Ruthsatz dated September 5, 2004. App. A42. In this correspondence Ruthsatz is assured of complete support for the granting of Chapter 99 Redevelopment Rights as proposed by Ice House. Therefore, the LCRA's purported advertising for proposals for the redevelopment of the area placed in the St. Louis Post Dispatch on August 31 and September 7, 2004 was nothing but a sham because Ice House and the LCRA had already agreed that Ice House would redevelop the area it had requested the City to blight. Cf. Petition, Exhibit 4, p. 63. No other developer submitted a proposal on this project. Answer, Exhibit B, 89:23-90:3.

Just as the selection of Ice House to redevelop the area was a foregone conclusion prior to the LCRA's adoption of Resolution 04-LCRA-7748 on

September 21, 2004, so was the Board's approval of Board Bill No. 253. Clearly, Disper Schmitt would not have purchased the 1200 South Seventh Street property in October 2004 (before the passage of Board Bill No. 253) to build a high end "martini bar" next to a junkyard unless it had been assured that Board Bill No. 253 would pass. Direct evidence of fraud and collusion are rare, and therefore, it has long been held that fraud and collusion may be proven by circumstantial evidence. Herrold v. Hart, 290 S.W.2d 49, 55 (Mo. 1956) and State ex rel. Prudential Insur. Co. of America v. Bland, 190 S.W.2d 234, 236 (Mo. 1945). Relators were prevented from presenting even circumstantial evidence of this fraud and collusion through the actions of the circuit court at the LCRA's request.

Additionally, as set forth above, Petition Exhibit 3, is a "true, correct and complete copy of the proceedings of the Board regarding Board Bill No. 253 Committee Substitute, now known as Ordinance Number 66499." Exhibit 3, p. 10. The complete record of the proceedings includes no record of any evidence presented to the Board in support of its finding of blight other than a vague claim that the area was in fair to poor condition. The "notice" provided to property owners, like Henderson, advised them that a Redevelopment Plan would be presented to the Board so that a real estate tax abatement could be provided after the redevelopment was complete. It did not notify property owners within the area that the City was attempting to blight their property so that it could ultimately be taken by eminent domain. Petition Exhibit 3, p. 28. There is no evidence that the Board's Housing Urban Development and Zoning Committee considered evidence

of blight in the area at the public hearing held on November 10, 2004. While Ruthsatz testified that the LCRA provided photographs to the committee at the public hearing, he could not even recall if he personally testified at this hearing, and therefore, could not know what occurred at this specific public hearing.

Answer, Exhibit B, 98:1-22. Regardless, what may or may not have been presented to a committee of the Board on November 10, 2004, it could not substitute for the evidence of blight that the full Board was required to consider when it met to pass Board Bill No. 253 on November 17, 2004. As to the Board's consideration of Board Bill No. 253, at best Ruthsatz testified to what an LCRA "typically" does before the Board. No testimony was presented as to the evidence the LCRA presented in support of blight to the Board in this case. Answer, Exhibit B, 101:19-25. Cf. Answer, p. 2.

Additionally, when presented to the Board, Board Bill No. 253 was missing a portion of the Blighting Study and Plan, which the Board never noticed because its passage was a foregone conclusion. Missing from the Plan was the conclusory finding of blight made by the LCRA, as well as the development objectives, proposed land use of the area, the proposed zoning for the area, and a portion of the statement of the relationship of the Plan to other local objectives. Despite these missing elements of the Blighting Study and Plan, the Board unanimously passed Board Bill No. 253, apparently without comment or even noticing that these essential components were missing from the Plan because fraud, collusion and bad faith guaranteed its passage. Petition Exhibit 3, p. 62.

Missouri courts recognize that fraud can be somewhat ambiguous in meaning because it has been defined differently for different circumstances. State v. Becker, 938 S.W.2d 267, 269 (Mo. banc 1997). “In its broadest sense, fraud is ‘[a] generic term, embracing all multifarious means by which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.’ *Black's Law Dictionary* 660 (6th ed. 1990).” *Id.*

Collusion is defined as:

cooperation for a deceitful or fraudulent purpose, a secret understanding whereby one party plays into another's hand for fraudulent purposes, an agreement between two or more persons to obtain an object forbidden by law ... an agreement between two or more persons to defraud another under the forms of law, or to accomplish an illegal purpose. Weaver v. Schaaf, 520 S.W.2d 58, 66 (Mo. banc 1975).

Bad faith requires a showing of dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. Blue v. Harrah's North Kansas City, LLC, 170 S.W.3d 466, 479 (Mo. App. W.D. 2005). For the reasons discussed above, Relators have presented sufficient direct and circumstantial evidence of fraud, collusion and bad faith to invalidate Ordinance 66499. At a minimum, if the

process actually used to pass Board Bill No. 253 were legitimate, Ruthsatz would not have testified to a very different route of passage during the condemnation hearing.

In seeking to uphold the actions of the circuit court, which prevented Relators from obtaining and presenting evidence of fraud, collusion and bad faith, the LCRA argues that there is a difference between the purpose and motive of a condemnation action. LCRA's Suggestions, p. 11. However, evidence of fraud, collusion and bad faith negates the conclusive effect a legislative finding of blight will have upon the courts in finding that the use is public. State ex rel. Atkinson, 517 S.W.2d at 45 (Mo. banc 1975). When evidence of fraud, collusion and bad faith is coupled with the legislative finding of blight being arbitrary (because unsupported by evidence of blight) and numerous violations of the statutory conditions precedent to a taking, a court clearly lacks jurisdiction to order condemnation on a petition for eminent domain. Additionally, partial or incomplete redevelopment of an area (particularly due to the lack of a plan and/or the financing needed to complete a development as discussed below) may exacerbate blight. The taking of property under an abandoned redevelopment plan does not advance a public purpose. State ex rel. Devanssay v. McGuire, 622 S.W.2d 323, 326 (Mo. App. E.D. 1981). Here Relators evidence of fraud, collusion, and bad faith prevents a finding that the taking at issue herein truly serves a public purpose, and therefore, the Order of Condemnation violated Article I, § 28 of the Missouri Constitution, and the Court was without jurisdiction

to order condemnation on the petition.

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE IT DID NOT HAVE JURISDICTION OVER THE PETITION IN EMINENT DOMAIN BECAUSE ORDINANCE 66499 IS ARBITRARY IN THAT IT WAS UNSUPPORTED BY ANY EVIDENCE ON THE BOARD'S RECORD THAT THE REDEVELOPMENT AREA WAS BLIGHTED WITHIN THE MEANING OF MISSOURI LAW.

Section 99.430.2 R.S.Mo. provides that an authority may simultaneously recommend its finding to blight an area and a redevelopment plan.¹² App. A8-A9. However, the governing body (the Board) must still find the area blighted based upon some evidence. As set forth above, according to the Board's official record, **no evidence** of "blight" as defined in §99.320(3) was presented to the Board to support its finding of blight, with the possible exception of a conclusory finding that the area was in poor to fair condition without evidence to support this finding. See Petition Exhibit 3, pp. 10-62 and App. A26. A finding by the Board without a factual foundation is arbitrary. Maryland Plaza, 594 S.W.2d at 290-291. Relators

¹² While Relators refer to a "redevelopment plan" attached to Ordinance 66499, the plan was not much of a plan, lacking the essential detail required by Missouri law for the reasons set forth in Section III below.

do not challenge the sufficiency of the evidence as to the finding of blight as the LCRA claims, they challenge the lack of evidence to support this finding as established by the Board's own record of the proceeding.

The LCRA claims that it presented photos of the area to the Board and the Board heard information regarding the property contained in the redevelopment area in support of its finding of blight. Answer, p. 2. However, this is not what Ruthsatz testified to doing at the condemnation hearing. He testified that typically an LCRA representative is present during an Alderman's presentation and provides him/her with materials, including photographs of the area. Answer, Exhibit B, 101:16-25. He did not testify that this occurred during the passage of Board Bill No. 253. Ruthsatz also testified that the evidence of blight presented to the Board was the LCRA's recommendation to it. *Id.* 97:11-18. The best evidence of the evidence presented to the Board prior to the passage of Ordinance 66499 is Petition Exhibit 3, the complete copy of the proceedings before the Board regarding Board Bill No. 253. It contains no evidence to support the Board's finding of blight, not even the LCRA's conclusory finding of blight, which was missing from the copy of the Blighting Study and Plan submitted to the Board. The Board's passage of Ordinance 66499 without evidence that the area was blighted is itself evidence of fraud, collusion and bad faith.

The Missouri Court of Appeals for the Eastern District has recently ruled on the sufficiency of the evidence supporting a Board/Council's finding of blight in Centene Plaza Redevelopment Corp. v. Mint Properties, Inc. Case No.

ED89275 (April 24, 2007), transferred to this Court. App. A55-A60.¹³ In Centene Plaza Redevelopment Corp. the City of Clayton was provided with substantially more evidence of blight within the meaning of § 353.020(2) (applicable to redevelopment corporations) than the case before this Court, and the Court of Appeals concluded the evidence was insufficient to support a finding of blight under even the more stringent common law standard of review. Here the same conclusion must be reached because no evidence of blight was presented to the Board.

A legislative finding of blight will be accepted by the court absent proof that the legislative finding was arbitrary. State ex rel. Atkinson, 517 S.W.2d at 45.

¹³ The same issue raised but left unanswered in Centene Plaza Redevelopment Corp. is present here: is the standard of review of the legislative finding of blight governed by §523.261 R.S.Mo. as a procedural statute that may be applied retroactively or by the common law standard discussed in detail herein. App. A11. Relators have applied the more stringent common law standard on the basis that the Board's actions in this case are not even "fairly debatable" because no evidence of blight was presented in this case. There can be little doubt that the Board's finding of blight is not supported by "substantial evidence" as required by § 523.261 R.S.Mo. should this Court determine that the statute applies retroactively.

Here the legislative finding was arbitrary because unsupported by any evidence/factual foundation. Maryland Plaza, 594 S.W.2d at 290-291. Therefore, Ordinance 66499 is void, and the circuit court was without jurisdiction over the condemnation hearing.

III. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE IT DID NOT HAVE JURISDICTION OVER THE PETITION IN EMINENT DOMAIN BECAUSE THE LCRA FAILED TO COMPLY WITH THE LEGAL CONDITIONS PRECEDENT TO PURSUING A CONDEMNATION ACTION SET FORTH IN SECTIONS 99.450.2 AND 99.430.1(4) & (7) R.S.MO. BY FAILING TO INCLUDE A SUFFICIENTLY COMPLETE LAND USE PLAN, A STATEMENT OF THE PROPOSED METHOD AND ESTIMATED COST OF THE ACQUISITION AND PREPARATION OF THE REDEVELOPMENT AREA, A STATEMENT OF THE PROPOSED METHOD OF FINANCING THE PROJECT, AS WELL AS FAILING TO COMPLY WITH THE SCHEDULES SET FORTH IN THE ORDINANCE AND FAILING TO DETERMINE THAT THE REDEVELOPER WAS LEGALLY AND FINANCIALLY CAPABLE OF REDEVELOPING THE AREA.

Missouri courts have recognized a difference between a taking by a

governmental entity and by a private developer. This is because when a governmental entity or utility seeks condemnation, it possesses assets independent of the project for its completion. However, when a private developer seeks to condemn property, it generally has few or no assets itself. State ex rel. Devanssay, 622 S.W.2d at 326. Therefore, one important question this Court should resolve is the detail required of a plan when the LCRA allows a private developer to usurp its power and procedures to take property when the private developer has no real assets itself. This question becomes particularly important when there is no meaningful oversight or involvement by the LCRA and no commitment of government assets to ensure completion of a project when property is to be taken by eminent domain, despite Respondent's representations that the LCRA is not a private developer but a governmental entity. See Answer, ¶¶ 38-40 and 46.

Here the LCRA has no financial interest in or commitment to the redevelopment of the purportedly blighted area. Rather it is using its mighty power at the behest of a private developer, who at the end of the day may or may not have the financial and legal ability to redevelop the area. The Board, at the LCRA's request, has allowed the project to advance with no real plan for development and no real evidence that Ice House has the financial means to redevelop the entire blighted area to ensure the taking at issue is for a public purpose, recognizing that partial or incomplete development may actually exacerbate blight and does not serve a public purpose. *Id.* The LCRA essentially argues that the statutory mandates applicable to it should be rendered completely

meaningless by this Court so that the instant project may go forward.

However, the LCRA has failed to comply with the requirements of Chapter 99. Section 99.450.2 R.S.Mo. requires an authority to consider the financial and legal ability of a prospective redeveloper to carry out the proposal before entering into redevelopment contract proposals with the redeveloper. App. A10. There is no evidence that the LCRA performed this statutory duty before entering into the Redevelopment Agreement with Ice House on June 1, 2005. See LCRA's Suggestions, Exhibit B. The same is true with respect to the LCRA's decision to designate Ice House as the redeveloper. At the time Ice House was selected by the LCRA as the redeveloper for this project on September 21, 2004, it had presented no evidence that it had the financial ability to carry out the proposal. At best, it had presented a vague plan that the redevelopment of the area would cost One Hundred Million Dollars, 80% of which would come from loans from unidentified sources. Owner equity in the project was valued at One Hundred Thousand Dollars. No explanation was given as to how Ice House intended to obtain the additional Nineteen Million Nine Hundred Thousand Dollars needed to complete this project or how it would obtain the Eighty Million Dollars in loans contemplated to fund the project. App. A45-A53. Clearly, because of fraud and collusion, the LCRA completely abdicated its duty under § 99.450.2.

Additionally, § 99.430.1(4) R.S.Mo. provides that a redevelopment plan "shall be sufficiently complete to indicate its relationship to definite local objectives as to the appropriate land uses, ... and the proposed land uses and

building requirements in the land clearance or urban renewal project area, and shall include without being limited to”:

- a. A land use plan showing proposed uses of the area; and
- b. A schedule indicating the estimated length of time needed for completion of each phase of the project. App. A7-A8.

Section 99.430.1(7) requires that any recommendation of a redevelopment plan by an authority to the governing board must be accompanied by:

- a. A statement of the proposed method and estimated cost of the acquisition and preparation for redevelopment or urban renewal ... and the estimated proceeds or revenues from its disposal to redevelopers;
- b. A statement of the proposed method of financing the project; and
- c. A schedule indicating the estimated length of time needed for completion of each phase of the project. App. A8.

The redevelopment plan at issue herein failed to provide these necessary elements to enable the Board to determine whether the plan was financially feasible and for the purpose of improving the community, rather than to allow private developers to spot take property for a private purpose, apparently to increase the value of their investment in other property in the area. At best the redevelopment plan provides generally for the redevelopment of the area for commercial, residential and office uses. App. A36. No real plan exists for the redevelopment of the area, which is certainly not “sufficiently complete” as to

proposed land uses and building requirements as required by § 99.430.1(4) to comply with the statute. Rather, to this day, the plan to redevelop the entire area is a mystery, and therefore, it was and is impossible for the Board to determine how the plan related to definite local objectives. See e.g. Maryland Plaza, 594 S.W.2d at 284 regarding impermissibly vague plans. Similarly, it was impossible for the LCRA and Board to determine whether the redeveloper had the financial ability to complete the project when it did not even know what the completed project would look like. The Board certainly could not determine what the proposed land use plan was because this section of the Blighting Study and Plan was missing from the ordinance it considered.

With respect to the statement of the proposed method of financing the project, the plan stated: “All costs of the development of the Area will be borne by the Redeveloper.” App. A31. Apparently, now the actual plan is that subdevelopers like Disper Schmitt will pay for the project. The Board found this to be a “feasible financial plan for the development of the Area” without any evidence that the redeveloper or subdevelopers were/are financially capable of bearing the costs of development.¹⁴ App. A13. The LCRA claims that this Court

¹⁴ Ruthsatz testified that the feasible financial plan could not be more specific because no redeveloper had been designated. Answer, Exhibit B, 93:20-94:6. However, by the time the plan was submitted to the Board, the LCRA had designated Ice House the redeveloper for the area. Petition Exhibit 4, pp. 63-65.

should also consider Resolution 04-LCRA-7748 in which the redeveloper listed redeveloper equity, bank financing and historic tax credits as the method of financing this One Hundred Million Dollar Project. See LCRA's Suggestions, p. 20. However, this method of financing the project remained impermissibly vague and contradicts Ruthsatz' testimony that the method of financing could not be more specific because no developer had been selected for the project. As set forth above, the only evidence of redeveloper equity committee to the project is the One Hundred Thousand Dollars listed by French Market in the Developer's Statement of Experience and Qualifications. No method of financing the additional Nineteen Million Nine Hundred Thousand Dollars that was not coming from loans was provided, and no proposed method for obtaining Eighty Million Dollars in bank financing was provided. See App. A46. This shows that the proposed method of financing the project was nothing more than a "wish list" when Ordinance 66499 was collusively approved by the LCRA and Board. The legislative body must have before it information to determine the availability of adequate methods of financing to complete the project. "To approve a redevelopment plan without such information would be arbitrary." State ex rel. Devanssay, 622 S.W.2d at 326.

Additionally, the plan contains no statement of the estimated cost of the acquisition and preparation for redevelopment or urban renewal ... and the estimated proceeds or revenues from its disposal to redevelopers. Apparently this is because the LCRA allows private developers to usurp its governmental powers and simply blight and take property the developers want under the LCRA's name.

This was not the legislature's intent in establishing different processes for private developers and authorities to take property by eminent domain in Chapter 99 and Chapter 353. The City of St. Louis also imposes more stringent standards when a private developer seeks to redevelop an area through St. Louis Revised Code Chapter 11.06. The plan contains no estimate of the cost of acquiring the property in the area. It is impossible to determine whether the redevelopers had the legal and financial ability to carry out their vague and ambiguous project when they did not even know how much it would cost to acquire the property within the redevelopment area.

Wielding the mighty power of eminent domain without any real financial plan to bring a project to completion, and as a result exacerbating blight, is why state law requires the redevelopment plan to include a statement of the proposed method and estimated cost of the acquisition and preparation for redevelopment and a statement of the proposed method of financing a project. § 99.401.1(7) R.S.Mo. Here there is no government entity financially backing this redevelopment. At best, Ice House has shown that it submitted a "wish list" to the LCRA to finance this project of the kind rejected by Maryland Plaza, 594 S.W.2d at 284. As this Court has previously recognized, a viable redevelopment plan must have an adequate financial base to ensure that the taking of private property achieves a public purpose, particularly, when the redevelopment project is funded by private developers, as is the case here. State ex rel. Devanssay, 622 S.W.2d at 326. To approve a redevelopment plan without sufficient information to establish

that it can be brought to successful completion is arbitrary and a taking of private property under an abandoned redevelopment plan does not advance a public purpose. *Id.* Property owners, like Relators, who will be deprived of their property, have a legitimate right to know that the redeveloper is financially responsible and can finance the plan to successful completion, which has not occurred in this case. Maryland Plaza, 594 S.W.2d at 291.¹⁵

Both subpart 4 and 7 of § 99.430.1 require the plan to contain a schedule indicating the estimated length of time needed for completion of each phase of the project. The plan adopted by Ordinance 66499 required the project to be completed in a single phase initiated within one (1) year of passage of the ordinance and completed within approximately two (2) years of approval of the plan by ordinance. App. A30. However, because the LCRA and Ice House continue to act fraudulently and collusively, they consider it of no importance that the redevelopers have failed to comply with the schedule contained in Ordinance 66499, apparently because they did not and do not have the financial resources necessary to complete the project according to schedule. Sadly, the LCRA has disregarded its statutory responsibility to the citizens of the City of St. Louis as a

¹⁵ While Maryland Plaza related to a taking by a private developer under Chapter 353 R.S.Mo., the same rationale is applicable in this case because a private developer is using the LCRA to take property with the private developer totally funding the redevelopment project.

public governmental body by colluding with private developers to take other people's property, regardless of whether these developers have the ability to complete the projects they start. The LCRA has evidenced its willingness to abandon the redevelopment of the area according to the requirements of the enabling ordinance by turning a blind eye to Ice House's failure to comply with the single phase development of this area within two years of the passage of Ordinance 66499, further evidence of the fraud, collusion and bad faith in this case. Because the LCRA failed to strictly comply with its own enabling ordinance, the circuit court lacked jurisdiction over this condemnation action. While the LCRA also claims that the schedule/plan can be modified, as set forth below, no evidence was presented that the schedule/plan was modified consistent with the ordinance.

In a condemnation action, the court must initially determine whether the condemnation is authorized by law, specifically whether there is constitutional, statutory or ordinance authority for the exercise of eminent domain; the taking is for a public use; and the condemning authority has complied with the conditions precedent to bringing the action. City Center Redevelopment Corp., 180 S.W.3d at 15. If the condemnation is not authorized by law for any of the reasons set forth above, a court does not have jurisdiction to order condemnation on the petition and a writ of prohibition is the appropriate relief. State ex rel. Terrell, 719 S.W.2d at 866. Because property owners in a purportedly blighted area have a right to ensure that there is a responsible plan for redevelopment and that the developers

have the capability of financing the plan to completion to ensure the removal of the purported blight, **strict** compliance with all conditions precedent is necessary before giving private developers the awesome and extraordinary power of eminent domain. Maryland Plaza, 594 S.W.2d at 291-292.

Because the LCRA failed to comply (strictly or otherwise) with the conditions precedent to a taking set forth in §§ 99.450.2 and 99.430.1(4) & (7) R.S.Mo. set forth above, the circuit court did not have jurisdiction to order condemnation on the petition. State ex rel. Terrell, 719 S.W.2d at 866¹⁶. The LCRA's failure to comply with statutory procedural requirements when approving a redevelopment plan is a basis for finding that the Board acted arbitrarily and beyond its power. Maryland Plaza, 594 S.W.2d at 290. Approval of a defective plan by the Board is arbitrary, and therefore, void. *Id.* at 291. The Court does not have jurisdiction to order condemnation on a void ordinance because the condemnation is not authorized by law, and therefore, a writ of prohibition is the appropriate relief. State ex rel. Terrell, 719 S.W.2d at 866.

In addition to Ordinance 66499 failing to comply with the statutory prerequisites of §§ 99.430.1 and 99.450.2, the LCRA admits that it failed/refused to comply with Ordinance 66499 before bringing this condemnation action.

¹⁶ The Board's passage of Ordinance 66499, despite the LCRA and Ice House's failure and refusal to comply with § 99.430.1(4) and (7) R.S.Mo. is itself some evidence of fraud, collusion and bad faith in enacting the ordinance.

Specifically, Ordinance 66499 required the redevelopment to occur in a single phase and be completed by December 2006. App. A30. The Ordinance imposed this requirement even though the LCRA and Ice House apparently discussed and planned a multi-phase development of the area before the passage of the Ordinance. See Petition Exhibit 4, pp. 63-64. Substantial modifications of the plan required the approval of the Board. Other modifications to the plan required the approval of the LCRA with the consent of the Planning Commission of the City. App. A33. It is unclear from the Ordinance and redevelopment plan whether the development of the project in multiple phases (as opposed to the single phase approved by the Board) constitutes a substantial modification to the plan. Regardless, there is no evidence that the LCRA or Ice House followed the procedures required to modify the plan by obtaining the approval of the Board or City Planning Commission. Compliance with the ordinance, like the statute, is a prerequisite to the exercise of the power of eminent domain. Therefore, the circuit court was without jurisdiction to condemn Relators' property. City Center Redevelopment Corp., 180 S.W.3d at 15.

IV. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM PROCEEDING ON THE LCRA'S CONDEMNATION PETITION BECAUSE THE CIRCUIT COURT ERRED AND EXCEEDED ITS JURISDICTION IN ENTERING ITS ORDER OF CONDEMNATION WITHOUT PROVIDING RELATORS THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR CLAIMS/DEFENSES THAT ORDINANCE NO. 66499 WAS ARBITRARY, UNCONSTITUTIONAL, IN VIOLATION OF CHAPTER 99 R.S.MO., AND PROCURED BY FRAUD, COLLUSION AND BAD FAITH TO ENABLE THE TAKING OF PRIVATE PROPERTY FOR A PRIVATE PURPOSE.

In addition to depriving Relators of the right to reasonable discovery to prove their claims and defenses set forth in Sections I through III above, the circuit court prevented Relators from presenting evidence to support these claims/defenses at the trial of this matter. While the LCRA claims that there is no evidence of fraud, collusion and bad faith on the record, this is due to the circuit court preventing Relators from presenting such evidence at the LCRA's request. As set forth above, on October 12, 2006, the circuit court quashed trial subpoenas issued to the LCRA's custodian of records, the LCRA's executive director, and Dalton (Lewis Rice/Ice House) to support the claims made in Relators' motions to dismiss and answers. It remains unclear as to how the testimony of the LCRA's executive director and its own documents were not relevant to the proceeding,

particularly when certain LCRA documents were admitted into evidence to support the condemnation.

On the day of the hearing, the circuit court also prevented Relators from calling Disper as a witness in support of their claims/defenses. Four (4) additional witnesses who would have testified to the harassment campaign waged by Disper and Young to force Henderson from her property were also prevented from testifying. As set forth above, Young's campaign to force Henderson off of her property has been going on for twenty (20) years; Disper only since he bought the property next to Henderson's.

These witnesses would have established Relators' claims/defenses that Ordinance 66499 was procured by fraud, collusion and bad faith, was arbitrary and in violation of Missouri law, as evidenced by the documents produced to Relators by the LCRA after the condemnation hearing described above. The circuit court's actions deprived Relators of any meaningful review into whether the condemnation action was authorized by law, as well as Relators most basic due process right – a meaningful opportunity to be heard before the taking of their property – secured by the 5th and 14th Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution.¹⁷

¹⁷ While the LCRA is likely to continue to take issue with Relators' failure to call Alderwoman Young, this witness could not be effectively examined without the

The LCRA's authority to condemn was the subject of the initial hearing in the condemnation action. State ex rel. Rantz, 901 S.W.2d at 291. Relators' motions to dismiss and answers were both part of the proceeding. In both, allegations of fraud, collusion and bad faith were raised. Relators would have no other forum to present evidence in support of the claims/defenses they had raised. They were "entitled to have access to relevant information prior to trial of the issues presented" by them. *Id.* at 293. In quashing virtually all of the trial subpoenas issued by Relators, the circuit court was not denying Relators the right to discovery (itself problematic) but the right to present evidence in support of their claims/defenses.

When the City, here through the LCRA, requests the aid of a court to enforce a condemnation ordinance, the court is not a mere tool to do the will of the Board but has a right and duty to inquire into the truth of the matter, particularly as raised by the pleadings. Hyde, 96 S.W. at 205. A court is not obligated to take the recitals of the ordinance as conclusive and reject all evidence showing it was procured by fraud, collusion and bad faith, as the circuit court did in this case. Instead, the court is required to hear the evidence and find the facts. *Id.* Here because of the allegations made in the motions to dismiss and answers, the court's duty included an inquiry into whether Ordinance 66499 was arbitrary because

LCRA documents attached hereto, which the circuit court prevented Relators from obtaining by quashing the subpoena issued to the LCRA's custodian of records.

unsupported by evidence, violated Missouri law, and/or was procured by fraud, collusion and bad faith. The trial court deprived Relators of the opportunity to present relevant evidence so that it could perform its duty, and therefore, it could not make a proper determination that the condemnation was authorized by law and that it had jurisdiction over the condemnation action, as it was required to do. See e.g. City Center Redevelopment Corp., 180 S.W.3d at 15. Therefore, this Court must make such a determination on an incomplete record or remand this case to the circuit court to allow Relators to present evidence on these issues.

As set forth above, Relators were able to obtain certain documents from the LCRA **after** the condemnation hearing to support their claims/defenses. However, it remains unclear as to whether Relators have obtained all evidence that they would be entitled to through discovery in the condemnation proceeding.

Regardless, Relators have been able to present substantial evidence in support of their claims/defenses to, at a minimum, justify a full and fair hearing before the circuit court, as opposed to a hearing at which only the LCRA is allowed to present evidence and submit exhibits as the court allowed. Clearly, the LCRA's file is evidence, not discovery, portions of which the LCRA was permitted to admit at the condemnation hearing. As a result, Relators should have been permitted to obtain the LCRA file because it was not discovery and/or irrelevant as the circuit court previously had found. Answer, Exhibit B, 31:24-32:9.

Under the court's orders, the LCRA was allowed to submit only those documents which purportedly supported the condemnation petition, while

preventing Realtors from obtaining and submitting evidence from the LCRA's file that supported their claims/defenses. As a result, Relators were denied the opportunity to meaningfully cross-examine Ruthsatz or examine other witnesses that might otherwise have been called at the hearing. The circuit court permitted trial by ambush in a rush to condemn this property once Disper Schmitt requested that the LCRA exercise the mighty power of eminent domain on its behalf, even though the LCRA itself waited over a year to file the instant condemnation action after it was authorized, apparently because Disper Schmitt did not have the financing needed to acquire the property at that time. App. A4.

Had a full trial been allowed, the evidence would have shown that the LCRA completely abdicated its responsibility to act as a governmental body in the interest of the public, instead acting in collusion with private developers as set forth in detail above. The evidence described above shows collusion at every phase of this redevelopment project from the presentation of the blighting ordinance to the Board, to approving a predetermined redeveloper without evidence of its financial ability to complete the redevelopment, to finally authorizing the taking of Relators' property by Disper Schmitt after Disper and Young's harassment campaign could not force Henderson to sell to Disper Schmitt at well below market value.

In contrast to the close connections to important decision-makers that Ice House, Dalton, and Disper Schmitt enjoyed is Henderson, a 77 year-old proprietor of a small business. She has operated her auto salvage yard at the same location in

the City of St. Louis for over fifty years, making a living for her family and paying taxes to the City, but clearly outside of the power circles. Henderson's misfortune is that now that her property is in close proximity to the new Busch Stadium, it is valuable to private developers, who have evidenced a willingness to resort to any means, including harassing a 77 year old woman, to obtain it. That an area of Clayton, Missouri was recently declared blighted which action was upheld by a circuit court, but then reversed by the Court of Appeals with transfer to this Court, is evidence of the arbitrary standard legislative bodies are allowed to use to find blight because the Missouri courts are reluctant to intervene. See App. A55-A60.

After enacting Ordinance 66499 through fraud and collusion, Young and Disper Schmitt couldn't wait to get Henderson out of the area; so to expedite the process, they repeatedly made false complaints against Henderson with various law and code enforcement agencies in an effort to coerce Henderson not only to sell her property to Disper Schmitt but to sell it at well below market value because it apparently didn't have the financial resources needed for the project. Disper Schmitt's tactics to force Henderson off the property became so oppressive that Henderson was forced to file a separate civil lawsuit. Petition Exhibit 6, pp. 112-144. While these activities were occurring, Disper Schmitt and Ice House were represented by Dalton, whose firm now represents the LCRA. Dalton threatened Henderson that if she did not sell voluntarily, he would simply take her property by eminent domain. However, Dalton does not have the power to take property by eminent domain, only the LCRA does, which has ceded its

governmental power to private developers.

While the LCRA also claims to have made good faith **offers** to purchase Relators' property, this is not the case. See LCRA' Suggestions, p. 4. Rather, a single grossly under priced offer was made to Relators. As set forth above, no property valuations were produced by the LCRA pursuant to Relators' Sunshine Law request. Recently the LCRA's purported "good faith offers" were found to be ten percent of the true value of the property at issue because the LCRA acts in the interest of the developers that provide its legal representation, not the interest of the public, as it is required to do. App. A60-A61.

To add insult to the evidentiary injury of the circuit court, Dalton attempted to prevent the issuance of a preliminary writ of prohibition through affidavit, when the subpoena to compel him to testify and produce documents at the condemnation hearing was quashed. See LCRA's Suggestions, Exhibit F. If Respondent can supplement the record in this action, Relators must be permitted to do the same, particularly when they were prevented from presenting relevant evidence at the condemnation hearing, at the LCRA's request. Dalton admits he is Disper Schmitt's attorney. He also admits that he has a one-third interest in Brio Group, which has a one-half interest in Ice House. He omits the fact that Brio Group is comprised of Dalton, Disper and Schmitt. He further omits that he is financially involved in other Disper Schmitt projects. Relators were not permitted to question Dalton about his current and previous financial dealings with Disper and Schmitt as reported in the St. Louis Business Journal in July 2006 because the circuit court

quashed the subpoena issued to him.

Similarly, no evidence was permitted of Dalton and Disper's contacts and conversations with the LCRA, Young and/or other Board members before the introduction of Board Bill 253, now Ordinance 66499. The trial court should have entertained this evidence to develop a complete record before determining whether Ordinance 66499 was procured by fraud collusion or bad faith. If the actions of the LCRA could withstand scrutiny, it would have had no objection to Relators presentation of evidence in this case. From the inception of this project, the LCRA worked directly and specifically with the Ice House developers to blight this area so that the Henderson, Dennis and other targeted properties could be taken by eminent domain. The pretextual nature of the purported advertising for developers is itself evidence of fraud in this case to cover-up the LCRA's collusion with Ice House to blight the area.

Because the circuit court refused to permit Relators to present evidence/testimony in support of their claims/defenses before ruling on the Relators' motions to dismiss and the LCRA's condemnation petition, it abdicated its responsibility to first determine whether the condemnation was authorized by law as it was required to do. City Center Redevelopment Corp., 180 S.W.3d at 15. Ultimately, the circuit court made no finding as to whether Ordinance 66499 was arbitrary, induced by fraud, collusion or bad faith, or in strict compliance with the statutory prerequisites. App. A1-A3. Nonetheless, the Order in Condemnation was issued. Relators will suffer irreparable injury if this case is permitted to

proceed to an assessment of damages by the commissioners without Relators ever being given a full and fair opportunity to be heard **before** the circuit court rules on the underlying condemnation petition. It would appear to be self-evident that a travesty of justice and denial of basis due process rights occurs when only one party is permitted to present evidence. However, when this occurs, it is easy to understand how that party ultimately prevails.

An appeal is an inadequate remedy to address the circuit court's refusal to allow Relators to present evidence in support of their claims/defenses because Ice House and Disper Schmitt, parties alleged to be involved in the fraud, collusion and bad faith that resulted in the passage of Ordinance 66499, would be able to exercise rights of possession while the appeal was pending. This would put Henderson out of business. Therefore, an absolute writ of prohibition is the proper remedy in this case. State ex rel. Terrell, 719 S.W.2d at 863.

CONCLUSION

The “mighty” power of eminent domain allows for real and irremediable abuses, particularly when authorities allow their powers to be usurped by private developers through sham proceedings. Areas have been blighted when redevelopers did not have the financial resources to purchase the properties within the area, leaving property owners in legal and financial limbo owning two houses when the redevelopment is later abandoned. See App. A63-A65. Cities have made findings of “blight” in areas, like Clayton, where it is impossible to imagine that blight exists. See App. A55-A60. The LCRA has made “fair market value” offers for the purchase of property at ten percent (10%) of the actual property value because it permits developers to control the process, abdicating its governmental authority and responsibility. See App. A61-A62. The potential for abuse and irreparable harm are the reasons Missouri Courts require strict compliance with state law and the enabling ordinance when an entity wields the “mighty” power of eminent domain.

For the reasons set forth herein this Court’s preliminary writ of prohibition should be made absolute and the circuit court ordered to dismiss the condemnation action styled Land Clearance for Redevelopment Authority of the City of St. Louis v. John and Regina Dennis, et al., et al., Cause No. 0622-CC05527 as beyond the jurisdiction of the circuit court for the reasons set forth in Sections I through III herein. Alternatively, and without waiver of the foregoing, at a minimum, this Court’s preliminary writ of prohibition should be made absolute prohibiting the

circuit court from allowing this case to proceed to a commissioner's hearing on value until the court affords Relators a full and fair opportunity to present evidence on their claims and defenses that the circuit court is without jurisdiction over this condemnation action.

Respectfully submitted,

PLEBAN & ASSOCIATES, LLC

By: _____

C. John Pleban, #24190
Lynette M. Petruska, #41212
2010 S. Big Bend
St. Louis, Missouri 63117
(314) 645-6666
(314) 645-7376 fax

Attorneys for Relators

CERTIFICATE PURSUANT TO RULE 84.06
AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document contains 13,228 words.

The undersigned further certifies that two (2) true and accurate copies of the foregoing document, the appendix thereto, and a floppy disk version of Relators' Brief were sent by regular mail, postage prepaid, on this 25th day of April, 2007, to:

Winthrop B. Reed, III
Lynn S. Blackman
500 N. Broadway, Suite 2000
St. Louis, MO 63102-2147
Attorneys for LCRA

The Honorable Evelyn Baker
Carnahan Courthouse, Div. 21
1114 Market St.
St. Louis, MO 63101
Respondent

The undersigned further certifies that the foregoing document complies with Rule 84.06(c) in that it includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b).