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IN THE SUPREME COURT OF MISSOURI

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CAUSE NO. SC88287

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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.

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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

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**RESPONDENT'S BRIEF**

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## **STATEMENT OF FACTS**

Relators' Statement of Facts is incomplete. Respondent submits this complete Statement of Facts pursuant to Mo.R.Civ.P. 84.04(f).

### **The Relators' Properties**

This condemnation action arises from the redevelopment of a blighted area immediately south of downtown St. Louis, the Ice House District Redevelopment Area. Relator Opal Henderson owns real property located within the redevelopment area at 608-610 Hickory St., 1202-1204 S. 7th St., 1212-1224 S. 7th St., and 1217 S. 6th St. in the City of St. Louis. (See Petition in Eminent Domain, A8).<sup>1</sup> She operates an automobile salvage yard on this property. Relators John and Regina Dennis own a vacant lot in the redevelopment area at 1201-1203 S. 6th St. in the City of St. Louis. (See Petition in Eminent Domain, A8). Relators' property is located in a prior redevelopment area, the Stadium South Redevelopment Area, that pre-existed the current redevelopment area. (See Appendix to Relators' Brief, p. A40).

The Land Clearance and Redevelopment Authority of the City of St. Louis ("LCRA") is a public body corporate and politic organized under R.S.Mo. § 99.330. It has the powers conferred by R.S.Mo. § 99.420, and exists to carry out the purposes of the

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<sup>1</sup> Unless otherwise noted, all documents included in Respondent's Appendix were presented to the court below or admitted into evidence by Respondent at the condemnation hearing.

Land Clearance for Redevelopment Authority Law. Those purposes include the redevelopment of blighted areas that constitute “insanitary, blighted, deteriorated and deteriorating areas which constitute a serious and growing menace injurious to the public health, safety, morals and welfare of the residents of the state[.]” R.S.Mo. § 99.310.

### **The Board of Aldermen’s Decision to Redevelop the Area**

In August 2004, LCRA prepared a “Blighting Study and Plan” (“Plan”) for a redevelopment area bounded by Chouteau Ave., South 7th Street and I-55. (*See* Plan, attached to Ordinance No. 66499, A17). This redevelopment area is within the boundaries of an older redevelopment area, the Stadium South Redevelopment Area. The Blighting Study and Plan for the current area is incorporated into Ordinance No. 66499, the ordinance of the Board of Aldermen authorizing condemnation of Relators’ properties. (*See* Ordinance No. 66499, A13-A28).<sup>2</sup> The Blighting Study and Plan declares that the redevelopment area is blighted. (*See* Ordinance No. 66499, A18-A19).

Following preparation of the Blighting Study and Plan, LCRA advertised for redevelopment proposals for the area. (*See* Resolution No. 04-LCRA-7748, A29-A31).

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<sup>2</sup> The copy of Ordinance No. 66499 included in Respondent’s Appendix is a copy of the certified copy of Ordinance No. 66499 that was admitted into evidence by the trial court. The copy of Board Bill No. 253 (which later became Ordinance No. 66499) contained within the Board of Aldermen’s file and attached to Relators’ Petition for Writ of Prohibition as Exhibit 3, pp. 34-59, appears to be missing a section or page.

Advertisements were placed in the *St. Louis Post-Dispatch* on August 31, 2004 and September 7, 2004. (*See* Resolution No. 04-LCRA-7748, A29-A31).

On September 8, 2004, Ice House District Redevelopment Company, LLC (“Ice House”) submitted a proposal for redevelopment of the redevelopment area. (*See* Resolution No. 04-LCRA-7748, A29-A31). On September 21, 2004, LCRA designated Ice House as the redeveloper for the redevelopment area described in the Blighting Study and Plan. (*See* Resolution No. 04-LCRA-7748, A29-A31).

LCRA submitted its Blighting Study and Redevelopment Plan for the redevelopment area, which was attached to Board Bill No. 253, to the Board of Aldermen of the City of St. Louis for approval. (*See* Proceedings Before Board of Aldermen, attached to Relators’ Petition for Writ of Prohibition as Exhibit 3, p. 11 of Relators’ Exhibits). The Board of Aldermen held a public hearing regarding Board Bill No. 253 (which included the Blighting Study and Plan) on November 11, 2004. (*See* HUDZ Committee Sign-In Sheet, A32).

The Board approved Board Bill No. 253 on November 19, 2004. The Bill was approved by the Mayor of the City of St. Louis on December 6, 2004. (*See* Ordinance No. 66499 Approval Summary, A33). Bill No. 253 then became Ordinance No. 66499. (*See* Ordinance No. 66499, A13-A28). Section 8 of the Ordinance explicitly recognized that the approved Redevelopment Plan included the possible exercise by LCRA of its eminent domain powers to acquire properties within then Redevelopment Area.

## **The Redevelopment Agreement**

On June 1, 2005, LCRA and Ice House entered into a Redevelopment Agreement covering the redevelopment area. (*See* Redevelopment Agreement, A34-A66). Under this Agreement, the redevelopment of the area could take place in phases and could involve the use of subdevelopers. (*See* Redevelopment Agreement, A35). A subdeveloper, Disper Schmitt Properties, LLC (“Disper Schmitt”) was eventually selected.

The Redevelopment Agreement provides that property within the redevelopment area may be acquired through eminent domain upon the request of Ice House and at the discretion of LCRA. (*See* Redevelopment Agreement, A36). By Resolution No. 05-LCRA-7942E, LCRA authorized the acquisition of Relators’ property by eminent domain. (*See* Resolution No. 05-LCRA-7942E, A67-A69).

### **LCRA’s Purchase Offers and Ms. Henderson’s Tort Suit**

On July 28, 2006, LCRA made good faith offers to purchase Relators’ property. (*See* Letters from Dale Ruthsatz at LCRA to Opal Henderson and John and Regina Dennis, A70-A91). The offers were based upon independent appraisals obtained by LCRA. (*See* Letters from Dale Ruthsatz at LCRA to Opal Henderson and John and Regina Dennis, A70-A91). The letters were sent via certified mail and were held open until the end of business on August 10, 2006. (*See* Letters from Dale Ruthsatz at LCRA to Opal Henderson and John and Regina Dennis, A70-A91).

After Relator Opal Henderson received the good faith offer, which by its terms was to expire on August 10, 2006, Ms. Henderson filed (on August 8, 2006) the separate

lawsuit referred to in Relators' brief against Disper Schmitt and its members, Mark Disper and Daniel Schmitt, alleging that Disper Schmitt was trying to force Henderson to sell her property to Disper Schmitt for less than fair market value ("Henderson Suit"). The Henderson Suit purports to allege causes of action for Slander, Intentional Infliction of Emotional Distress, Prima Facie Tort, Conspiracy and Trespass against Mr. Disper, Mr. Schmitt, Disper Schmitt and certain unnamed Doe Defendants. The causes of action in the Henderson suit are based upon allegations that Mr. Disper made purportedly false reports regarding illegal activity occurring on Henderson's property to various city officials in an effort to get Henderson to sell the property to Disper Schmitt at less than fair market value.

### **The Condemnation Action Before Respondent**

The offer period established by LCRA's good faith offer letters expired without response from Relators. After LCRA's good faith offers to purchase Relators' property were rejected, LCRA filed its Petition in Eminent Domain in the Circuit Court for the City of St. Louis on August 11, 2006, seeking to take Relators' property by eminent domain. (*See* Petition in Eminent Domain, A6-A12).

The condemnation action was assigned to Respondent, the Honorable Evelyn M. Baker. Respondent set the hearing on the condemnation petition for October 6, 2006. (*See* Summonses>Returns of Service of Summonses, A92-A99). LCRA personally served all known property owners, including Relators, and additionally published notice of the date of hearing in the *St. Louis Daily Record*. (*See* Summonses>Returns of Service of Summonses, A92-A99; *See also* Affidavit of Publication, A100-A103). All Relators

were served with summons in the underlying action and given well in excess of the statutorily required 10 days' notice of the condemnation hearing. (*See* Summons/Returns of Service of Summonses, A92-A99).

Shortly before the scheduled hearing date, counsel for Relators filed several motions in the underlying action, including Motions to Dismiss. On the dates set for hearing, October 6, 2006, counsel for all parties agreed to postpone the hearing date to October 13, 2006, in order to give Respondent time to review the pleadings and rule on the Motions to Dismiss. (*See* October 6, 2006 Order, A104). On October 6, 2006, Respondent also entered an Order prohibiting Relators from conducting discovery prior to the condemnation hearing. (*See* October 6, 2006 Order, A104). In response, Relators filed a Petition for Writ of Prohibition in the Court of Appeals for the Eastern District of Missouri, which that court denied. (*See* October 13, 2006 Order of Missouri Court of Appeals for the Eastern District, A154).

On October 10, 2006, LCRA filed its Memorandum in Opposition to Relators' Motions to Dismiss. (*See* Memorandum in Opposition to Motion to Dismiss, A106-A118). Relators served numerous subpoenas that would require persons to attend the October 13, 2006 hearing to bring documents and give testimony. Subpoenas were served on Jonathan Dalton, an attorney at Lewis, Rice & Fingersh, L.C. (counsel for LCRA); the Custodian of Records of LCRA; Rodney Crim, executive director of LCRA; Alderwoman Phyllis Young; the Metropolitan St. Louis Sewer District; the City of St. Louis building inspector; the Department of Natural Resources; and the Clerk of the City of St. Louis Board of Aldermen. Relators also apparently attempted to serve a

subpoena on Mark Disper, a member of Disper Schmitt.<sup>3</sup> Before the October 13 hearing, Respondent granted LCRA's Motion to Quash the subpoenas to Rodney Crim and the LCRA custodian of records, on the grounds that Relators' subpoenas were improperly designed for the purposes of discovery. (*See* October 12, 2006 Order, A119). Judge Baker also quashed the subpoena on Jonathan Dalton for the same reason. (*See* October 12, 2006 Order, A119). On the day of the hearing, Judge Baker denied Relators' Motions to Dismiss. (*See* October 13, 2006 Order, A120).

At the condemnation hearing, LCRA offered the testimony of Dale Ruthsatz, assistant secretary of LCRA. Counsel for Relators extensively cross-examined Mr. Ruthsatz and introduced documents, including the entire file of the Clerk of the City of St. Louis Board of Aldermen as it related to Ordinance No. 66499, into evidence. (*See* Transcript of Condemnation Hearing, p. 122, lns. 5-20, A152). Counsel for Relators made offers of proof with regard to Jonathan Dalton, Mark Disper, Johnny Bruce (from the office of the Building Inspector), Alverta Opperman (from the office of the Metropolitan Sewer District) and Jonathan Kennedy (from the office of the Department of Natural Resources). Counsel for Relators did not attempt to call the remaining

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<sup>3</sup> Because LCRA was not provided with copies of the subpoenas by counsel for Relators, these are the only subpoenas of which LCRA is aware. It is quite possible that more were served.

witnesses, including Alderwoman Phyllis Young, despite their presence pursuant to subpoena, in the courtroom. (*See* Transcript of Condemnation Hearing, A121-A153).

### **The Order of Condemnation and Writ Proceedings**

At the close of the evidence, Respondent entered her Order of Condemnation. (*See* Order of Condemnation, Relators' Appendix, A1-A3). Relators then filed their second Petition for Writ of Prohibition in the Court of Appeals for the Eastern District of Missouri, which that court denied. (*See* January 3, 2007 Order of Missouri Court of Appeals, Eastern District, A105). Relators then filed the instant action. This Court entered a preliminary order in Prohibition. Respondent now asks that the preliminary order be quashed.

## ARGUMENT

**I. RESPONDENT IS ENTITLED TO AN ORDER PERMITTING HER TO PROCEED ON LCRA’S CONDEMNATION PETITION, BECAUSE RESPONDENT HAS JURISDICTION OVER THE PETITION IN THAT THE EVIDENCE PRESENTED TO THE BOARD OF ALDERMEN WAS SUFFICIENT TO RENDER THE QUESTION OF BLIGHT MUCH MORE THAN “FAIRLY DEBATABLE,” AND THUS MORE THAN SUFFICIENT TO SUPPORT THE ENACTMENT OF ORDINANCE NO. 66499. [RESPONDS TO RELATORS’ POINT II].**

**A. Standard of Review.**

As this Court has stated, prohibition is a discretionary writ that may be issued “to prevent an usurpation of judicial power, to remedy an excess of jurisdiction, or to prevent an absolute irreparable harm to a party.” *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). A writ of prohibition may be issued if condemnation proceedings are unauthorized. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d 385, 388 (Mo. banc 1991); *State ex rel. Broadway-Washington Associates, LTD. v. Manners*, 186 S.W.3d 272 (Mo. banc 2006) (writ of prohibition issued to prevent eminent domain acquisition; condemnor had violated statute by acquiring the property more than five years after adoption of redevelopment ordinance.).

In the case at bar, the condemnation proceeded on the basis that Relators’ property was in a blighted area. Determining whether an area is blighted is a task, in the first instance, for the legislative body that authorizes the condemnation. A legislative finding

of blight, when judicially challenged, enjoys a presumption of correctness. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 910 (Mo. App. E.D. 1991). Unless it appears that the conclusion of the city’s legislative body is clearly arbitrary, a court cannot substitute its opinion for that of the legislative body. *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320, 324 (Mo. banc 1976). A court may not interfere if the questioned action is even reasonably doubtful or fairly debatable. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, *supra*.

An ordinance is presumed to be valid. *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 16 (Mo. 1974). The Board of Aldermen’s blight determination is controlling on Respondent and on this Court “unless [the Board’s] decision is shown to be so arbitrary and unreasonable as to amount to an abuse of the legislative process.” *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146, 150 (Mo. banc 1987).

A trial court’s role in entertaining challenges of the type made by Relators here is to determine whether the property owner has met the owner’s heavy burden of establishing that the legislative body’s conclusion of blight was arbitrary, unreasonable or the result of fraud. *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, *supra*. The trial court does not conduct a *trial de novo* on the question of blight. Indeed, this Court has held that a court in which a condemnation action is brought cannot review the sufficiency of the evidence before a legislative body that led to action to declare an area blighted. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d at 390.

Similarly, if a trial court finds that the legislative decision to condemn was valid, the trial court's finding comes to this Court with a presumption of validity. The trial court's finding may be reversed only on a showing of such a clear abuse of discretion that the trial court lacked jurisdiction. *State ex rel. Thomasville Wood Products, Inc. v. Buford*, 512 S.W.2d 220, 221 (Mo. App. 1974); *State ex rel. Cummings v. Witthaus*, 219 S.W.2d 383, 386 (Mo. 1949).

In a statutory amendment that took effect after the Board of Aldermen found Relators' property to be in a blighted area and after LCRA had filed this condemnation action, the General Assembly imposed a requirement that a legislative finding of blight be supported by "substantial evidence." R.S.Mo. § 523.261 (2006 Supp.). Relators state that they have applied the former common law requirements rather than the new statutory "substantial evidence" test in making their arguments in this Court (Relators' Brief at 35, n. 13). This is a correct application of the new statute.

Section 523.261 became effective August 28, 2006. It was not in place when the record supporting this condemnation was made in the Board of Aldermen. While procedural amendments may be applied to proceedings in actions arising from past conduct, *Hess v. Chase Manhattan Bank, USA, N.A.*, 2007 Mo. LEXIS 65 (Mo. banc May 1, 2007), they generally are not applied to those portions of the proceedings that took place prior to the amendments. As the Court stated in *State ex rel. Atmos Energy Corp. v. Public Service Commission*, 103 S.W.3d 753, 762 (Mo. banc 2003), "As far back as 1909 this Court held that, 'If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings.

But the steps already taken, the status of the case...and all things done under the late law will stand unless an intention to the contrary is plainly manifested[.]’ *Clark v. Kansas City, St. L. & C. R. Co.*, 219 Mo. 524, 118 S.W. 40, 43 (Mo. 1909).”

It would be unfair to impose a requirement that the Board of Aldermen’s proceedings here be documented so as to withstand a challenge based on a claimed lack of substantial evidence, when the settled law at the time of the proceedings before the Board of Aldermen was that findings of blight by legislative bodies were not subject to judicial review for the sufficiency of the evidence. There is no indication that the General Assembly intended such a result.

**B. Relators Have Not Met Their Burden Of Showing That The Board Of Aldermen’s Finding Of Blight Is Arbitrary.**

Whatever the standard for judging the evidence of blight before a condemning legislative body, the evidence here met that standard.<sup>4</sup> In enacting Ordinance No. 66499, the Board of Aldermen of the City of St. Louis declared that the area that includes Relators’ property is blighted. (*See* Ordinance No. 66499, A14). Relators’ property

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<sup>4</sup> Logically, deciding whether the evidence before the Board of Aldermen was enough to support the ordinance comes before the inquiry whether that evidence was somehow fraudulent or the ordinance was otherwise tainted by bad faith or collusion. Respondent thus addresses Relators’ Point II first, and deals with the fraud issue (Relators’ Point I) in Section II of this Argument.

contains an automobile salvage yard, where a large number of junked automobiles, used tires, and automobile parts, among other automobile-related waste, are stored within open view of passersby. Also in the redevelopment area is “the former Ice House that is used to house the Tram Tours vehicles which is literally falling in on itself.” (*See Relators’ Appendix, A40*).<sup>5</sup> The Relators’ property is located on Seventh Street, a major north-south street, 1.1 miles by road from St. Louis City Hall, immediately to the south of Busch Stadium, and north of the Soulard neighborhood. Whether an area containing property of this kind at this location is blighted is, at the least, a debatable question for the Board of Aldermen to decide.

The applicable definition here is that of R.S.Mo. § 99.320(3), which defines “Blighted area” as:

[A]n area which, by reason of the predominance of defective or inadequate street layout, insanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing

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<sup>5</sup> E-mail of Alderman Phyllis Young to Rodney Crim, March 18, 2004. While this e-mail was presented to the Court for the first time by Relators in their Appendix and was not before Respondent, it in fact affords support for the legislative finding of blight. As Alderwoman Young stated in her e-mail, “This area needs to be cleaned.”

accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use[.]

This definition is different from the definition of blight contained in R.S.Mo. § 353.020 that is now before the Court in *Centene Plaza Redevelopment Corporation v. Mint Properties*, No. SC 88487 (Argued and Submitted, May 22, 2007). The Chapter 353 definition requires that conditions in the area to be condemned constitute both economic and social liabilities before the area may be found blighted. The Chapter 99 definition, which applies to condemnations conducted by public Land Clearance for Redevelopment Authorities (rather than the private redevelopment corporations created by Chapter 353), requires only that conditions in the area to be blighted areas constitute an “economic or social liability;” both economic and social effects are not required. That a junkyard in an area of this kind is an “economic liability” is self-evident. At the least, the Board of Aldermen could have reasonably so found.

The blight finding here was preceded by a duly-noticed hearing before the Board of Aldermen. The Board’s file on Ordinance No. 66499, which was entered into evidence before Respondent, shows that a public hearing on the condemnation Ordinance, which included the finding of blight, was held on November 10, 2004 at 10:00 a.m. before the Housing, Urban Development and Zoning Committee (“HUDZ Committee”). The Board of Aldermen’s file also contains copies of letters to 16 property owners within the Redevelopment Area notifying them of the hearing. (*See* Letters to Property Owners, A155-A170). At least one person appeared in opposition to the

ordinance. In fact, the person who appeared in opposition to the ordinance was an attorney for Opal Henderson, one of the Relators in this matter. (*See* November 10, 2004 HUDZ Committee Sign-In Sheet, A32).

Dale Ruthsatz, assistant secretary of LCRA, testified before Respondent that at the HUDZ Committee hearing either a person on behalf of LCRA or the alderman of the ward (in this case, the Hon. Phyllis Young) would have testified and would have passed around photographs of the proposed redevelopment area. (*See* Transcript of Condemnation Hearing, p. 98, lns. 11-22, A146).

When it adopted Ordinance No. 66499, the Board of Aldermen adopted the blighting study submitted by LCRA. The evidence contained within the blighting study was before the Board of Aldermen when the Board made its finding of blight. The blighting study found that the area including Relators' property is in "poor to fair condition." (*See* Ordinance No. 66499, A18). The blighting study states that by "poor condition," LCRA means that the area including Relators' property includes:

- (1) buildings that are structurally unsound and/or substantially deteriorated, requiring major improvements such as new roofs, windows, systems, etc., in order to be used productively, or (2)
- property without buildings which is poorly maintained, has crumbling pavement, and/or is used for open storage.

(*See* Ordinance No. 66499, A18).

By "fair condition," LCRA means that the area including Relators' property also includes:

(1) property that is generally structurally sound but suffers from inadequate maintenance and upkeep, or (2) vacant unimproved property that is underutilized.

(See Ordinance No. 66499, A18).

The Board of Aldermen reasonably concluded, given the descriptions of the property within the Redevelopment Area contained in the Blighting Study and Redevelopment Plan, that the property met the statutory definition of blight set forth above. LCRA's and the Board of Aldermen's finding that the buildings located on the property contained within the redevelopment area were either "structurally unsound and/or substantially deteriorated" or suffering "from inadequate maintenance and upkeep" or "underutilized" constituted "an economic or social liability" under Section 99.320(3). It is at least "fairly debatable" that poorly maintained and structurally unsound buildings constitute "insanitary or unsafe conditions" or show the "deterioration of site improvements," as set forth in Section 99.320(3).

Mr. Ruthsatz testified the Board of Aldermen was presented with LCRA's recommendation of blight. (See Transcript of Condemnation Hearing, p. 97, lns. 11-14, A146). This is specifically the evidence of blight Missouri law contemplates the Board of Aldermen will consider. Section 99.430.2 of the Revised Missouri Statutes provides:

...The planning agency shall submit its written recommendations with respect to the finding of a blighted or insanitary or undeveloped industrial area and the [redevelopment] plan to the authority and the local governing body.... Upon receipt of the recommendations of the planning agency, ...

the governing body may simultaneously approve the finding of a blighted or insanitary or undeveloped area and approve the plan....

R.S.Mo. § 99.430.2.

The redevelopment ordinance here thus meets any applicable test for the sufficiency of the evidence. LCRA, the planning committee charged by statute with the duty to do so, submitted its recommendation to the Board of Aldermen. The Board, after a hearing, found the area to be blighted and approved the recommendation. The Aldermen can be presumed to be familiar with the area blighted.

That the area was found to be blighted and the condemnation action was brought to further redevelopment of the blighted area overcomes Relators' contention that the taking here was for a private rather than a public use.<sup>6</sup> *Annbar Associates v. West Side*

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<sup>6</sup> Relators also advance an argument that the "spot-taking" of Relators' property by LCRA indicates that the intended use is private. This mischaracterizes LCRA's actions. The properties LCRA sought to acquire for this portion of the redevelopment were owned by three separate ownership groups; one set of property owners agreed to terms with LCRA prior to the initiation of the litigation. Additionally, other properties in the Redevelopment Area are currently being redeveloped by other subdevelopers. In fact, at least one other condemnation action in regard to the property contained within the Redevelopment Area is pending. *See LCRA v. Inserra, et al.*, Cause No. 0622-CC07267, pending in Division No. 18 of the Circuit Court for the City of St. Louis.

*Redevelopment Corp.*, 397 S.W.2d 635, 646 (Mo. banc 1966); *Schweig v. Maryland Plaza Redevelopment Corporation*, 676 S.W.2d 249, 254 (Mo. App. E.D. 1984). The City of St. Louis, as a constitutional charter city, is explicitly empowered by the Missouri Constitution to enact ordinances for the redevelopment of blighted areas by use of eminent domain. Mo. Const., Art. VI, § 21. Respondent thus has jurisdiction to proceed, unless Relators can establish that the ordinance, although enacted after a hearing at which evidence supporting a finding of blight was presented, was somehow invalid because induced by fraud or collusion. Despite advancing a number of different “fraud” theories, Relators cannot meet this burden.

**II. RESPONDENT IS ENTITLED TO AN ORDER PERMITTING HER TO PROCEED ON LCRA’S CONDEMNATION PETITION, BECAUSE RELATORS HAVE NOT SUSTAINED THEIR BURDEN OF ESTABLISHING THAT ORDINANCE NO. 66499 WAS PROCURED BY FRAUD OR COLLUSION OR WAS OTHERWISE ARBITRARY, IN THAT: (1) BEFORE RESPONDENT, RELATORS DID NOT PLEAD OR PROVE FACTS SHOWING FRAUD AND (2) THE ADDITIONAL MATERIALS THAT RELATORS HAVE FILED IN THIS COURT (BUT NEVER PRESENTED TO RESPONDENT) DO NOT ESTABLISH FRAUD, COLLUSION OR BAD FAITH. [RESPONDS TO RELATORS’ POINT I].**

**A. Standard of Review**

This Point Relied On is governed by the same standard of review as is Point I. This Court may intervene by Prohibition only if Respondent so far abused her discretion

as to have exceeded her jurisdiction. The condemnation ordinance is entitled to a presumption of validity.

### **B. Avoiding a Condemnation Order By Claims of Fraud or Collusion**

While the principle that a condemnation ordinance may not be enforced when it is procured through fraud, collusion or bad faith is often stated, the principle is seldom applied to void ordinances that the political branches of government have enacted. Much more commonly, as here, claims of fraud are raised without basis, in the vain hope of thwarting a condemnation that is manifestly for a public use and is not tainted by fraud in any way.

To find an example, Relators reach back over a century to *Kansas City v. Hyde*, 196 Mo. 498, 96 S.W. 201 (Mo. 1906). That case was not a blight case. It was decided long before the adoption, in the 1945 Constitution, of Art. VI, § 21, which contemplates the possibility of the condemning authority reselling blighted property to third parties for redevelopment. In *Hyde*, the presiding officer of one of the two legislative houses of the city government procured an ordinance to condemn the property at issue so that the officer's own property could be serviced by a street railway that served no public use. This Court held that the defendant was entitled, at trial of the condemnation proceeding, to offer evidence that the condemnation would serve only a private use. Nothing in *Hyde* controls this case, where there was no evidence of self-dealing by the governmental officials involved and the condemnation served the recognized public use of redeveloping a blighted area.

Throughout these proceedings, Relators have presented a large number of constantly-shifting claims of alleged misconduct on the part of LCRA, Alderwoman Phyllis Young, Disper Schmitt, counsel for LCRA and others. Many of these allegations were not presented to Respondent, although all of them were known to (or at least knowable by) Relators if they had exercised reasonable diligence in preparing for the condemnation hearing. Nowhere in their briefs do Relators show how Respondent could have abused her discretion or exceeded her jurisdiction by proceeding despite allegations of fraud, when they never presented most of their “fraud” allegations to her.

**1. The “Fraud” Allegations Presented to Respondent.**

Fraud must be pleaded and proved, with the particularity required by Mo.R.Civ.P. 55.15. *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d at 389; Mo.R.Civ.P. 55.15. The “fraud” or “bad faith” necessary to vitiate a condemnation ordinance is fraud or illegality in procurement of the condemnation ordinance, not general ill will or even a course of conduct prejudicial to the party claiming fraud. *See State ex rel. U.S. Steel v. Koehr*, 811 S.W. 2d at 389. The closest Relators came to pleading fraud before Respondent was the assertions that Alderwoman Young and Disper-Schmitt engaged in a “harassment campaign” against Relators over a long period of time and that Jonathan Dalton, a member of the law firm that represents LCRA here, has some sort of financial interest in the redevelopment of the property.

**a. The “Harassment Campaign”**

Relators have pleaded in support of these allegations that Disper Schmitt (the subdeveloper appointed by LCRA for this condemnation) has “unlawfully harassed and

oppressed Henderson to coerce her to leave the subject property prior to the filing of this condemnation petition.” (See Relators’ Answer, attached to Relators’ Petition for Writ of Prohibition as Exhibit 10, p. 5, ¶12). In Relators’ Counterclaim, Relators alleged that Mark Disper (of Disper Schmitt) and Alderwoman Phyllis Young made several complaints to various City and State entities (the Metropolitan St. Louis Sewer District, the Building Commission, the City of St. Louis Police Department, and the Missouri Department of Natural Resources) that Opal Henderson was in violation of City ordinance or State law for certain activities.<sup>7</sup> It appears, from the face of Relators’ counterclaim, that if complaints were made, Opal Henderson was sometimes cited for violations, and sometimes no violations were found upon investigation. In either event, there are no facts pleaded that would in any way connect these alleged complaints to the Board of Aldermen’s passage of Ordinance No. 66499.

Relators allege that Alderwoman Young has tried, for 20 years, to force Opal Henderson from her property. Relators have not alleged any facts tending to show how this purported one-woman campaign resulted in the fraudulent passage of Ordinance No.

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<sup>7</sup> Relators’ counterclaim was orally dismissed by Respondent on the day of the condemnation hearing, because counterclaims are impermissible in condemnation actions. *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146, 149 (Mo. banc 1987); (See Transcript of Condemnation Hearing, p. 27, lns. 10-25; p. 28, lns. 1-18, A128).

66499 by the “aye” vote of 22 aldermen and the aldermanic president. (See November 19, 2004 Vote of Board of Aldermen, A171).

**b. The Role of Mr. Dalton**

Relators have alleged that some sort of fraud must have occurred because Jonathan Dalton is associated with Ice House District Redevelopment Company, LLC and is also affiliated with Lewis, Rice & Fingersh, L.C., the law firm that represented LCRA before Respondent and appears here to defend Respondent’s Order of Condemnation. Relators have mischaracterized Mr. Dalton’s role in the redevelopment of Relators’ property.

As the record reflects, Mr. Dalton holds a one-third interest in Brio Group, LLC. (See Affidavit of Jonathan Dalton,<sup>8</sup> A172-A174). Brio Group, LLC, in turn holds a one half interest in Ice House District Redevelopment Company, LLC. (See Redevelopment Agreement, A47). French Market, LLC, an entity in which Mr. Dalton has no interest, holds the other one half interest in Ice House. (See Redevelopment Agreement, A47; Affidavit of Jonathan Dalton, A172-A174).

Ice House District Redevelopment Company, LLC is the Redeveloper appointed by LCRA for the Redevelopment Area described in Ordinance No. 66499. (See LCRA

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<sup>8</sup> Because of the mischaracterizations regarding Mr. Dalton’s involvement in this matter, Mr. Dalton’s Affidavit was first filed in the Missouri Court of Appeals for the Eastern District, attached as Exhibit E to LCRA’s Suggestions in Opposition to Relators’ Petition for Writ of Prohibition.

Resolution No. 04-LCRA-7448, A29-A31). However, the Redevelopment Agreement entered into by and between Ice House and LCRA contemplates the use of subdevelopers. (See Redevelopment Agreement, A35). Ice House District Redevelopment Company, LLC, Disper Schmitt and LCRA have entered into a Parcel Development Agreement that appoints Disper Schmitt as the subdeveloper for the properties at issue here. It is Disper Schmitt that will own the property. Mr. Dalton has no interest in Disper Schmitt, other than as its attorney in certain corporate matters, and will not benefit financially from this condemnation action. (See Affidavit of Jonathan Dalton, A172-A174). Although Mr. Dalton is a member of Lewis, Rice & Fingersh, L.C., he is not involved in the litigation of this condemnation action. (See Affidavit of Jonathan Dalton, A172-A174).

There is nothing whatsoever within these facts that connects Mr. Dalton with any alleged “fraud” on the Board of Aldermen. None of these alleged facts establish that Mr. Dalton somehow wrongfully influenced the Board of Aldermen to pass Ordinance No. 66499, or acted improperly in any way. Absent fraud in its procurement, the Ordinance is not subject to challenge here.

**2. The “Fraud” Allegations Presented For the First Time in This Court are Likewise Without Merit.**

In determining whether to issue a writ, this Court may consider only the record made before Respondent. *State ex rel. Grimes v. Appelquist*, 706 S.W.2d 526, 529 (Mo. App. S.D. 1986). Relators ignore this rule, and present much material to this Court that Respondent never saw because Relators never presented it to her.

Following the condemnation hearing, and after filing the Petition in Prohibition in this Court, Relators have, by request under the Open Records Law, obtained copies of certain records contained within LCRA's file. These public records were presumably available to Relators long before the condemnation hearing. Relators John and Regina Dennis were served with the Petition in Eminent Domain and with Notice of the condemnation hearing on August 21, 2006. Relators Opal Henderson and the Opal Henderson Revocable Trust were served with the Petition in Eminent Domain and with Notice of the condemnation hearing on August 30, 2006. Notice was published in the *St. Louis Daily Record* beginning on August 18, 2006. (See Summonses>Returns of Service of Summonses and Affidavit of Publication, A92-A103)

The hearing before Respondent was held on October 13, 2006. Relator Opal Henderson had retained counsel in this matter long before she was ever served with the Petition in Eminent Domain, as evidenced by the appearance of her counsel at the Board of Aldermen's public hearing on the blighting issue in November, 2004. Relators and their counsel thus had ample time to secure these records and present them to Respondent, but they failed to do so. Now, using these records (many of which are included in their Appendix, the first time they have been made part of the record in this proceeding), Relators spend much of their brief arguing that the records prove fraud. In fact, they do not.

**a. Alleged Pre-Selection of a Developer**

Contrary to Relators' allegations, LCRA did make its finding of blight before appointing a developer. LCRA submitted its Blighting Study and Redevelopment Plan

(which included its finding of blight) to the Board of Aldermen on August 24, 2004. (*See* Ordinance No. 66499, A17). LCRA then advertised for redevelopment proposals on August 31 and September 7, 2004. (*See* Resolution No. 04-LCRA-7748, A29-A31). Ice House submitted a proposal dated September 8, 2004 and was designated as developer on September 21, 2004. (*See* Resolution No. 04-LCRA-7748, A29-A31).

Relators appear to argue that because Alderwoman Phyllis Young met with an unidentified potential redeveloper who had recently purchased property in the area and asked LCRA to “let me know what your thoughts are about this idea,” that a redeveloper was somehow pre-selected. (*See* Appendix to Relators’ Brief, p. A40). The law is clear that a condemning authority may meet with and negotiate with potential developers before beginning the redevelopment process. *Kintzele v. City of St. Louis*, 347 S.W.2d 695, 701 (Mo. 1961); (allowing preliminary negotiations between potential redevelopers and public authorities before the legislative authority approves a redevelopment plan). In fact, the declared purpose of the LCRA is to “afford maximum opportunity, consistent with the sound needs of the municipality as a whole, to the rehabilitation or redevelopment or renewal of areas *by private enterprise.*” R.S.Mo. § 99.310 (*emphasis added*). It is only prudent for an Alderwoman, before initiating the redevelopment process, to determine that there is sufficient interest in the area that the redevelopment will be successful.

The correspondence referred to by Relators also notes that the area the alderwoman discussed with the redeveloper “already falls within the Stadium South Redevelopment Area.” (*See* Appendix to Relators’ Brief, p. A40). Therefore, the

property had already been blighted by LCRA under an earlier-enacted blighting study and redevelopment plan. Then, months later, Alderwoman Young requested that LCRA prepare a blighting study and redevelopment plan for the area, which constitutes a portion of the Stadium South Redevelopment Area previously referred to. (*See* Appendix to Relators' Brief, p. A41). There is nothing improper here.

Alderwoman Young was doing her job, seeking redevelopment of a blighted area within her ward. She merely requested LCRA do its job in preparing the required blighting study and redevelopment plan. These documents do not meet Relators' burden of showing fraud on the Board of Aldermen.

#### **b. Alleged Improper Modification of Redevelopment Area**

Relators next argue that the boundary of the redevelopment area was improperly modified. Included in Respondent's Appendix is a copy of the certified copy of Ordinance No. 66499 that was enacted by the Board of Aldermen and admitted into evidence at the condemnation hearing. Exhibits B-D to Ordinance No. 66499 show the approved boundaries of the condemnation area. These boundaries exclude the Hardee's site, which is located east of Broadway. (*See* Ordinance No. 66499, A26-A28). These are the boundaries approved by the Board of Aldermen and set forth in Ordinance No. 66499. The boundaries have not changed since the Ordinance was enacted.

The boundaries in the Ordinance as enacted differ from those contained within the original Board Bill 253 that was included within the Board of Aldermen's file; however, the version of Board Bill 253 included in the Board of Aldermen's file is obviously an early version of the Bill. The version of Board Bill 253 included in the Board of

Aldermen's file is missing a page. (*Cf.* Ordinance No. 66499, A13-A28, with Exhibit 3 to Relators' Petition for Writ of Prohibition). Additionally, the copy included in the Board of Aldermen's file does not state that it is the "Committee Substitute" version of Board Bill 253, which is the version that was ultimately passed. (*Id.*; Ordinance No. 66499 Approval Summary, A33). Though this may amount to imperfect recordkeeping by the Board of Aldermen, it does not amount to an improper change of the boundaries of the redevelopment area subsequent to the Board of Aldermen's approval of Ordinance No. 66499, nor does it amount to fraud.

**c. Alleged Improper Appointment of Disper Schmitt as Redeveloper**

Contrary to Relators' argument, a letter from Dan Schmitt to Dale Ruthsatz fails to establish that Ice House was somehow improperly appointed as redeveloper. By September 5, 2004, LCRA had already advertised once for redevelopers. (*See* Resolution No. 04-LCRA-7748, A29-A31). Ice House submitted its formal proposal on September 8, 2004. (*See Id.*). Mr. Schmitt's letter to Dale Ruthsatz at LCRA supports Ice House's proposal. (*See* Appendix to Relators' Brief, p. A42). This correspondence adds no credence to Relators' argument that Ordinance No. 66499 was procured through fraud, bad faith or collusion.

Relators have attempted to challenge every possible contact between Disper Schmitt, Ice House, Jonathan Dalton, Alderwoman Phyllis Young, and LCRA, but they have been unable to produce even circumstantial evidence that the Board of Aldermen of the City of St. Louis was somehow defrauded into passing Ordinance No. 66499.

Relators certainly have not produced the “clear proof” that *State ex rel. U.S. Steel v. Koehr* requires. Seven months *after* the Order of Condemnation was entered, after receiving LCRA’s file through an Open Records Act request and improperly presenting those documents to this Court, Relators are still unable to meet their burden of overcoming Ordinance No. 66499’s presumed validity. Relators neither pleaded nor proved sufficient facts before the Court below to establish that Ordinance No. 66499 was procured through fraud, bad faith or collusion. Therefore, Respondent had jurisdiction to enter the Order of Condemnation, and this Court should vacate its Preliminary Order.

**III. RESPONDENT IS ENTITLED TO AN ORDER PERMITTING HER TO PROCEED ON LCRA’S CONDEMNATION PETITION BECAUSE RESPONDENT HAD JURISDICTION OVER THE PETITION IN THAT LCRA PROPERLY COMPLIED WITH THE LAND CLEARANCE FOR REDEVELOPMENT AUTHORITY LAW, R.S.Mo. §§ 99.300-99.660. [RESPONDS TO RELATORS’ POINT III].**

**A. Standard of Review.**

In their third Point Relied On, Relators contend that LRCA failed to comply with a number of different provisions of the Land Clearance for Redevelopment Authority Law, R.S.Mo. §§ 99-3.00-99.660. The standard of review set forth in Sections I and II above applies to this Point Relied On as well. If the proper findings are made by the legislative authority, the land in question may be acquired by eminent domain. *Tierney*, 742 S.W.2d at 150. The legislative determination of the Board of Aldermen that the requirements of Section 99.430 have been satisfied is a legislative finding that is entitled to deference and

cannot be overturned by a court as long as it is even fairly debatable. *State ex rel. Devanssay v. McGuire*, 622 S.W.2d 323, 327 (Mo. App. E.D. 1981).

Relators make a number of arguments as to why this condemnation allegedly falls short of statutory requirements. They present their arguments in no particular order, jumping back and forth among the statutory provisions. Respondent addresses all of Relators' claims, with the responses organized for purpose of clarity in the order in which the requirements at issue appear in the statute.

**B. LCRA complied with all applicable provisions of The Land Clearance For Redevelopment Authority Law, R.S.Mo. §§ 99.300-99.660.**

Ordinance No. 66499 incorporates the “Blighting Study and Plan” for the area prepared by LCRA and specifically finds that LCRA has made the “statements required to be made and submitted by Section 99.430.” (*See* Ordinance No. 66499, A14). These documents satisfy the requirements of Chapter 99 of the Revised Missouri Statutes and of Missouri’s Constitution that must be met before property can be taken by eminent domain.

**1. The Redevelopment Plan Submitted by LCRA and approved by the Board of Aldermen complies with all requirements of Section 99.430.1(4).**

Section 99.430.1(1), R.S.Mo., requires the governing body of the community in which a redevelopment project is located to approve a redevelopment plan, and imposes requirements on such plans. The LRCA redevelopment plan approved in Ordinance No. 66499 meets all of these requirements. The redevelopment plan must include:

- (a) The boundaries of the land clearance or urban renewal project area, with a map showing the existing uses and condition of the real property therein;
- (b) A land use plan showing proposed uses of the area;
- (c) Information showing the standards of population densities, land coverage and building intensities in the area after redevelopment or urban renewal;
- (d) A statement of the proposed changes, if any, in zoning ordinances or maps, street layouts, street levels or grades, building codes and ordinances;
- (e) A statement as to the kind and number of additional public facilities or utilities which will be required in the area after redevelopment or urban renewal; and
- (f) A schedule indicating the estimated length of time needed for completion of each phase of the plan.

R.S.Mo. § 99.430.1(4).

Relators contend that Ordinance No. 66499 does not contain a sufficient land use plan, as required by Section 99.430.1(4)(b) (Relators' Brief at 39-40). The land use plan is attached to the Plan as Exhibit C. (*See* Ordinance No. 66499, A27). The land use plan shows the redevelopment area and states that the properties within the redevelopment area will be converted to Commercial/Residential/Office use. This contrasts with the current land use of the area, shown in Exhibit B to the Plan, which shows that the area is

currently used as Residential/Institutional/Commercial/Industrial property, and that it is only Partially Occupied. (*See* Ordinance No. 66499, A26).

Although Relators might desire a more detailed land use plan, § 99.430.1(4) does not require the information Relators desire. “The statutory requirements...should not be read as requiring that the council be informed of the precise placement of every brick before the duly appointed authority is even allowed to commence proceedings to acquire the property.” *Tierney*, 742 S.W.2d at 153 (interpreting Chapter 100 of the Revised Missouri Statutes, commonly known as the Planned Industrial Expansion Act, which contains similar requirements to Chapter 99). LCRA has shown that the proposed land usages for the Redevelopment area are commercial, residential and office uses. This meets section 99.430.1(4)’s requirement.

Relators also contend that the Plan does not contain Section 99.430.1(4)(f)’s “schedule indicating the length of time needed for completion of each phase of the project.” (Relators’ Brief at 43-44). Section C of the Plan states: “The implementation of this Plan shall take place in a single phase initiated within approximately (1) year of approval of this plan by ordinance and completed within approximately two (2) years of approval of this Plan by Ordinance. The LCRA may alter the above schedule as economic conditions warrant.” (*See* Ordinance No. 66499, A22). The Plan thus contains the required schedule.

While Relators complain that the redevelopment has not met the schedule, the General Assembly has not imposed a requirement that LCRA and the redeveloper adhere to the schedule set forth in the Plan. Section 99.430.1(4) only requires an *estimated*

schedule, which indicates that the legislature contemplated that scheduling changes might be necessary. It logically follows that Ordinance No. 66499 specifically allows the schedule to be altered by LCRA “as economic conditions warrant.” (*See* Ordinance No. 66499, A22). In the instant situation, “economic conditions” such as the inability to purchase Relators’ property at an agreed-upon price, along with expensive eminent domain litigation, have delayed the anticipated commencement of redevelopment. This does not mean that the Plan is devoid of the required schedule.

**2. The Plan meets Section 99.430.1(7)’s requirements concerning financing.**

Relators further contend that LCRA has failed to comply with the financial requirements of Section 99.430.1(7) (Relators’ Brief at 41-42). In addition to the requirements of Section 99.430.1(4), the redevelopment plan proposed by a land clearance for redevelopment authority seeking to take property through eminent domain must include:

a statement of the proposed method and estimated cost of the acquisition and preparation for redevelopment or urban renewal of the land clearance or urban renewal project area and the estimated proceeds or revenues from its disposal to redevelopers; a statement of the proposed method of financing the project; a statement of a feasible method proposed for the relocation of families to be displaced from the land clearance or urban renewal project area; and a schedule indicating the estimated length of time needed for completion of each phase of the plan.

R.S.Mo. § 99.430.1(7).

The financing requirements of subsection (7) are satisfied by Section D of the Plan. Section D-1 of the Plan provides that “All costs associated with the development of the Area will be borne by the Redeveloper.” (*See* Ordinance No. 66499, A22). Section D-3 of the Plan states that LCRA may sell any property that it acquires to a Redeveloper “at not less than its fair value.” (*Id.*) These two statements necessarily imply that LCRA will not incur any acquisition or preparation costs, and that any proceeds or revenue that LCRA receives from the project will equal or exceed the fair value of the property acquired. Additionally, the project will be financed by the Redeveloper.

Significantly, Ordinance No. 66499 finds that “the proposed financing plan for the Area is feasible.” (*See* Ordinance 66499, A15). As with the determination of blight, the decision of the Board of Aldermen that the financing plan is sufficient is a legislative determination that is entitled to deference. *State ex rel. Devanssay*, 622 S.W.2d at 327. If the determination of the legislative body is even fairly debatable, this Court cannot find Ordinance No. 66499 arbitrary. *Id.*

Relators attempt to read into the language of Section 99.430.1(7) a requirement that the Plan contain concrete details regarding financing. This is not required by Chapter 99. The statute allows LCRA to submit a redevelopment plan prior to, or concurrently with, appointing a redeveloper for the proposed redevelopment area. R.S.Mo. § 99.430. Here, LCRA submitted its Plan to the Board of Aldermen on September 21, 2004. (*See* Exhibit 3 to Relators’ Petition for Writ of Prohibition, p. 11 of

Relators' Exhibits). LCRA appointed Ice House as the Redeveloper for the Redevelopment Area on the same day. (*See* Resolution No. 04-LCRA-7748, A29-A31). It would have been impossible for LCRA to prepare a Plan including concrete financing details when the Plan was prepared concurrently with the search for a redeveloper. For this reason, the statute's reference to "method of financing" is not synonymous with "financing." *Id.* (interpreting an ordinance enacted pursuant to Chapter 353 of the Revised Missouri Statutes containing similar language to Chapter 99). The "method of financing" in this case is that the Redeveloper will finance the project.

In addition, LCRA Resolution No. 04-LCRA-7748, which was passed on the same day the Plan was submitted to the Board of Aldermen, provides that "[s]ources of funding include Redeveloper equity, bank financing and use of Historic Tax Credits." (*See* Resolution No. 04-LCRA-7748, A29-A31). The Board of Aldermen and this Court may consider additional materials in determining whether the requirements of Section 99.430.1(7) have been met. *State ex rel. Devanssay*, 622 S.W.2d at 327. Between the Plan and LCRA Resolution No. 04-LCRA-7748, the financing requirements of subsection (7) have been satisfied.

**3. LCRA has complied with R.S.Mo. § 99.450(2).**

Relators contend that LCRA failed to consider the financial and legal abilities of the Developer, as required by R.S.Mo. § 99.450(2). (Relators' Brief at 38). Resolution No. 04-LCRA-7748 establishes that LCRA considered the financial and legal abilities of Ice House to carry out its redevelopment proposal, as set forth in Section 99.450(2). The Resolution cites the sources of funding that Ice House would use, including its equity,

bank financing and Historic Tax Credits. (*See* Resolution No. 04-LCRA-7748, A29-A31). The Resolution further states that Ice House will use Brownfield Credits and TIF financing for environmental clean-up and land acquisition. (*See* Resolution No. 04-LCRA-7748, A29-A31).

Neither Section 99.430 nor Section 99.450 requires LCRA to determine that a redeveloper has actually obtained bank loans or received approval for the use of tax credits. This is common sense. Until a Redevelopment Plan is actually approved by the Board of Aldermen, no reputable financial institution would be willing to advance the funds to finance the project. Missouri courts have recognized that in the early stages of a redevelopment, delineating the precise sources of financing would be impossible. *State ex rel. Devanssay*, 622 S.W.2d at 327. LCRA and the Board of Aldermen are presumed to have expertise in knowing whether government subsidies such as tax credits would be available to help fund a project. *Id.* at 328. Therefore, bank financing, tax credits and developer equity are sufficient “methods of financing” to provide a sufficient financing plan pursuant to Sections 99.430 and 99.450. *See Id.*

**4. Completing redevelopment in phases complies with Ordinance No. 66499.**

Finally, Relators argue that LCRA did not comply with Ordinance No. 66499 because the Redevelopment Agreement ultimately entered into by and between Ice House and LCRA allows the blighted area to be redeveloped in phases, while the Ordinance contemplates a single phase of redevelopment. (Relators’ Brief at 45-46). Relators did

not raise this issue in any pleading or argument before the court below, and they should not be allowed to raise it now.

Review of Ordinance No. 66499 shows that Relators' argument is meritless. Ordinance No. 66499 incorporates LCRA's Plan for the redevelopment area. Section C of the Plan sets forth the Schedule of Development. Section C reads as follows:

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.

The LCRA may alter the above schedule as economic conditions warrant.

(See Ordinance No. 66499, A22). Section C of the Plan is the only section of Ordinance No. 66499 that states that the Plan originally contemplated implementation in a single phase.

Section C of the Plan establishes that LCRA could alter the schedule of development, including whether the plan was to be implemented in one phase or multiple phases, without subsequent approval by the Board of Aldermen. A change from a single-phase development to a multi-phase development does not indicate that the Board of Aldermen was defrauded into passing Ordinance No. 66499.

The conclusory allegations of fraud made at various places in Point III of Relators' Brief add nothing to Relators' argument that LCRA did not comply with Missouri law in attempting to take Relators' property by eminent domain. Respondent has dealt with

these allegations extensively in Points II and IV of this Brief, and will not further address them here. LCRA has satisfied the requirements of Chapter 99.

**IV. RESPONDENT IS ENTITLED TO AN ORDER PERMITTING HER TO PROCEED ON LCRA'S CONDEMNATION PETITION BECAUSE RESPONDENT ACTED WITHIN HER DISCRETION IN QUASHING THE SUBPOENAS SERVED BY RELATORS. [RESPONDS TO RELATORS' POINT IV].**

**A. Standard of Review.**

It is within the trial court's discretion to determine whether proffered evidence is relevant and therefore admissible. *Burrows v. Union Pacific R. Co.*, 218 S.W.3d 527, 534 (Mo. App. E.D. 2007). Questions regarding the admissibility of evidence fall within the court's discretion and cannot be overturned absent an abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. banc 2000). The party seeking to overturn a trial court's evidentiary ruling must show that the trial court's ruling "is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Id.* at 604, quoting *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991).

**B. Respondent did not abuse her discretion in quashing the trial subpoenas served by Relators.**

In the Petition for Writ of Prohibition, Relators allege that Respondent improperly prohibited them from presenting evidence in support of their claims of fraud, collusion and bad faith. Specifically, Relators allege that they were denied the ability to put on the

testimony of certain witnesses, who would have testified “to the harassment campaign waged by Disper and Young to force Henderson from her property.” (*See* Relators’ Brief, p. 48).

Prior to the condemnation hearing, Respondent ruled that certain of the subpoenas propounded by Relators were served for improper discovery purposes. (*See* Transcript of Condemnation Hearing, p. 22, lns. 14-23, A127). At the condemnation hearing, Respondent ruled that the witnesses called by Relators had “nothing to do with [the condemnation] hearing and were therefore irrelevant. (*See* Transcript of Condemnation Hearing, p. 119, lns. 16-24; p. 120, ln. 25; p. 121, lns. 1, 10-11; p. 122, lns. 2-4, A151-A152).

At the outset of their Fourth Point Relied On, Relators refer to an order of Respondent denying their motion for prehearing discovery. (Relators’ Brief at 47). Review of that order is not before the Court; Relators do not assign it as a reason for granting the writ in any of their four points relied on.

In any event, the pretrial order denying discovery was proper. The two-step process of a Missouri condemnation action does not contemplate extensive litigation at the first stage of the proceedings; such discovery would allow landowners to delay the commencement of the project for months or years. *State ex rel. Missouri Highway and Transportation Commission v. Bush*, 911 S.W.2d 690, 691 (Mo. App. E.D. 1995). Therefore, discovery is not allowed during the initial phase of a condemnation action unless a landowner can “allege and prove ... fraud, bad faith or an arbitrary and unwarranted abuse of discretion.” *See State ex rel. Rantz v. Sweeney*, 901 S.W.2d 289

(Mo. App. S.D. 1995). Conclusory allegations that do not allege facts showing fraud or bad faith are insufficient to justify discovery in the first stage of a condemnation proceeding. *State ex rel. Missouri Highway and Transportation Commission v. Bush*, 911 S.W.2d at 692. The court should not allow a “fishing expedition to see if some possible attack on ... the condemnation can be found.” *Id.* As shown in Section II above, Relators’ allegations of fraud were conclusory; even if true, they would not establish fraud of the kind that would vitiate a City ordinance. They afforded no basis for making an exception to the general rule prohibiting discovery prior to a condemnation hearing.

Relators’ Fourth Point Relied On addresses, not the pretrial discovery order, but the quashing of certain trial subpoenas issued at the instance of Relators. Respondent’s action in quashing the subpoenas at issue was proper for a number of reasons.

**1. The evidence Relators sought to offer from the witnesses in question was irrelevant and therefore inadmissible.**

The testimony Relators sought to elicit from the subpoenaed witnesses could not have established Relators’ claims of fraud, collusion and bad faith. Evidence that, as a matter of logic, does not tend to prove the fact it is offered to prove is not relevant. *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981), *cert. denied*, 454 U.S. 933 (1981). Where offered evidence is of little to no probative value, it is proper for the trial court to exclude it. *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 104 (Mo. banc 1985).

Respondent properly excluded the evidence offered by Relators because the evidence was not probative of Relators' allegations of fraud, bad faith and collusion. Relators state that their witnesses would have testified "to the harassment campaign waged by Disper and Young to force Henderson from her property." (*See* Relators' Brief, p. 48). Relators conclusorily state that the witnesses would have established that Ordinance No. 66499 was procured through fraud, bad faith, or collusion, yet *no* pleading, offer of proof or document submitted to this Court alleges any fact that, if proved true, would show that the Board of Aldermen was defrauded into passing Ordinance No. 66499.

Relators made offers of proof at the condemnation hearing about certain of the subpoenaed witnesses. In regard to Jonathan Dalton, Relators stated that Mr. Dalton would have testified that he stated "that if Opal Henderson did not sell her property to Disper, Mr. Disper and his partner, Mr. Schmitt ... would simply take the property by eminent domain." (*See* Transcript of Condemnation Hearing, p.32, lns. 16-25, A129). Relators asserted that Mr. Dalton would further testify that he represented Mark Disper, Ice House and LCRA, and that he is a member of Lewis, Rice & Fingersh. (*See* Transcript of Condemnation Hearing, p. 33, lns. 3-22, A130). Finally, Mr. Dalton was expected to testify that he attempted to encourage LCRA and the Board of Aldermen to pass ordinances allowing Ms. Henderson's property to be taken by eminent domain. (*See* Transcript of Condemnation Hearing, p. 34, lns. 7-18, A131).

None of these allegations, if Mr. Dalton had testified, would have established any element of fraud. The Board of Aldermen is "encouraged" or "influenced" to adopt

many ordinances by City officials and entities and private individuals everyday. There is no prohibition against lobbying the Board of Aldermen. Relators' allegations are lacking any element of impropriety. Without any specifically alleged impropriety, Respondent was not required to allow Relators to present Mr. Dalton's testimony. *See* Mo.R.Civ.P. 55.15 ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

Relators offered to establish through another of the subpoenaed witnesses, Mark Disper<sup>9</sup>, the efforts that Mr. Disper made to have Opal Henderson removed from her property, including asking the Metropolitan Sewer District and a City of St. Louis police officer to assist him in removing Henderson from the property. (*See* Transcript of Condemnation Hearing, p. 118, lns. 9-18, A151). Relators also intended to establish that Mr. Disper reported that Ms. Henderson was in violation of the law to the Metropolitan Sewer District, the Department of Natural Resources, and the St. Louis Police Department, and that such reports were bogus. (*See* Transcript of Condemnation Hearing, p. 118, lns. 18-21, A151).

Assuming for purposes of this Brief that the purported "facts" stated above were true, not one of the allegations is even related to the Board of Aldermen or Ordinance No. 66499. Though Mr. Disper may have wanted Ms. Henderson removed from her property,

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<sup>9</sup> Despite Relators' contention, Mr. Disper was never served with Relators' subpoena.

none of the facts Relators expected him to testify about establish that he was somehow able to deceive the Board of Aldermen into passing Ordinance No. 66499. Respondent properly quashed Mr. Disper's subpoena.

Relators next asked to call Steve Serraco as a witness, but they offered no facts regarding his testimony. (*See* Transcript of Condemnation Hearing, p. 119, lns. 16-20, A151). Relators then offered the testimony of Johnny Bruce, a building inspector for the City of St. Louis, who purportedly would have testified that his supervisors threatened to move him to an undesirable area unless he cited Opal Henderson for violation of City ordinances. (*See* Transcript of Condemnation Hearing, p. 120, lns. 6-24, A151). Even if true, Johnny Bruce's supervisors were not the Board of Aldermen. Whether the Building Inspector's office also wanted Ms. Henderson removed from her property was irrelevant to the condemnation hearing, because the Building Inspector has no power of eminent domain, and the Building Inspector is not alleged to have made any representations to the Board of Aldermen in securing the passage of Ordinance No. 66499. Respondent properly prevented Mr. Bruce from testifying.

Relators stated that Alverta Opperman of the Metropolitan Sewer District would have testified that she was asked to find a violation on Ms. Henderson's property at the request of Mark Disper. (*See* Transcript of Condemnation Hearing, p. 121, lns. 2-11, A152). Again, Relators have not alleged any fact in relation to Ms. Opperman's testimony that would show that Ordinance No. 66499 was fraudulently enacted. Similarly, Relators expected Jonathan Kennedy from the department of Natural Resources to testify that Alderwoman Young complained of gas and diesel fuels coming

into the sewers from Ms. Henderson's property. (*See* Transcript of Condemnation Hearing, p. 121, lns. 16-25, A152). Alderwoman Young's complaint to the Department of Natural Resources regarding a property located in her ward does not establish that she somehow deceived the remaining 22 aldermen who voted in favor of Ordinance No. 66499. (*See* Vote of the Board of Aldermen, A171). Respondent properly quashed the subpoena on Alverta Opperman.

As stated in Section II, above, none of the myriad of complaints Relators make about the alleged actions of Disper Schmitt, Jonathan Dalton, Alderwoman Phyllis Young, or LCRA have any effect on the validity of the Board of Aldermen's consideration and passage of Ordinance No. 66499. There is no allegation that the Board of Aldermen was bribed, lied to or cheated in any way. The issues Relators proposed to present at the condemnation hearing would have shown no effect on the Board of Aldermen's passage of Ordinance No. 66499 and were therefore irrelevant to the proceeding. Respondent acted within her discretion in quashing the subpoenas served by Relators.

**2. Respondent could not receive evidence relevant to the motive of the condemnation action.**

Respondent anticipates that Relators will argue that their evidence would have shown that Jonathan Dalton, Disper Schmitt, LCRA and Alderwoman Phyllis Young were all acting together because they wanted Relators' property. This information may have been relevant in the lawsuit Ms. Henderson filed against Disper Schmitt, but it was not relevant in the condemnation action. Relators' argument misses a fine point in

condemnation law, which Respondent discerned when she quashed Relators' subpoenas. Though trial courts can investigate the *purpose* of a condemnation action, the court cannot question the *motive* of such an action. *City of Wentzville v. Dodson*, 133 S.W.3d 543, 548 (Mo. App. E.D. 2004) (emphasis added). The motive of a condemnation action is "that which prompts the choice or moves the will thereby inciting or inducing action," *Id.*, quoting *City of Kirkwood v. Venable*, 173 S.W.2d 8, 12 (Mo. 1943), holding questioned on other grounds by *Bueche v. Kansas City*, 492 S.W.2d 835, 839 (Mo. banc 1973) and *City of St. Louis v. Butler Co.*, 219 S.W.2d 372, 374 (Mo. banc 1949). Even if all the witnesses had been allowed to testify and had testified as Relators anticipated, all of Relators' alleged evidence goes to motive: Alderwoman Phyllis Young, Jonathan Dalton, and Disper Schmitt wanted to get rid of Opal Henderson's salvage yard business, and they thus decided to attempt to take the property by eminent domain. Respondent was correct in denying Relators' attempts to put on testimony regarding the motive behind the condemnation action.

**3. The purpose of the condemnation action was conclusively established by the Board of Aldermen's finding of blight.**

Though courts have the power to investigate the *purpose* of a condemnation action, in this case, the public purpose of the action had been conclusively established by the Board of Aldermen's finding of blight. Once a legislative body finds an area to be blighted, the taking of any property included within the blighted area is authorized as a taking for a public use. *State, on Inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City*, 270 S.W.2d 44, 53 (Mo. banc 1954). As long as the primary

purpose of an act is public, the fact that private persons benefit from the act does not make the purpose private. *Schweig v. Maryland Plaza Redevelopment Corporation*, 676 S.W.2d 249, 254 (Mo. App. E.D. 1984). None of the testimony Relators state they would have elicited from witnesses would counter either LCRA's or the Board of Aldermen's determination that the property contained within the Redevelopment Area was blighted.

Relators have argued that the public purpose of the condemnation action--removing the blight--has been defeated because of LCRA's "spot-taking" of Relators' property. Relators' allegation of "spot-taking" not only mischaracterizes the action taken by LCRA in this matter as explained in Section I of this Brief, but it also demonstrates the reason that Missouri courts show such deference to legislative findings of blight. If each property owner were able to contest the public purpose of the condemnation action, "redevelopment plans for blighted areas would be hopelessly bogged down in a marsh of litigation that could prolong the acquisition of property in the area so long that the redevelopment plan could become useless." *State ex rel. U.S. Steel v. Koehr*, 811 S.W.2d at 389. Such a situation defeats the purpose of redeveloping blighted areas. *Id.*

Any purported fact either alleged in Relators' pleadings before the court below or offered as proof during the condemnation hearing tends to show the motive of the condemnation action, as the action's public purpose had already been conclusively established by the Board of Aldermen's determination of blight. Furthermore, even if all the allegations made by Relators were true, no allegation establishes any connection between the testimony of the proposed witnesses and the passage of Ordinance No. 66499. Respondent acted entirely within her discretion in denying Relators' requests to

put on testimony that could not establish fraud, bad faith or collusion. Respondent properly quashed the witness subpoenas issued by Relators.

**CONCLUSION**

For the reasons stated, the Preliminary Writ of Prohibition issued by this Court should be quashed, and the condemnation proceeding should be allowed to continue to a determination of value.

Respectfully Submitted,

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**RULE 84.06 CERTIFICATION AND CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing brief (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and contains 12,329 words.

The undersigned hereby certifies that the original and 10 copies of the foregoing Respondent's Brief and of Respondent's Appendix, along with a CD-ROM version of Respondent's Brief, were delivered to this Court for filing on May 29, 2007.

The undersigned hereby also certifies that two true and correct copies of the foregoing Respondent's Brief and of Respondent's Appendix, along with a CD-ROM version of Respondent's Brief were served via hand delivery on May 29, 2007, to:

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The undersigned hereby also certifies that two true and correct copies of the foregoing brief and of Respondent's Appendix, along with a CD-ROM version of Respondent's Brief were hand delivered on May 29, 2007 to:

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