

**IN THE  
MISSOURI SUPREME COURT**

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Supreme Court No. SC88487

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CENTENE PLAZA REDEVELOPMENT CORPORATION,

Respondent,

v.

MINT PROPERTIES, et al.,

Appellant.

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Circuit Court For The County Of St. Louis  
Honorable James R. Hartenbach

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Missouri Court Of Appeals, Eastern District  
App. Ct. No. ED89275  
Honorable Clifford H. Ahrens, Mary Kathryn Hoff, Nannette A. Baker

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**BRIEF OF AMICUS CURIAE CITY OF CLAYTON**

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## **INTRODUCTION**

On December 13, 2005 the Board of Aldermen of the City of Clayton enacted Ordinance No. 5911. The ordinance declared an area including appellants' properties blighted under Chapter 353 of the Revised Missouri Statutes, approved a redevelopment plan, and authorized respondent Centene Plaza Redevelopment Corporation to pursue necessary condemnation of the properties. On January 19, 2007 the St. Louis County Circuit Court issued a condemnation judgment for the properties, from which the appellants appealed.

The Missouri Court of Appeals, Eastern District, transferred the case to this Court on April 24, 2007. The Eastern District opinion (a) suggests that Section 523.261, RSMo. 2006 may have created a new standard of review for blighting cases, which may or may not operate retrospectively, and (b) construes Section 353.020(2) as requiring separate proof of two distinct concepts—economic as well as social liabilities—as a prerequisite to a legislative finding of blight. The Eastern District would hold that Ordinance No 5911 is void for the lack of any evidence supporting a finding of social liability.

The City disagrees with these conclusions, which call into question the legislative integrity of Ordinance No. 5911 and threaten this critically important redevelopment project. This brief addresses the City's interest in this matter.

## **STATEMENT OF INTEREST**

The City of Clayton has a stake in the present case which is distinct from and far broader than that of Centene Plaza Redevelopment Corporation or the Appellants. It is the City's responsibility to assess, define, and promote the interests and welfare of those who live and work in Clayton. Pursuant to its legislative authority, the City's Board of Aldermen determined, from the totality of available information, that redevelopment of the area in question through Chapter 353 of the Revised Statutes of Missouri would best serve, protect, and enhance the future of the City and its residents. Appellants challenge the City's legislative judgment, thereby placing into question the integrity of the City's Board of Aldermen and putting at risk the welfare and future of the Clayton community. The City of Clayton submits this brief as amicus curiae for the purpose of protecting the interests of the public it serves.

At its core, the matter before the Court is not the economic interests which may motivate the parties to the case. Rather, the crux of the matter is whether or not the Board of Alderman of the City of Clayton properly exercised its legislative discretion to advance the economic and societal interests of its constituency in recognizing the need for redevelopment of a critical area of the City. The City firmly believes it has lawfully utilized the authority and discretion vested in it by Chapter 353, and that this Court should affirm the City's judgment and that of the trial court.

The economic redevelopment project which this condemnation action enabled traces its roots to 1993 and the preparation and adoption of the Clayton Business Districts Master Plan.<sup>1</sup> That Master Plan predicted and accurately described both the reasons for and remedies to the problems which, then and now, beset Clayton's downtown business district:

... [T]he high quality-of-life enjoyed by [Clayton's] residents springs in large part from the strong historic economic base provided by its business districts, especially its Central Business District (CBD). The CBD provides well over half of the City's total revenues ... while consuming less than a third ... of its expenditures on public services and capital investments.

The disproportionate contribution of the CBD to the City's revenues has begun to decline and its retail dominance is no longer true. To continue to provide the quality services which have been Clayton's hallmark, particularly in public education, Clayton's residents must choose to either raise taxes, encourage the creation of additional revenue sources or shift their tax burdens. This Master Plan sets forth a series of recommendations aimed at stabilizing and

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<sup>1</sup> See excerpts from the Master Plan, attached as Appendix A. Exhibit 2. It is also worth noting that this Plan was co-authored by the development consulting firm, Development Strategies, headed by Appellants' witness Richard Ward.

improving Clayton's CBD in order to increase city revenues over time.

If the Clayton Business Districts are to remain competitive in the future, the City must adopt a much more proactive, intervention-oriented approach and a firm commitment to their development and management. The City must have a vision for the role, function and appearance of each of its four business districts...

App. A1 (Master Plan, p. 1).

The prognostications of the Master Plan became manifest in the City's Forsyth corridor. In recent years the City lost several retail businesses, most prominently Library Limited/Borders Books, the Shady Oak Theater and other once-successful retail shops. Annual retail sales in the redevelopment area declined from approximately ten million dollars to one million dollars. Exhibit 20 (PGAV Study), p. 20. The assessed value of the redevelopment area has not kept pace with surrounding properties. *Id.*, pp. 18-19. The area is burdened by physical deterioration, outmoded, improperly laid out and inapt for use in keeping with the intended and appropriate retail/office use, as evidenced by both economic measurements and vacancy data. *Id.*, pp. 7-14. What was once a vibrant and aesthetic streetscape and efficient revenue generator to support public services, has not only failed to keep pace with inflationary increases in the cost of public services, its contribution to the social and financial fabric of the community has withered markedly. *Id.*

Despite the Master Plan’s recommendations over a decade previously to:

- “adopt a much more proactive, intervention-oriented approach” to critical revitalization of its downtown, App. A1 (Master Plan, p. 1);
- “assist private development through property consolidation, property acquisition, public infrastructure, zoning incentives, or financial incentives,” App. A2 (Master Plan, p. 3);
- “[consider] eminent domain and tax abatement . . . as incentives for significant private reinvestment.” App. A3 (Master Plan, p. 31); and
- “consider the use of eminent domain provisions of ... redevelopment tools in those particular cases where good-faith attempts to assemble the required properties have proven futile” App. A4 (Master Plan, p. 95);

the City did not act rashly. Until this instance the City had forbore declaring any property in Clayton as blighted for redevelopment purposes — not once in its entire history — or utilizing any of the statutory economic redevelopment programs available to it.

Into this mix came the Centene Corporation, and the City’s opportunity to revitalize a critical area in demonstrable decline. Balancing the rights of property owners and their own responsibility to the City’s pressing needs, the members of the Board of Aldermen publicly investigated and considered the matter over the course of several months. In December of 2005 the Board enacted Ordinance No. 5911, which specifically articulated the Board’s finding that the area in question is “an economic and social liability” and “blighted” within the meaning of Chapter

353 and which approved a plan for the area's redevelopment. Exhibit 21 (Ord. 5911, Sec. 1.A, p. 2). Pursuant to that ordinance, Centene Plaza Redevelopment Corporation initiated the condemnation actions which have led to this appeal.

The City's interest in this case is two-fold. First is the integrity of its legislative process. The City believes that its Board of Aldermen acted responsibly, with full knowledge of the area's economic and social decline and the need for redevelopment, both to revitalize the existing site and to spur future development in the Forsyth Corridor. The Appellants' suggestion, and the Eastern District's apparent agreement, that courts may willfully second-guess the City's legislative determinations is troubling. Second is the project itself, which is now at risk. Not only does the opinion call into question the project's legality, it also generates delay and uncertainty, not only for Centene but for future Clayton developers who may need the economic tools made available to the City by the Missouri legislature.

Other municipalities use these tools at will, often in circumstances far less dire than those demonstrated here. Why should the benefits of their use be denied here, especially when they allow Clayton to entice a publicly-traded corporation to bring its money and its jobs,<sup>2</sup> its architecture and its vitality, to revitalize an

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<sup>2</sup> The Redevelopment Plan will result in hundreds of millions of dollars of new capital investment, and the Redevelopment Agreement ensures that Centene Corporation will provide a minimum of 959 jobs in the redevelopment area

existing urban center, rather than sending them to the greenfields of outlying areas? Without the use of Chapter 353 and other redevelopment tools, the urban core of cities in the St. Louis metropolitan area will wither and die.

To protect these interests the City desires to address two issues. First, the standard of judicial review, and specifically the traditional deference given by the judiciary to legislative decisions. While the Appellants, and seemingly the Court of Appeals, believe Section 523.261, RSMo. 2006, has altered that standard, the statute does nothing more than codify the same standard used by Missouri courts since 1954.

Second, the City's redevelopment is threatened by the Appellants' assertion, and the Court of Appeals' proffered assessment, that insufficient evidence supports the City's findings of "economic and social liabilities" in the redevelopment area. The City believes that the circumstances pertaining here fully satisfy any reasonable construction of the statutory prerequisites for acquisition and redevelopment of the subject properties through Chapter 353 condemnation.

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(requiring proportional loss of tax abatement for failure to meet minimum employment requirements). Exhibit 23 (Redevelopment Agreement, Sec. 4.02(b)), p. 12-13.

## ARGUMENT

**I. SECTION 523.261, RSMO. 2006 DID NOT CREATE A NEW “SUBSTANTIAL EVIDENCE” STANDARD, IN THAT (A) MISSOURI COURTS HAVE ALWAYS HELD THAT BLIGHTING DETERMINATIONS MAY NOT BE ARBITRARY, AND (B) AN ARBITRARY DETERMINATION IS ONE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The appellants claim that House Bill 1944, more specifically that portion of the bill now codified as Section 523.261 RSMo. 2006, created a new standard of review by declaring that blighting determinations “shall not be arbitrary or capricious or induced by fraud, collusion, or bad faith” and “shall be supported by substantial evidence.” The first clause is the same standard by which blighting determinations have always been judged by Missouri courts. The second, according to the appellants, creates a new, “more landowner-friendly” standard of review that requires enhanced judicial scrutiny. The appellants are wrong, as this “new” statutory standard is part and parcel of the “old” judicial standard.

Ever since 1954, when the Court considered the constitutionality of the Land Clearance for Redevelopment Law, this Court has applied to blighting determinations a standard of review that defers to the local legislative body. State on inf. Dalton v. Land Clearance For Redevelopment Authority Of Kansas City, 270 S.W.2d 44 (Mo. banc 1954). The genesis of this deference is the separation of

powers doctrine. As noted in Kaskel v. Impellitteri, 115 N.E.2d 659 (N.Y. 1953), a blighting determination is one authorized by the state legislature to be made by the local governing body; it is “an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts.” Kaskel, 115 N.E.2d at 662, as quoted in Dalton, 270 S.W.2d at 51. Because of deference to the legislative function, this Court declared in Dalton that a blighting determination will be accepted by the judiciary “unless it further appears upon allegation and clear proof that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith.” Dalton, 270 S.W.2d at 52.

In Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corporation, 518 S.W.2d 11 (Mo. 1974), the Court reaffirmed this standard with regard to Chapter 353 blighting determinations and noted that in the absence of fraud, collusion, or bad faith, judicial review is limited to whether a blighting determination is arbitrary or unreasonable. Parking Systems, 518 S.W.2d at 16. The Court acknowledged further that this question was a factual one and that the challenger bore the burden of proof: “The issue of reasonableness or arbitrariness must turn upon the particular facts of each case, and the appellants, having challenged the validity of the ordinance as to them, have the burden of proving unreasonableness.” *Id.* (Citations omitted.) In considering the fact question the Court cautioned that the judiciary must be mindful of deference to the legislative body:

[I]n determining whether the appellants have met their burden, it

must be kept in mind that the courts cannot interfere with a discretionary exercise of judgment in determining a condition of blight in a given area any more than they can interfere with a discretionary exercise of judgment in zoning property . . . “Unless it should appear that the conclusion of the City’s legislative body . . . is clearly arbitrary and unreasonable, we cannot substitute our opinion for that of the City . . . . If the City’s action . . . is reasonably doubtful or even fairly debatable” we cannot substitute our opinion for that of the City Council.

*Id.* (Citations omitted.)

In Allright Missouri, Inc. v. Civic Plaza Redevelopment Corporation, 538 S.W.2d 320 (Mo. banc 1976), the Court reinforced the heavy burden faced by an opponent of a blighting determination. In discussing the evidence supporting a challenged blighting determination (under Chapter 353), the Court made clear that a challenger must submit proof so overwhelming that no other reasonable conclusion is possible:

The evidence on which the City’s legislative body made its determination did not compel a conclusion that the area was blighted . . . . Nor did it compel a conclusion that it was not. There was room for reasonable differences of opinion and fair debate on this question. From the evidence before it, this legislative body reasonably could have determined, as it did, that the area was

‘blighted’ . . . . Hence, it may not be said that the adoption of the ordinance approving [the developer’s] application amounted to an arbitrary exercise of legislative power. Allright failed to meet its burden of proof.

Allright, 538 S.W.2d at 324.

These cases hold that a blighting decision, if not supported by substantial evidence, is arbitrary, and the standard has been used consistently by Missouri courts. For example, in JG St. Louis West Limited Liability Company v. City of Des Peres, 41 S.W.3d 513 (Mo. App. 2001), the appellants challenged trial court approval of the city’s decision to blight a successful regional shopping mall under Missouri’s tax increment financing statute. The Eastern District noted that the blighting determination was legislative in nature, consequently the appellants bore the burden of proving that the decision was arbitrary or induced by fraud, collusion, or bad faith. JG St. Louis West, 41 S.W.3d at 517. The appellants limited their attack to whether the city’s finding of blighting was arbitrary, yet the court repeatedly rejected the claim, finding that substantial evidence supported the city’s action:

Plaintiffs have again failed to meet their burden of proving that Board’s decision in approving the use of TIF was arbitrary. We find Board’s decision fairly debatable in that there was substantial evidence of a predominance of blighting factors establishing a causal connection to the classification of shopping mall as an economic

liability.

JG St. Louis West, 41 S.W.3d at 519.<sup>3</sup>

In the face of this well-established common law standard, the appellants argue that by adopting Section 523.261, the legislature added on a new “substantial evidence” standard, but that standard has existed all along.

The point plainly is lost on the appellants, as they are unable to articulate how their “new” standard has any effect on the judiciary’s consideration of the evidence submitted in this case. The appellants seem to suggest that Section

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<sup>3</sup> Other Missouri cases also recognize that both legislative and administrative determinations are arbitrary if not supported by substantial evidence. See, e.g., City of Bridgeton v. Missouri-American Water Co., Slip Op. SC87744, p. 9 (Mo. banc April 17, 2007)(legislative declaration of public purpose of road reconstruction); City of St. Peters v. Ronald a. Winterhof Living Trust, 117 S.W.3d 698 (Mo. App. 2003)(municipal annexation); Summit Ridge Development Co. v. City of Independence, 821 S.W.2d 516 (Mo. App. 1991)(rezoning denial); HHC Medical Group, P.C. v. City of Creve Coeur Board of Adjustment, 99 S.W.3d 68 (Mo. App. 2003)(sign permit denial); Hundley v. Wenzel, 59 S.W.3d 1 (Mo. App. 2001)(denial of grievance seeking insurance benefits); State ex rel. C.C.G. Management Corp. v. City of Overland, 624 S.W.2d 50 (Mo. App. 1981)(denial of a conditional use permit); Cox v. City of Columbia, 764 S.W.2d 501 (Mo. App. 1989)(city manager’s firing of a police officer).

523.261 establishes a new standard of *proof*, and that courts should now weigh the evidence to determine whether a preponderance supports the blighting determination. In doing so the appellants misconstrue “substantial evidence,” which means evidence having “probative force upon the issues, i.e., evidence favoring facts which are such that reasonable men may differ as to whether it establishes them.” Collins v. Division of Welfare, 270 S.W.2d 817, 820 (Mo. banc 1954).

As defined in Collins, a “substantial evidence” standard is coextensive with the “fairly debatable” standard identified in the Parking Systems case, which recognizes the judiciary’s traditional deference to legislative discretion. While reasonable people can differ on their conclusions from the evidence, the judiciary recognizes that the legislature’s view takes precedence. A substantial evidence review standard simply does not permit a court to weigh the evidence to determine who wins and who loses a factual dispute.

The case of Fujita v. Jeffries, 714 S.W.2d 202 (Mo. App. 1986), further illustrates the difference between a substantial evidence/fairly debatable review standard and the “preponderance of the evidence” standard which appellants seek to impose. The former is evidence which is competent and probative:

Substantial evidence is that which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inferences which can be drawn from it, and deferring all issues of weight and credibility, to the fact finder.

Fujita, 714 S.W.2d at 206. The latter is the quantum of evidence needed to establish the validity of a conclusion :

Preponderance of the evidence is that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not . . . .

*Id.* As noted by the Eastern District, “[b]oth parties to a contested matter can present substantial evidence, however only one can meet the preponderance of the evidence standard.” *Id.*

By requiring that a blighting determination be supported by substantial evidence, Section 523.261 does not establish a “preponderance of the evidence” standard or any other new standard. Rather it codifies the traditional judicial standard for determining whether a blighting determination is arbitrary. Whether the traditional judicial standard or the “new” statutory standard is used, if “reasonable men may differ” as to whether blight exists, the courts will defer to the legislature. Allright, 538 S.W.2d at 324; Collins, 270 S.W.2d at 820. Any other conclusion would offend the fundamental constitutional principle of separation of powers, which mandates legislative deference.<sup>4</sup>

In sum, Section 532.261 effected no substantive change to this Court’s traditional standard of review, which the trial court correctly applied.

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<sup>4</sup> Mo. Const. Art. II, Sec. 1; see Dalton, 270 S.W.2d at 51.

**II. THE CITY’S BLIGHTING DETERMINATION WAS SUPPORTED BY EVIDENCE OF ECONOMIC AND SOCIAL LIABILITIES. THE SUGGESTION THAT THE BLIGHTING DETERMINATION MUST BE SUPPORTED BY SEPARATE AND DISTINCT EVIDENCE OF “ECONOMIC LIABILITIES” AND “SOCIAL LIABILITIES,” ESPECIALLY AS DEFINED BY THE EASTERN DISTRICT, DESTROYS THE PURPOSE AND UTILITY OF CHAPTER 353.**

The Missouri Legislature first enacted the Urban Redevelopment Corporation Law, §§ 353.010 *et seq.*, R.S.Mo., in 1943. Since that time Missouri municipalities have sanctioned hundreds, if not thousands, of redevelopment projects to be carried out by private redevelopment corporations. If the Court of Appeals’ approach prevails, for the first time in 64 years a Missouri appellate court would reject a legislative determination of blight and declare (a) that the law requires a discrete quantum and character of evidence to sustain divergent findings of economic and social liability, (b) that proof of “social liabilities” requires evidence of existing adverse impacts to the health, safety, and welfare of the public, and (c) that there was no such proof in the trial below. These conclusions are erroneous.

**A. The City’s Blighting Determination Was Sound.**

As a threshold matter, the City concurs with respondent Centene’s thorough exposition of the evidence supporting the Board of Aldermen’s finding of blight, and the City will not belabor the issue here. It will suffice to note that the trial

court had before it evidence of aged buildings, the facilities and design of which are obsolete, impractical, and unlikely to encourage future commercial use; vacancies; the absence of significant retail activity; very few jobs; no social interaction; declining sales tax revenues; and real estate tax revenues that had not increased in a manner commensurate with the location and potential of the blighted area. The evidence also established that redevelopment of the area would lead to more than 800 new permanent jobs, new shops with foot traffic and vibrant street life, increased tax revenues, and new, aesthetically-improved structures. This evidence amply supports the City’s blighting determination.

However, in that the appellants and the Eastern District have suggested that Chapter 353’s definition of “blighted area” must be dissected into discrete components, and that each such component must be supported by separate and independent proofs, the City is compelled to point out that such an interpretation destroys the purpose and the utility of the legislation.

**B. Chapter 353 Does Not Require Separate, Discrete Evidence  
To Support A Finding Of “Social Liability.”**

Blight is not a legal construct; it is a socio-economic reality, the existence of which is best left to local legislators to determine and fight. As demonstrated in Point I, Missouri courts recognize this truth by deferring to a local government’s blighting determination. Dalton, *supra*. This Court has acknowledged that the reality of blight cannot be confined by statutory terms. In the Parking Systems case, the Court affirmed the city’s blighting determination under Chapter 353,

based on structural deficiencies only and without any discussion or requirement of “economic and social liabilities”:

In their subpoint (e) appellants contend that evidence of ‘structural deficiencies’ alone did not constitute evidence of ‘blighting environmental factors.’ We do not agree. From that evidence the City Council reasonably could conclude that there existed ‘blighting environmental factors,’ assuming th[at] such a finding was a specific requirement.

Parking Systems, 518 S.W.2d at 17.

This Court has also acknowledged economic underutilization as a valid blighting consideration, though that particular concept is not referenced in any redevelopment statute. See Tierney v. Planned Industrial Expansion Authority of Kansas City, 742 S.W.2d 146, 151 (Mo. banc 1988)(“The concept of urban redevelopment has gone far beyond ‘slum clearance,’ and the concept of economic underutilization is a valid one.”). See Crestwood Commons Redevelopment Corporation v. 66 Drive-In, Inc., 812 S.W.2d 903, 910 (Mo. App. 1991)(quoting Tierney in the context of a Chapter 353 redevelopment.)

Despite this Court’s expansive view of a city’s blighting determination, the Eastern District dissected the phrase “economic and social liabilities.” The court acknowledged the substantial evidence of economic liability “because of the age, obsolescence, inadequate or outmoded design, and physical deterioration of some of the properties.” The court then went on to hold that this evidence could not also

support a finding of social liability. Slip Op. at 5.<sup>5</sup> This conclusion is arbitrary, and fails both in fact and theory.

If an area is an economic liability because of age, obsolescence, and physical deterioration, that area will not be conducive to use or enjoyment by anyone. People will not want to do business, shop, work, relax, or play in such an area. The conditions of the area will promote loitering, litter, and crime. Its property values will fall, and it will not produce any significant tax revenues. That blight will grow, as properties and people working and residing on its fringes become affected. Common sense and experience inform that an area which is an “economic liability,” implicitly, is also a “social liability.” These terms are not foreign to each other; rather they complement each other. Where one exists, the other is generally found as well.

This truth is further demonstrated when one considers the role of municipal governments in the context of the social fabric. For example, the quality of education is an undisputed barometer of social quality. Conditions which impede the provision of a quality education are ineluctably social, yet public school districts do not have jurisdiction or authority to initiate economic redevelopment activities to sustain or enhance their ability to provide quality education. They

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<sup>5</sup> “If evidence to support a finding of economic liability could also constitute evidence to support a finding of social liability, the plain language of section 353.020(2) would be defeated.” Slip Op. at 5.

necessarily rely on their governmental partners, especially cities such as Clayton, to manage the broader local environment in a way that enables school districts to accomplish their mission. That is why the Clayton School District took the extraordinary step of publicly supporting Ordinance No. 5911, thus endorsing the City's blighting determination. Exhibit 14.

Economic and social concerns are bound together in other ways. Physical deterioration and vacancies increase the likelihood of fire, vandalism, theft, and other criminal activities, which in turn increases the cost of keeping the public safe while lessening the public's sense of security, fostering unease and even fear among people who live or work nearby. Conversely, the eradication of economic liabilities permits more public spending on parks, public art, civic events, and recreational amenities. A city's ability to provide and enhance these social benefits are important elements in defining the character of a community and are much less likely to occur or be successful in areas that are obsolete, outmoded and not properly maintained.

To divorce economic from social liabilities in the context of a blighting determination not only defies reality, it leads to absurd results. In this case the Eastern District declared that evidence of social liability must necessarily be distinct from evidence of economic liability, and the court defined "social liability" by equating it with something "injurious to the public health, safety, morals and welfare," such as juvenile delinquency, infant mortality, crime, and disease. Slip Op. at 3-4. Yet if "social liability" is defined as suggested by the

Eastern District, i.e., a presently existing threat to the health, safety, and welfare of the public (such as juvenile delinquency, crime, fire risk, or transmission of disease), a city will be foreclosed from using Chapter 353 during the formative years of decay and will not be permitted to use the tool until an economically-blighted area deteriorates into a crime-infested, disease-ridden, fire trap.

To underscore how unrealistic appellants' and the Eastern District's "social" versus "economic" dichotomy is, try to realistically postulate a set of circumstances fostering juvenile delinquency, infant mortality, crime and disease or similarly threats to public health, safety and welfare which would not also constitute an economic liability. Perhaps a theoretical well-maintained private park or facility, located in a thriving and desirable area, which houses a flourishing trade in prostitution or illegal drugs while producing substantial tax revenue? Common sense and experience do not admit of such a hypothesis. Moreover, were such circumstances to exist, appellants' view of the statute would preclude a city from removing the social liability and rehabilitating the site until and unless the property owner also failed to pay taxes or repair and maintain the premises. The law simply does not support an analysis which leads to such absurd results.

### **C. The Statute Can Be Construed In The Disjunctive.**

The City reiterates that the evidence before the trial court amply supported the complementary concepts of "economic and social liabilities" but is compelled to point out that the Eastern District's deconstruction of this phrase is the least plausible interpretation that could be placed on Section 353.020(2). Indeed, it

would be more reasonable to construe the statute to require proof of economic *or* social liabilities. While courts generally construe the statutory use of “and” and “or” literally, they do not hesitate to interchange the meaning of these words when necessary to give effect to the intent of the legislature. 1A Sutherland Statutory Construction §21:14 (6<sup>th</sup> Ed.); 73 Am. Jur. 2d Statutes §156 (2<sup>nd</sup> Ed.).

Missouri courts have done so. In Ex parte Lockhart, 171 S.W.2d 660, 666-667 (Mo. App. 1943), this Court sanctioned the construction of the word “and” as “or” in an ordinance to give effect to the plain purpose of the St. Louis Board of Aldermen and to avoid an unreasonable result. See also Broillier v. Van Alstine, 163 S.W.2d 109, 114-116 (Mo. App. 1942)(workers’ compensation act, providing for benefits to “cure and relieve” from the effects of injury, to be read in the disjunctive), reversed on other grounds in Crall v. Hockman, 460 S.W.2d 668 (Mo. banc 1970); City of St. Louis v. Consolidated Products Co., 185 S.W.2d 344, 346-347 (Mo. App. 1945)(the word “and” to be construed as “or” in ordinance regulating the use of steam boilers).<sup>6</sup>

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<sup>6</sup> Other courts have also recognized the need to substitute “and” for “or,” and vice versa, to serve the legislative purpose. See Ex parte Uniroyal Tire Company, 779 So. 2d 227, 234 (Ala. 2004); Duncan v. Wiseman Baking Company, 357 S.W.2d 694, 698-699 (Ky. 1962); Sale v. Johnson, 129 S.E.2d 465, 468 (N.C. 1963); Skutt v. Dillavou, 13 N.W.2d 322, 325 (Ia. 1944); Robson v. Cantwell, 141 S.E. 180, 184-185 (S.C. 1928).

In this case there is no sensible reason for the Eastern District to construe the phrase “economic and social liabilities” as establishing separate and distinct concepts that require separate and distinct proofs. As shown above, the two are inseparable. Even this Court’s previous opinions suggest as much. In the Parking Systems case the Court referenced Chapter 353’s conjunctive language, noting immediately thereafter that Kansas City had adopted “the same definition for blighted area,” but in fact the city’s ordinance required a finding that “the properties involved are *either* economic *or* social liabilities.” Parking Systems, 518 S.W.2d at 15. And in Tierney v. Planned Industrial Expansion Authority of Kansas City, 742 S.W.2d 146, 149 (Mo. banc 1988), the Court described the PIE’s statutory authority as including the acquisition of “blighted, insanitary *or* undeveloped” industrial areas, while the statute itself is phrased in the conjunctive. §100.310(15)(a), RSMo.

These cases demonstrate that what’s critical to the implementation of Missouri’s redevelopment statutes is their legislative intent, not an over-analyzed part of speech used to defeat the very purpose which it was intended to serve. The purpose of Chapter 353 is to provide a vehicle by which local governments may effect “the clearance, replanning, reconstruction or rehabilitation of any blighted area” and provide for “such industrial, commercial, residential or public structures as may be appropriate.” Section 353.020(8), RSMo. In light of this settled public policy, one is at a loss to divine any intelligent explanation as to why the Eastern

District interpreted Chapter 353 as requiring a finding of blight supported by separate and discrete evidence of “economic liabilities” *and* “social liabilities.”<sup>7</sup>

The Eastern District’s construction of Chapter 353’s definition of “blighted area” again leads to absurd results within the context of the state’s other redevelopment laws. According to the Eastern District, a city would be prohibited from using Chapter 353 to redevelop a dilapidated area without evidence of a discrete “social liability,” yet the same city would be allowed to condemn the exact same property and redevelop the exact same area using another redevelopment tool, such as tax increment financing. There is no rational explanation for such disparate application of these redevelopment statutes.

The term “social liabilities” cannot be divorced from “economic liabilities” and utilized independently in the context of Chapter 353’s definition of blight. Although the appellants and the Eastern District would do so, this would prohibit local governments from using Chapter 353 to arrest socio-economic decay; the

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<sup>7</sup> Appellants argue that Chapter 353 is the only redevelopment mechanism by which a private corporation can exercise condemnation authority, implying that private involvement somehow raises the evidentiary bar, see Appellants’ Substitute Brief at 35-36, but this Court has already rejected as inconsequential any distinction between public and private parties with regard to the goals to be accomplished by Missouri’s redevelopment laws. *Annbar, id.*; *Dalton*, 270 S.W.2d at 49-52.

statute could only be used on proof of evidence of existing injuries to the public health and safety, such as crime, disease, and infant mortality. The legislature did not intend such a restrictive, counter-productive result.

## CONCLUSION

The Clayton Board of Aldermen cannot be assumed to have been ignorant of, or to have ignored, basic social characteristics when considering this redevelopment. Nor can they be presumed to have forgotten the warnings of the City's Master Plan. The Board of Aldermen did not forget their constant duty to allocate available resources and prioritize the safety, cultural, and social services offered to Clayton's residents and businesses. Local legislators grapple with societal concerns on a daily basis. They don't need a consultant's report to appreciate that diminished pedestrian traffic, empty facilities where people can no longer get services or browse for goods, impediments to convenient parking, reduced employment, and physical deterioration promote a spiraling diminution in the pride, spirit and sense of worth of their community. Awareness of and sensitivity to these kinds of conditions is the *raison d'être* of their office and inherent in the process of governing.

These factors are at the heart of determining and forming the social environment of a city, and they were considered by the Board in determining that the conditions in this area constituted "economic and social liabilities." That legislative determination is presumed to be well-taken, and the appellants bear the burden to establish that it is arbitrary, i.e., not supported by substantial evidence, capricious, or induced by fraud, collusion or bad faith. Parking Systems, 518 S.W.2d at 16. They have not done so. The City's legislative determination must be upheld, and the judgment of the trial court must be affirmed.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies as counsel of record for respondent that respondent's brief includes all information required by Rule 55.03, that the brief complies with the limitations contained in Rule 84.06(b), that the word count for this brief is 6,799 per MS Office Word 2003 and that the diskette provided to the court and to the respondent has been scanned for viruses and is free of same.

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**APPENDIX**

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Appendix A

**CLAYTON BUSINESS DISTRICTS MASTER PLAN EXCERPTS**

**(EXHIBIT 2)**

Page 1:

“... the high quality-of-life enjoyed by [Clayton's] residents springs in large part from the strong historic economic base provided by its business districts, especially its Central Business District (CBD). The CBD provides well over half of the City's total revenues ... while consuming less than a third ... of its expenditures on public services and capital investments.”

“The disproportionate contribution of the CBD to the City's revenues has begun to decline and its retail dominance is no longer true. To continue to provide the quality services which have been Clayton's hallmark, particularly in public education, Clayton's residents must choose to either raise taxes, encourage the creation of additional revenue sources or shift their tax burdens. This Master Plan sets forth a series of recommendations aimed at stabilizing and improving Clayton's CBD in order to increase city revenues over time.”

“If the Clayton Business Districts are to remain competitive in the future, the City must adopt a much more proactive, intervention-oriented approach and a firm commitment to their development and management. The City must have a vision for the role, function and appearance of each of its four business districts [including the district containing the subject properties, the “Forsyth Corridor”].”

Page 2:

“FORSYTH CORRIDOR - Forsyth is envisioned as the spine of the downtown area extending the length of the Central Business District. With an improved pedestrian environment and a clear visual theme, Forsyth will become the city's ceremonial civic street and a prestigious corporate address, anchored with major open spaces and strengthened by key opportunities for new private investment.”

Page 3:

“For certain key sites in Clayton, redevelopment can serve a strategically important function for the community. A number of different tools or incentives are available to encourage redevelopment. Depending on the circumstances and the desired and necessary level of city intervention in the development process, Clayton could assist private development through property consolidation, property acquisition, public infrastructure, zoning incentives, or financial incentives.”

Page 22 (*recommending a strategy for enhancing office development*):

Clayton's strategy should be to create a special, active pedestrian CBD environment that is attractive to office workers, employers and property owners as well as to the City's residents. Quality-of-life is not a term limited to a residential context. It is equally important to all who spend a large part of their waking lives in an office environment as a means of putting groceries on the table. Employers and property owners recognize this fact and also recognize its impacts on rents, property values and vacancy rates.”

Page 24 (*recommending a strategy for handling parking and traffic*):

“*Public Parking*. Because of streetscape improvements proposed for Forsyth Boulevard and the accompanying development opportunities (shops, institutions and entertainment) provision for adequate convenient public parking will be essential. These parking reservoirs will need to be easily accessible and close to their destinations, both visually and physically (one block maximum - within 300-500 linear feet).”

Page 30 (*describing development obstacles along the Forsyth corridor*)

“Weak retail businesses are found at some locations along the corridor.”

Page 31 (*recommending "Public Actions" needed in the Forsyth corridor*):

“Increase ground floor retail (require for new and rehab development) and require visible activity at street level windows for non-retail (e.g. office uses).”

“Eminent domain and tax abatement should be considered as incentives for significant private reinvestment.”

Page 52 (*describing the desired future for the “action area” which includes the subject properties*):

“This area should remain as a concentration of high-density office uses, hotels, and accompanying public and private parking facilities in the future. The Forsyth frontage itself may ultimately be redeveloped for higher density uses. If this occurs, it is important that subsequent redevelopment incorporate pedestrian oriented street-level retail with the same development guidelines and design criteria as those recommended for the ... Forsyth Corridor.”

Page 53 (same “action area”, discussing redevelopment/land use change opportunities):

“Several older, three-story office buildings remain in this action area on the adjacent sites that could be consolidated for future higher-density development.”

The other future redevelopment opportunities lie along the Forsyth Blvd. extending from the Boatmen's Bank Tower to the Library Limited. Most of the structures in this location are one to three-story shallow retail buildings with surface parking access by the alley behind them. This sizable concentration of properties offers redevelopment possibilities with a considerable degree of flexibility including a consolidated parking facility, consistent design and shared amenities.”

Page 95 (discussing redevelopment mechanisms to implement the Plan):

“Assembling properties needed for private redevelopment can be a real challenge in an urban setting such as Clayton's CBD. Two methods for the city to assist with this as an inducement to redevelopment are available to Missouri communities. Missouri's Chapter 353 Urban Redevelopment Statute is the most well known ... . Clayton should consider the use of eminent domain provisions of ... redevelopment tools in those particular cases where good-faith attempts to assemble the required properties have proven futile and where the strategic value of the private investment is clear and in concert with City plans.

Page 97-98 (*discussing criteria for use of redevelopment tools*):

“... there are certainly cases in which a usual existing site conditions, property consolidation complications, or lack of adequate public infrastructure justify the use of one or more of these redevelopment tools to achieve important public policy objectives. The existence of such condition which should represent the first criterion for Clayton to consider using the redevelopment tools described previously.

The second criterion for using redevelopment incentives should be whether or not a proposed redevelopment project is consistent with the Master Plan and significantly contributes to the vision articulated in the Plan. More specifically, the City should limit its use of... Chapter 353 inducements to proposals that clearly contribute to ... the Forsyth Corridor.”