IN THE MISSOURI SUPREME COURT

NO. SC88487

CENTENE PLAZA REDEVELOPMENT CORPORATION,

Plaintiff-Respondent,

v.

MINT PROPERTIES, INC., et al.,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT FOR THE COUNTY OF ST. LOUIS

The Honorable James R. Hartenbach

SUBSTITUTE BRIEF OF APPELLANTS

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INTRODUCTION AND SUMMARY

The issue in this appeal is whether the concept of blight can be stretched to the point where a private corporation can condemn some of the most valuable real estate in the entire St. Louis area to pursue its own development project. The properties at issue in this appeal are located in the middle of one of Missouri's wealthiest communities. They are situated on Forsyth Boulevard in downtown Clayton, directly across the street from the Pierre Laclede Center. There is no question that these parcels are **not** blighted. Plaintiff/Respondent Centene Plaza Redevelopment Corporation ("Centene") nevertheless claims it can condemn them because they are in a redevelopment area declared blighted by Clayton. The majority of this "blighted area" consists of Centene's Library Limited property at Hanley Road and Forsyth Boulevard that Centene bought in 2004 for $12,250,000, or for $7.4 million an acre. According to testimony at the condemnation hearing, this is the highest price per square foot ever paid for real estate in St. Louis.

The finding of blight is not supported either legally or factually. First, the allegedly blighted area is not a "social liability" as required by § 353.020(2).[1] Plaintiff's own expert testified that he didn't "think there was anything there that could be characterized as a social liability." Indeed, the Blighting Study commissioned by Clayton and relied upon by it in passing the blighting ordinance at issue makes no finding of social liability. Additionally, there was no evidence, let alone substantial evidence, to

[1] All statutory citations herein will be to R.S.Mo. 2006 unless otherwise noted.

support a finding that the redevelopment area is an "economic liability" or that the conditions in the redevelopment area are "conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes," as required by § 353.020(2). In fact, the assessed values of the properties in this supposedly blighted area increased from 2000 to 2005 by 25%, the same increase as all commercial properties in Clayton during the same period and more than double the increase in the Consumer Price Index.[2] Most significantly, the increase in assessed value for this "blighted area" is more than double the rate of increase of the majority of the blocks around the redevelopment area.

Finally, even assuming the Library Limited property was blighted, the taking of Defendants' non-blighted properties is not "necessary" for the redevelopment of blighted property, as required by Missouri statutes. Several redevelopment plans for the allegedly blighted property had been pursued in the open market without utilizing Defendants' properties. Centene admitted that it planned to build its corporate headquarters on the Library Limited property and had no plans to utilize Defendants' properties until Clayton required Centene to expand the scope of its project to include those properties.

The apparent deference given to Clayton's blight findings by the trial court is misplaced.[3] In response to the United States Supreme Court's decision in *Kelo v. City of*

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[2] Equalized assessed value, determined by the St. Louis County Assessor's Office, is the basis for determining property taxes.

[3] The trial court actually made no independent findings, instead adopting verbatim the conclusory order submitted by Centene.

New London, Connecticut, 545 U.S. 469, 125 S. Ct. 2655 (2005), the Missouri General Assembly enacted legislation in 2006 to make certain that blight determinations, like the one at issue here, receive increased judicial scrutiny. Section 523.261 now mandates that there be substantial evidence to support the legislative findings. Centene clearly failed to establish the requisite substantial evidence to support the legislative action. Therefore, the ordinance granting Centene the power of eminent domain is void. Furthermore, Clayton's legislative determination of blight also fails the previous common law test (whether the findings were arbitrary or capricious, or induced by fraud, collusion or bad faith). *Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp.,* 518 S.W.2d 11, 15 (Mo. 1974).

JURISDICTIONAL STATEMENT

This case has been transferred to this Court by order of the Missouri Court of Appeals pursuant to Mo. R. Civ. P. 83.02 "because of the general interest and importance of the issues presented in this case concerning the applicable standard of review for a legislative determination of blight, and the consideration of social liability in the context of such a determination." The case was before the Missouri Court of Appeals as an interlocutory appeal pursuant to § 523.261 from a Judgment of Condemnation in St. Louis County Circuit Court, Twenty-First Judicial Circuit, entered on January 19, 2007.

STATEMENT OF FACTS

Centene, a private redevelopment corporation formed in 2005, filed three separate actions to condemn Defendants' properties in downtown Clayton. (L.F., 16, 23, 29; Pl. Ex. 20.) Centene is an affiliate of Centene Corporation, a company with annual revenues

in excess of $1 billion that provides programs and related services in connection with health care and managed care. (Pl. Ex. 30, p. 4-5.)

The three acquisition targets that are the subject of this appeal are located in the 7700 block of Forsyth Boulevard.[4] (Pl. Ex. 30, p. 3; Appendix Tabs E, F and G.) Centene plans to build two office towers at the corner of Hanley and Forsyth on property it currently owns and which is adjacent to the Forsyth Properties. (Pl. Ex. 30, p. 3.)

A. Downtown Clayton

Clayton is one of the wealthiest municipalities in the St. Louis metropolitan area and, indeed, the entire state. (Def. Ex. A.) It had an average housing value of $438,230 in 2004 and an average family household income of $180,887. (Def. Ex. A.) Clayton has the highest occupancy rate among the top office markets in the St. Louis area, and boasts 1,000,000 square feet of retail space. (Def. Ex. A.) Retail sales in 2004 totaled $265,370,768 and sales tax revenue for that year was $5,766,300. (Def. Ex. A.) Until now, Clayton had never declared any portion of the city to be blighted, and it has never offered public subsidies to developers. (Tr. 79.)

B. The Library Limited Property

Prior to closing in 2002, the building comprising the major portion of the allegedly blighted area was occupied by the Library Limited bookstore and later a Borders

[4] Two other properties along Forsyth Boulevard that are not in dispute in this proceeding were also condemned by Centene. The five properties are referred to collectively as the "Forsyth Properties."

Bookstore. (Pl. Ex. 12, p. 8.)[5] When Borders closed in 2002, the property was purchased by Summit Development Group, LLC ("Summit"), a developer eager to demolish the building and develop the site into a twin tower hotel/office and retail development. (Pl. Ex. 12, p. 8.) Summit entered into a contract to purchase the 1.66 acre site for $7,268,660 (or $4.4 million an acre) on January 16, 2003, and ultimately closed on the property on November 7, 2003. (Def. Exs. F-2, I-2.)

Clayton embraced the redevelopment proposal by Summit, and passed an ordinance approving Summit's development plan for a Planned Unit Development made up of a 19-story hotel and a 380,000 square foot office building to be built on the site. (Def. Ex. S-2, p. CEN 784.)

Almost immediately after Centene learned about Summit's plans for the Library Limited Property, it decided that it wanted to pursue its own redevelopment of the site in order to expand its corporate headquarters. (Tr. 244-246.) Centene's headquarters were (and are) located in an adjacent building at 7711 Carondelet Avenue. (Tr. 246.) Centene attempted to persuade Summit to abandon its development plans and sell the site to Centene. Although Summit initially refused these overtures, it finally relented after Centene made it an offer that included anticipated profits from the development. (Tr. 522.) Thereafter, in November 2004, Centene bought the Library Limited Property from Summit for an effective sale price of $12.25 million. (Tr. 531-536.) This represents a

[5] The Library Limited building is architecturally significant in its own right. It was designed by Harris Armstrong, a prominent St. Louis architect. (Tr. 348-49.)

one year increase of 70% in the sale price of the Library Limited site, property that Clayton would declare blighted one year later.

C. Centene's Original Plan

Centene purchased the Library Limited Property with absolutely no intention of using Defendants' properties in its development. (Tr. 266-267.) It intended to construct two mixed-use towers with approximately 500,000 square feet of office and 50,000 square feet of retail space. (Tr. 193, 196.) At Summit's suggestion, Centene decided to ask Clayton if it could buy or lease Clayton's parking garage located just west of Centene's headquarters ("City Garage"). (Tr. 266, 526.) According to Centene, it initially sought to acquire the City Garage for additional parking for its existing facility at 7711 Carondelet. (Tr. 266.)

In the latter part of 2004, Centene contacted Clayton officials about acquiring the City Garage. (Tr. 266-268.) Over the next four months, representatives of Centene and Clayton had a number of meetings regarding the City Garage. (Tr. 114.) Eventually, Clayton agreed to sell the garage to Centene for $4.2 million, about $1 million less than its appraised value. (Pl. Ex. 7-A, PEX 450.) Those who participated in these meetings testified that there was no discussion of expanding the scope of Centene's project to include any properties other than the Library Limited Property and the City Garage. (Tr. 137; 269.)

D. Clayton's Request for Proposals

In order to proceed with a sale of the City Garage to Centene, Clayton had to issue a Request for Proposals ("RFP"). (Tr. 117.) But instead of just including the City

Garage, Clayton's April 2005 RFP included the entire block bounded by Forsyth, Hanley, Bemiston, and Carondelet. Clayton issued the RFP for the entire block because it decided that it wanted to "leverage" the sale of the City Garage into a larger project. (Tr. 115-116; Pl. Ex. 10, p. 4.)[6] Centene said that it had no plans to expand the scope of its project until Clayton issued its RFP on April 22, 2005. (Tr. 269.)

E. Centene's Response to the RFP

One month after Clayton issued the RFP, Centene submitted a response. (Pl. Ex. 30.) Nobody else submitted one. (Tr. 38.) Centene outlined a project area that included the City Garage, the properties already owned by Centene (the Library Limited Property and its current headquarters at 7711 Carondelet) and, in order to have a geometrically-shaped development, the five properties fronting on Forsyth. (Pl. Ex. 30, p. 3; Tr. 191-192.)

Centene's response to the RFP asked Clayton to provide it with "exclusive development rights to the Forsyth Properties including the right of eminent domain." (Pl. Ex. 30, p. 13.) Although, the alleged purpose of Clayton in requiring a larger project was to provide additional retail space, Centene's response did not contain any commitment to provide retail space, and refers to the possibility of such retail space only in Phase 3, the last phase of the development. (Pl. Ex. 30, p. 12.)

F. Description of Properties Included in Centene's Response to the RFP

[6] A depiction of the entire RFP area is included in the Appendix at Tab F.

Defendants' properties are located in the heart of the downtown Clayton Business District, across the street from the Pierre Laclede Center.[7] (Tr. 6, Tr. 463.) The properties are well-maintained commercial and retail properties. (Tr. 468-472, 485-489, 552-556.) Defendants and their tenants have spent hundreds of thousands of dollars in renovating and maintaining the properties. (Def. Exs. J-1, O-1; Tr. 558.) The properties consist of:

(1) the Sheehan property (7716 and 7718 Forsyth), a 10,800 square-foot building that is home to realtor Edward L. Bakewell, Inc. and Dolan Realty Advisors, LLC (a real estate brokerage firm) (Def. Ex. S; Tr. 470; Appendix Tabs H, I);

(2) the Kohner/Forsyth Office Building (7730 Forsyth), a 30,000 square-foot fully-leased building that includes the national headquarters of Kohner Properties (a multi-family housing developer) and Old Republic Title Company (Tr. 552-555; Appendix Tabs J, K); and

(3) the Mint/Danforth property, a 9,000 square-foot retail/office building (7732 and 7734 Forsyth), home to Maharam Fabric Corporation, a New York-based textile company with operations across the globe, which spent over $300,000 to renovate its space to mirror the company's New York City showroom (Def. Ex. V; Tr. 580; Appendix Tabs L, M.)

Defendants' properties lie in an area that Clayton's Master Plan denominates as the "Forsyth Corridor." The Master Plan is a general statement of development goals

[7] An aerial photo of the block is in the Appendix at Tab E.

with respect to several business districts in downtown Clayton. (Pl. Ex. 2, p. 5.) The Forsyth Corridor is an area that the plan's authors' note has a "variety of site development patterns." (Pl. Ex. 2, p. 13.) That variety, it says, "does not distract from the desired character, but is rather cosmopolitan and appropriate." (Pl. Ex. 2, p. 13.) Indeed, Defendants' properties are part of an area Clayton designated for preservation. Clayton's Director of Planning and Development Services said that they are in an Overlay Zoning District which:

> "seeks to preserve the pedestrian-friendly nature of this mostly one and two-story section of the CBD. The overlay district does allow a PUD if the project is appropriate to the goal of **preservation of the existing area.**" (Def. Ex. B) (emphasis added)

Appellants' uses along Forsyth Boulevard are in compliance with Clayton's CBD Core Overlay Zoning District, which limits the height of structures to four stories. (Tr. 351-353.)

The main component of the portion of the block ultimately denominated as the Redevelopment Area is the Library Limited Property located at the southwest corner of Forsyth Boulevard and Hanley Road, a corner that has been referred to variously as "the best site in Clayton" and the "100 percent corner" of downtown Clayton. (Def. Ex. P, p. 2.) The Library Limited Property presently has an approximately 70,000 square-foot building on the 7700 Forsyth property. (Tr. 371.) A second parcel of the Library Limited Property is a surface and below-grade parking garage located at 21 S. Hanley.

(Pl. Ex. 12, p. 5.) Centene has spent approximately $1 million to remodel the building for use as office space prior to the completion of the Blighting Study. (Tr. 264.)

G. PGAV's Blighting Analysis

Clayton expressly stated in the RFP that it would not consider Tax Increment Financing ("TIF") for any project. (Pl. Ex. 10, p. 3.) But, less than three weeks after Centene submitted its response to the RFP, Clayton's Board of Aldermen directed the consultant who had crafted its RFP to perform a blighting analysis to determine whether the proposed redevelopment area qualified as a blighted area pursuant to Chapter 353. (Tr. 147.) That consultant, Peckham, Guyton, Albers & Viets ("PGAV"), issued a report dated December 13, 2005 ("Blighting Study"). (Pl. Ex. 12.) The Blighting Study did not cover the entire area Centene proposed for development. (Pl. Ex. 12, p. 5-6.) Rather, it carved out the City Garage and Centene's headquarters[8] and included only the Forsyth Properties and the Library Limited Property. (Pl. Ex. 12, p. 5-6.)

Section 353.020(2) defines a "blighted area" as:

> That portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become **economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes**.

Id. (Emphasis added).

[8] The reduced "blighted area" is depicted in the Appendix at Tab G.

The Blighting Study concluded that the area was an economic liability and could not pay reasonable taxes: "In PGAV's opinion, the evidence of the extent and distribution of the existence of age, obsolescence, inadequate or outmoded design, and physical deterioration are such that the Area has become an economic liability and demonstrates an inability to pay reasonable taxes." (Pl. Ex. 12, p. 21.)

Critically, the PGAV Blighting Study does not make a finding that the Redevelopment Area constitutes a social liability (one of the three required categories of findings). (Pl. Ex. 12, p. 15-16.) PGAV admitted that it omitted this finding because it did not believe that the area was a social liability. (Def. Ex. B-2, p. 6.)

During the time that PGAV was preparing its blighting analysis, PGAV and Clayton had attempted to develop evidence to satisfy the social liability requirement. Michael Schoedel, the Clayton City Manager, asked both the Chief of Police and the Fire Chief to search their records for incidents in the Redevelopment Area over the past five years. (Tr. 645-46.) Clayton's Fire Chief, Mark Thorp, indicated that, from 2001 to 2006, there were **no** fire calls and **no** emergency service calls for most of the properties in the Redevelopment Area. (Def. Ex. X-2, Tr. 644-45.) Clayton's Chief of Police, Tom Byrne, submitted findings to Schoedel indicating that the number of police calls to the property in the Redevelopment Area for the seven year period dating back to 1999 were less than half of those received for the Pierre Laclede Center directly across the street during the same timeframe. (Def. Ex. Y-2.) Neither PGAV nor Clayton was able to develop any evidence to support public health, safety and welfare concerns in the Redevelopment Area.

Although the Blighting Study did not make a finding of social liability, it did conclude that the Redevelopment Area had an inability to pay reasonable taxes, which was the only basis for PGAV's conclusion that the area was an economic liability. (Pl. Ex. 12, p. 15.) In order to reach this conclusion, PGAV fashioned a comparison between the increase in assessed value of the Redevelopment Area and the rest of the properties in the city block that was the subject of the RFP. (Pl. Ex. 12, p. 19.) PGAV concluded that the multi-million dollar property in the Redevelopment Area was unable to generate reasonable taxes because the assessed value of the property in the Redevelopment Area increased by "only" 24.83 percent from 2000 to 2005, whereas the rest of the Redevelopment Area increased by 46.6 percent. (Pl. Ex. 12, p. 18-19.)[9] The Blighting Study did not mention that the increase in assessed value for all commercial properties in Clayton for the same time period was 25.7 %, almost equal to that of the Redevelopment Area. The PGAV Blighting Study included no other analysis of what is "reasonable" in terms of the amount of real estate taxes a property owner should pay.

PGAV acknowledged that, in determining the increase in assessed value of the Redevelopment Area, the purchase prices of the Library Limited Property paid by Summit and Centene were not considered. (Pl. Ex. 53, p. 15-16.) The assessed value of the Library Limited Property according to the St. Louis County Assessor was $5 million, as opposed to the $7.2 million paid by Summit or the $12.25 million paid by Centene. Had the latter amount been used, the increase in assessed value for the Redevelopment

[9] The explanation for this is discussed *infra* at Point II.

Area would have been **104 percent** for the five year period, not 24.83 percent, or more than twice the rate for the remainder of the block. (Pl. Ex. 12, p. 17; Tr. 531-536.)

Richard Ward, Defendants' expert witness, also testified that PGAV's benchmark for what constitutes "reasonable" taxes would result in most of the blocks in downtown Clayton being blighted. (Def. Ex. P, Tr. 380-81.) For example, the block directly north of the Redevelopment Area bounded by Hanley Road, Maryland Avenue, Bemiston Avenue and Forsyth Boulevard – which contains both the Pierre Laclede Center and Clayton's City Hall – increased in assessed value by only 3.5 percent. (Def. Ex. P, Attachment 6; Appendix Tab N.) The block west of the Redevelopment Area, which is bordered by Bemiston, Carondelet, South Central and Forsyth, **decreased** in assessed value by 11.8 percent. (Def. Ex. P, Attachment 6; Appendix Tab N.) (This block contains the Bank of America building.) The block directly south of the Redevelopment Area, which is bounded by Carondelet Avenue, Bemiston Avenue, Bonhomme Avenue and Hanley Road, increased by only 11.3 percent. (Def. Ex. P, Attachment 6, Appendix Tab N.)

PGAV acknowledged that it is most appropriate to compare the Redevelopment Area to Clayton as a whole and that there could not be a finding of an inability to pay reasonable taxes if the Redevelopment Area kept pace with the remainder of Clayton. (Def. Ex. B-2, p. 8.) Indeed, the Redevelopment Area did keep pace, even without adjusting for the recent Library Limited Property sales: equalized assessed value in the Redevelopment Area from 2000 to 2005 increased at almost the exact same rate as all commercial properties in Clayton during the same time period – 24.83 percent for the

Redevelopment Area versus 25.7 percent for Clayton as a whole. (Def. Ex. P, Attachment 3; Pl. Ex. 12, p. 17.)

Finally, PGAV based its finding that the Redevelopment Area had an inability to pay reasonable taxes on a drop in sales taxes between 1996 and 2004. (Pl. Ex. 12, p. 20.) This drop is attributable to the closing in 2002 of one large scale retailer in the Redevelopment Area - the Library Limited/Borders Bookstore. (Pl. Ex. 12, p. 8.) Since Borders closed, the property has been targeted for large scale redevelopment. Clayton encouraged, and in fact approved, two separate mixed-use, high density projects – the Summit and Centene projects. (Def. Ex. S-2; Pl. Ex. 21.) The failure to generate sales tax for the time period set forth was due to the pursuit of redevelopment of the parcels for large-scale, mixed-use development.

H. The Ordinance and This Litigation

On December 13, 2005, the Board of Aldermen passed Ordinance No. 5911[10], which approves a Redevelopment Agreement and a Redevelopment Plan and declares, based on the PGAV Blighting Study, that the Redevelopment Area is blighted. (Pl. Ex. 21) In Ordinance 5911 there is a specific finding that:

> "The area legally described in Appendix 1 of the Development Plan ("Redevelopment Area"), including the improvements currently located

[10] Clayton also passed Ordinance No. 5914, which corrected certain typographical errors in Ordinance No. 5911. For ease of reference, Appellants refer simply to Ordinance No. 5911.

thereon, is a blighted area under the provisions of the URC Law. **As documented by the "Analysis for the Designation of the Forsyth/Hanley Redevelopment Area as a Chapter 353 Area," which is attached as Appendix 3 to the Development Plan, the Redevelopment Area is blighted by reason of**: the age and obsolescence of existing structures, inadequate and outmoded design, physical deterioration, and the inability to pay reasonable taxes, and has therefore become an economic and social liability, and such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes. The clearance, redevelopment, replanning, rehabilitation and reconstruction in the Redevelopment Area is for the public convenience and necessity to effectuate the purposes of the URC Law." (Emphasis added.)

The only evidence presented to the Board of Aldermen on the issue of blight was the PGAV Blighting Study which intentionally omitted any finding on social liability. Prior to the passage of Ordinance No. 5911, Schoedel wrote in a memorandum to the Board:

"I fully expect that at sometime in the course of considering this project, the Board of Aldermen will be asked by their constituents how a portion of Clayton's central business district could be blighted. . . . We have hired experts to analyze this project – I think their reports stand on their own." (Pl. Ex. 6, p. 3).

On June 20 and June 30, 2006, Centene filed separate actions seeking to acquire Defendants' properties by condemnation. On July 14 and 28, Defendants filed their Answers to Plaintiff's Petitions asserting as affirmative defenses the issues raised in this appeal. (L.F. 40-64.) On October 20, 2006, the trial court entered an order consolidating all three actions. (L.F. 65.) On December 14, 15, 19 and 22, 2006, the trial court conducted a hearing to determine the propriety of the taking. (L.F. 1-12.) On January 19, 2007, the trial court entered an order of condemnation which adopted verbatim the proposed order presented by Centene. (L.F. 117-125.) (The order even includes the signature of Centene's counsel.) (L.F. 123.) That order does not address the defenses raised by Defendants during the hearing or provide any factual findings.

Defendants filed their Notice of Appeal pursuant to § 523.261 on January 29, 2007. (L.F. 126.) The parties filed supporting briefs and the case was argued before the Missouri Court of Appeals on April 11, 2007. That court rendered an opinion on April 24, 2007 transferring this case to the Missouri Supreme Court pursuant to Mo. R. Civ. P. 83.02 "because of the general interest and importance of the issues presented in this case concerning the applicable standard of review for a legislative determination of blight, and the consideration of social liability in the context of such a determination."[11]

The Missouri Court of Appeals expressly concluded:

> "While we note that pursuant to section 353.020(1), an 'area' may include buildings that are not themselves blighted, but which are deemed necessary

[11] A copy of the Opinion is included in the Appendix at Tab A.

for the redevelopment, there is a lack of evidence of social liability as to any portion of the area. The area, therefore, failed to meet the statutory definition of blighted. As discussed above, there was insufficient evidence to support a conclusion that the area in question was a social liability, and therefore blighted, under either the prior common law standard, or the more recent standard set forth in section 523.261. Therefore, we hold that the trial court's judgment condemning the defendants' properties was in error.

Because our conclusion regarding the lack of evidence of social liability would be dispositive, we would not consider defendants' remaining points concerning the findings of economic liability, inability to pay reasonable taxes, and necessity of the properties for redevelopment.

We would reverse the judgment of the trial court as discussed above; however, because of the general interest and importance of the issues presented in this case concerning the applicable standard of review for a legislative determination of blight, and the consideration of social liability in the context of such a determination, we transfer the case to the Missouri Supreme Court pursuant to Rule 83.02."

POINTS RELIED ON

I. The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not arbitrary or capricious in that there was not substantial evidence – or any evidence – of one of the

preconditions of a blighting determination: that Defendants' properties in the heart of Clayton were a "social liability."

City Center Redevelopment Corp. v. Foxland, Inc., 180 S.W.3d 13 (Mo. App. E.D. 2005)

Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284 (Mo. App. E.D. 1979)

Hoffman v. City of Town and Country, 831 S.W.2d 223 (Mo. App. E.D. 1992)

R.S.Mo. § 523.261

II. **The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not enacted arbitrarily or capriciously in that there was not substantial evidence of one of the preconditions of a blighting determination: that Defendants' properties in the heart of Clayton were an "economic liability.**

R.S.Mo. § 353.020(2)

III. **The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not arbitrary or capricious in that there was not substantial evidence – or any evidence – of one of the preconditions of a blighting determination: that conditions in the "Redevelopment Area" in the heart of Clayton were conducive to "ill health, transmission of disease, crime or inability to pay reasonable taxes." The trial court appears to have applied the wrong legal standard and misinterpreted the eminent domain law in reaching its conclusion.**

R.S.Mo. § 353.020(2)

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

Abbott Ambulance v. St. Charles County Ambulance Dist., 193 S.W.3d 354, 358 (Mo. App. E.D. 2006)

IV. The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not arbitrary or capricious in that there was not substantial evidence – or any evidence – of one of the preconditions of a blighting determination: that Defendants' properties were "necessary" for the "effective clearance, replanning reconstruction or rehabilitation" of the blighted property.

R.S.Mo. § 353.020(2)

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

City of St. Charles v. DeVault Management, 959 S.W.2d 815 (Mo. App. E.D. 1997).

Pequonnock Yacht Club, Inc. v. City of Bridgeport, 790 A.2d 1178 (Conn. 2002)

ARGUMENT

Standard of Review

There are two standards of review relevant to this case. The first is the standard to be applied by the judiciary to the City of Clayton's legislative determination of blight. As discussed in Section I.A., below, a reviewing court must now apply a less deferential

standard than it has in the past. The court must determine whether the legislative determination of blight is "supported by substantial evidence," rather than the previous test of merely not being arbitrary or capricious or induced by fraud, collusion or bad faith. *Crestwood Commons Redevelopment Corp. v. 66 Drive-In*, 812 S.W.2d 903, 910 (Mo. App. E.D. 1991). If the action of the legislative body was "reasonably doubtful or even fairly debatable," the Court could not substitute its judgment for that of the legislative body. *Id.*

The other standard of review is that to be applied by this Court to the trial court's judgment. Here, that standard of review is *de novo*. When a trial court has reviewed the propriety of a decision by a legislative body, the appellate court conducts the same review as the trial court to determine whether there is sufficient evidence to sustain the legislative determination. *Binger v. City of Independence*, 588 S.W.2d 481, 486 (Mo. banc 1979). *Accord, JG St. Louis West Limited Liability Co. v. City of Des Peres*, 41 S.W.3d 513, 517 (Mo. App. E.D. 2001) (Russell, J.) (appellate courts "make our own independent determination of whether the legislative body's decision [that blight existed] was fairly debatable"), *citing Hoffman v. City of Town and Country*, 831 S.W.2d 223, 224-25 (Mo. App. E.D. 1992) ("'we review *de novo*' any challenge to the acts of the legislative body"), *quoting Elam v. City of St. Ann*, 784 S.W.2d 330, 335 (Mo. App. E.D. 1990).

The standard in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) (trial court judgment is to be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously

applies the law) only applies to a review of legislative action when there are credibility findings. There were no such findings by the trial court here and typically such findings are not present in land-use cases. *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 839 (Mo. 1963).

The Court of Appeals order transferring this case to this Court referred to the *Murphy v. Carron* standard of review. Because there were no credibility findings to which deference may be warranted, the *de novo* standard described in *Binger* and *JG St. Louis West* is consistent with and part of the "erroneously declares the law" and "erroneously applies the law" elements of *Murphy v. Carron.*

I. The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not enacted arbitrarily or capriciously in that there was not substantial evidence – or any evidence – of one of the preconditions of a blighting determination: that Defendants' properties in the heart of Clayton were a "social liability."

A. Missouri's Eminent Domain Reform Law Required the Trial Court to Review Clayton's Findings Under a More Landowner-Friendly Standard.

In 2006, the Missouri General Assembly enacted eminent domain reform legislation, responding to the Missouri Eminent Domain Task Force and the public outcry created by the United States Supreme Court decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). One of the key changes was the standard to be applied by trial courts in reviewing the findings of blight made by governmental entities. The general assembly

now requires courts to apply the more landowner-friendly "substantial evidence" test. § 523.261.

Prior to the enactment of § 523.261, judicial review was limited to whether the legislative determination was arbitrary or was induced by fraud, collusion or bad faith or whether the legislative body had exceeded its powers. *Parking Sys., Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 15 (Mo. 1974). The "substantial evidence" test was a compromise between *de novo* review recommended by the Task Force and the previous test. *Final Report and Recommendations of the Missouri Eminent Domain Task Force* 25-26, at http://www.mo.gov/mo/eminentdomain/finalrpt.pdf (last checked Mar. 12, 2007).

Despite the fact that § 523.261, which became effective on August 28, 2006, was enacted three months prior to the hearing, the trial court based its finding that the Redevelopment Area was blighted on the law that was in place prior to the enactment of § 523.261, an error that applies to all Points Relied On herein.[12] Section 523.261

[12] The trial court's order noted in passing that if it were to apply the "substantial evidence" standard, Clayton's ordinances were amply supported by substantial evidence. However, it is clear that the court's order was not based on such a standard. For instance, the court made no reference as to how this new test affected the trial court's duties in reviewing Clayton's findings. Regardless, to the extent the trial court purported to apply the substantial evidence test, the trial court erroneously applied the law (as discussed below), thereby mandating reversal.

provides that not only is there judicial review of whether the legislative determination was arbitrary, the result of fraud, collusion, or bad faith, but also requires that any such determination be supported by substantial evidence:

> ". . . any legislative determination that an area is blighted, substandard, or unsanitary shall not be arbitrary or capricious or induced by fraud, collusion, or bad faith **and shall be supported by substantial evidence.** A condemning authority or the affected property owner may seek a determination as to whether these standards have been met by a court of competent jurisdiction in any condemnation action filed to acquire the owner's property or in an action seeking a declaratory judgment."

Id. (emphasis added).

It is clear that the substantial evidence standard set forth in § 523.261 applies in the present case.[13] Some laws are not applicable to pending cases because the Missouri constitution bars enactment of retrospective laws that impair a vested right. *Wilkes v. Missouri Highway and Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988); Mo. Const. art. I, § 13. But a long line of Missouri cases holds that the constitutional limitation does not apply to procedural or remedial matters which are applicable to pending cases: "Procedural or remedial statutes are generally applicable to all pending

[13] Indeed, at oral argument before the Eastern District, counsel for Respondent Centene conceded that the interlocutory appeal provision of 523.261 is procedural and therefore applies in this case.

cases, not reduced to a final, unappealable judgment." *Jones ex rel. Williams v. Missouri Dept. of Social Services*, 966 S.W.2d 324, 329 (Mo. App. E.D. 1998) (Ahrens, P.J.); *accord*, *Wilkes*, 762 S.W.2d at 28 (sovereign immunity waiver); *Vaughn v. Taft Broadcasting Co*., 708 S.W.2d 656, 660 (Mo. banc 1986) (restriction on punitive damages recoveries).

Thus, the substantial evidence test applies if the standard of review is procedural rather than substantive. The difference between substantive and procedural rights has been succinctly described as follows:

> "Substantive law creates, defines, and regulates rights and duties giving rise to a cause of action. Moreover, substantive law takes away or impairs a vested right acquired under existing law, creates a new obligation, imposes a new duty, or attaches a new disability to a past transaction. Procedural law, on the other hand, prescribes a method of enforcing rights or obtaining redress for their invasion. Remedial laws include laws that "merely substitute a new or more appropriate remedy for the enforcement of an existing right." No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights."

Jones, 966 S.W.2d at 328 (citations omitted).

There are many Missouri cases explicitly holding that the standard of review is a procedural matter. *See, e.g., Moore v. Bi-State Development Agency*, 87 S.W.3d 279, 285 (Mo. App. E.D. 2002); *Rheem Manufacturing Co. v. Progressive Wholesale Supply Co.*, 28 S.W.3d 333, 339 (Mo. App. E.D. 2000); *Reis v. Peabody Coal Co*., 997 S.W.2d 49, 59

(Mo. App. E.D. 1999) (Ahrens, J., on panel); *Kelly v. State Farm Mut. Auto Insurance Co.*, ____ S.W.3d ____, 2007 WL 147671, *3 n.1 (Mo. App. W.D. 2007); *Block Financial Corp. v. America Online, Inc.*, 148 S.W.3d 878, 884 (Mo. App. W.D. 2004); *Morgan Publications, Inc. v. Squire Publishers, Inc*., 26 S.W.3d 164, 169 (Mo. App. W.D. 2000); *Harter v. Ozark-Kenworth, Inc.*, 904 S.W. 2d 317, 320 (Mo. App. W.D. 1995).

Equally instructive, this Court has held that a change in the procedures for reviewing a government body's decision is applicable to a pending matter and did not violate the constitution. *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783 (Mo. banc 1999) (new law changing procedure for seeking judicial review of a settlement agreement applied to pending disciplinary proceeding). Also, when a statutory amendment limited to three the number of times an applicant could take a licensing examination, the court held that the law was procedural, even though it prevented a person who had already failed three times from ever taking the examination again. *State Bd. of Registration for the Healing Hearts v. Boston*, 72 S.W. 3d 260 (Mo. App. W.D. 2002).

Centene argued in the trial court that the "substantial evidence" test cannot apply here because doing so would change the methodology for enacting an already-enacted blighting ordinance. That argument mischaracterizes what § 523.261 does. The reform law does not affect what the legislative body must do. Under the previous and existing law, before blighting property, the legislative body must find the presence of the same

conditions as before, such as economic liability, social liability, ill health, transmission of disease, or other conditions.

The standard of review does not come into play until the parties are in court, which occurred after the reform act became effective. The issue is whether the plaintiff shows **at trial** that the legislative finding is supported by substantial evidence. It was the trial court's job to decide if the evidence was enough to pass the substantial evidence test (as well as the arbitrary-capricious, collusion, and bad faith tests). Applying the substantial evidence test in no way requires Clayton to adopt a new methodology. When reviewing a legislative determination, "[t]he trial court is . . . not confined to . . . the records made before the legislative body." *Hoffman v. City of Town and Country*, 831 S.W.2d 223, 225 (Mo. App. E.D. 1992). The governmental body does receive the benefit of a presumption of validity, but the review is based on the record before the court, not necessarily the record before the legislative body. *Id.*

Thus, the more rigorous standard of review in Section 523.261 does not in any way attack the methodology of Clayton after the fact. Centene undoubtedly put forward the best evidence it had to try to support Clayton's determination of blight, whether or not it was part of a "record" before Clayton.

Thus, under the newly-enacted § 523.261, if a property owner challenges a legislative determination of blight, it can only be upheld if the court finds that such determination was not arbitrary or capricious or induced by fraud, collusion, or bad faith **and was supported by substantial evidence.** The court in *Fujita v. Jeffries*, said that

"the term 'substantial evidence' both implies and comprehends competent evidence." 714 S.W.2d 202, 206 (Mo. App. E.D. 1986).

For the reasons set forth below, the evidence adduced at the condemnation hearing established not only that Clayton's legislative determination of blight was not supported by substantial evidence, but also that Clayton acted arbitrarily in finding that the Redevelopment Area was blighted within the meaning of Chapter 353 because it failed to meet the statutory requirements set forth in § 353.020(2). Thus, Clayton failed to meet its burden under either the newly enacted § 523.261, or the standards existing prior to the enactment of § 523.261.

B. There is No Evidence of Social Liability

Section 353.020(2) sets forth specific requirements that must be present in order for any area to qualify as a "blighted area." That statute defines a "blighted area" as:

> That portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic **and** social liabilities, **and** that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes.

Id. (emphasis added). Thus, this area of Clayton, the most valuable property in the entire St. Louis region, must be:

(1) old, obsolete, have inadequate or outmoded design, or be physically deteriorated; and

(2) must have become an economic liability because of the factors listed in (1); and

(3) must have become a social liability because of the factors listed in (1); and

(4) must be conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes.

It is well-established that statutes conferring the power of eminent domain must be strictly construed and enforced, and when not complied with, a court cannot authorize the exercise of the power. *See, e.g., City Center Redevelopment Corp. v. Foxland, Inc.*, 180 S.W.3d 13, 16 (Mo. App. E.D. 2005); *Maryland Plaza Redevelopment Corporation v. Greenberg*, 594 S.W.2d 284, 292 (Mo. App. E.D. 1979). When a condemning authority fails to comply strictly with all of the statutory prerequisites to its exercise of eminent domain, a petition to condemn property must be dismissed. *Id.*

Our courts have applied this strict compliance standard in rejecting other condemnation attempts. In *Maryland Plaza*, the City of St. Louis Board of Aldermen passed an ordinance approving a Chapter 353 development plan. The landowners argued that the approval of the plan and the redevelopment ordinance were void because the plan failed to contain a detailed statement of the proposed method of financing as required by the Revised Code of the City of St. Louis. The court noted that, while it could not substitute its judgment as to how "detailed" the financing statement must be, the development plan's statement was so inadequate that there was an absence of any detailed statement. The court held that the redevelopment ordinance was void and that the plaintiff did not have the power of eminent domain: "In this case, the determination

by the Board of Aldermen that appellant's redevelopment plan contained a 'detailed' statement of financing was without a factual foundation and, thus, arbitrary." *Id.* at 290-91.

More recently, the Missouri Court of Appeals once again upheld a trial court's denial of condemnation in *City Center Redevelopment Corp. v. Foxland, Inc.*, 180 S.W.3d at 16. There the property owner challenged a private redevelopment corporation's authority to condemn its property pursuant to an ordinance passed by the City of St. Louis finding its property blighted under Chapter 353. The court held that the private developer's failure to strictly follow the guidelines set forth in the city ordinance that granted the developer eminent domain rights foreclosed its ability to exercise the power of eminent domain. *City Center*, 180 S.W.3d at 16; s*ee also*, *City of St. Charles v. DeVault Management*, 959 S.W.2d 815 (Mo. App. E.D. 1997) (court upheld denial of condemnation where city failed to prove that redevelopment plan conformed to city's comprehensive plan).

Thus, under § 523.261, if Clayton did not strictly comply with the requirements of § 353.020(2) or if there was not substantial evidence of blight, the trial court was without authority to enter an order of condemnation. In this case, § 353.020(2) requires, *inter alia*, that the blighted area constitute **both** an economic **and** a social liability.

Statutory construction is a question of law. *Abbott Ambulance v. St. Charles County Ambulance Dist.***,** 193 S.W.3d 354, 358 (Mo. App. E.D. 2006) (Baker, J); *Vogt v. Emmons,* 158 S.W.3d 243, 249 (Mo. App. E.D. 2005). The first rule of statutory construction is that the plain language of the statute should be used to interpret its

meaning. "Words are to be given their plain and ordinary meaning wherever possible…." *Crack Team USA, Inc. v. American Arbitration Ass'n*, 128 S.W.3d 580, 581-82 (Mo. App. E.D. 2004). Section 353.020(2) plainly states that, to be blighted, an area must be both an "economic **and** social liabilit[y]." *Id.* (emphasis added).

Although no Missouri case has defined the term "social liability," this Court has provided guidance on what constitutes "blight" under Mo. Const. art. VI, § 21. *Tax Increment Financing Com'n of Kansas City v. J.E. Dunn Const. Co., Inc.*, 781 S.W.2d 70, 78 (Mo. banc 1965) (citing *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 639 (Mo. banc 1966)), this Court observed that, as the United States transformed from a predominately agricultural to an industrial society, the growth of urban areas created "slums and blighted areas therein constituting a serious and growing menace injurious to the public health, safety, morals and welfare. . . ." The need to eliminate these conditions "as a breeding ground for juvenile delinquency, infant mortality, crime and disease" prompted states to vest municipalities with the power to redevelop these areas. *Id.* Thus, as the Missouri Court of Appeals aptly stated in its opinion, "A review of this historical context in which determinations of blight and redevelopment appear to have emerged would lead us to believe the definition of social liability focuses upon the health, safety, and welfare of the public." *See* Appendix, A6.

Here, regardless of how social liability is defined, the Blighting Study on which Clayton relied in passing Ordinance No. 5911 made no finding that it existed and cited no evidence to support such a finding. PGAV admitted that its Blighting Study did not

contain a finding of social liability because it felt that the Redevelopment Area was not a social liability:

> Q. PGAV did not render any conclusions about the area becoming a social liability in this conclusion, did they?
>
> A. No.
>
> Q. Was there a reason for that?
>
> A. Yeah. . . . The factors that are – are existent here don't constitute, in our minds, a social liability in the way we understand that to be applicable to these situations.

(Def. Ex. C-2, p. 1.)

PGAV further testified:

> A. I don't think there was anything there that could be characterized as a social liability in the, if you take the literal meaning of that; I mean, in other words, an economic liability, well, it's a social liability from the standpoint that it's not generating revenue, and therefore it has a broader impact on the, on the municipal revenue sources and how it supports the rest of the City, but it's not a social liability in the context of something that contributes to, that contributes to crime, contributes to disease, or that kind of thing. . . .

(Def. Ex. B-2, p. 6.)

Faced with this insurmountable void in Clayton's findings, Centene was left to fill it with a series of speculative suggestions about how the Redevelopment Area is a social

liability based on alleged vacancies. This argument ignores the fact that nothing in the statute cites vacancy rates as a social liability. Nor is there any evidence that the vacancies resulted in any condition that would create a social liability. Indeed, the police and fire reports commissioned by Schoedel indicated the very opposite.

Centene cites Schoedel's testimony regarding the potential dangers (vandalism, fire, and crime) associated with vacant buildings as a possible basis for a finding of social liability. (Tr. 631-633.) However, the evidence at trial did not support a finding that any of these possible perceived dangers are present, nor is there any evidence that these were ever considered by the Board. (Tr. 631-644; Def. Exs. X-2, Y-2). Indeed, Clayton and PGAV attempted to build such a case, but a review of the police and fire reports in the area indicated there were negligible calls over the five year period prior to the issuance of the RFP. (Tr. 643-648; Def. Exs. X2 and Y2.) The information provided to PGAV showed that the number of police, fire and EMS calls to the Forsyth Properties was far fewer than, for instance, the Pierre Laclede Center across the street. (Def. Exs. X-2, Y-2.) The Clayton Fire Department reported that from January 1, 2001, through March 2, 2006, there were only four fire responses and two EMS responses to the Forsyth Properties. (Def. Ex. X-2.) City Manager Schoedel admitted that neither the Clayton Fire Department nor the Police Department statistics indicated that there were any crime or safety issues in the Redevelopment Area. (Tr. 643-648.) Not surprisingly, PGAV did not use this information in the Blighting Study.

Respondent's argument also ignores that the Library Limited Property sold twice within one year. (Def. Ex. I-2; Tr. 531-536). The building is fully occupied by Centene,

which spent almost $1 million to renovate it for use as office space. (Tr. 264.) The Sheehan and Kohner properties are fully occupied. (Tr. 470, 553-54.) Additionally, a tenant of Appellant Mint Properties, Maharam Fabric, has wanted to rent additional space, but has been deterred from doing so by the specter of condemnation. (Tr. 486.) Other prospective tenants have been dissuaded from occupying the small amount of vacant space because of the threats associated with this project. (Tr. 490.)

Despite the fact that neither the Blighting Study nor PGAV claimed that the alleged creation of jobs and a vibrant, pedestrian-friendly atmosphere satisfied the social liability component of § 353.020(2), Centene now urges that this is the case. As the court below accurately noted, "The evidence cited by Centene focuses upon only the prospective benefits of redevelopment, and not the current state of the properties themselves. . . . We conclude that Clayton's ultimate goals for the area cannot serve as probative evidence of social liability in light of the lack of evidence concerning the public health, safety, and welfare in the record before us." *See* Appendix, A9. This reasoning is consistent with that of the Supreme Court of Ohio in *City of Norwood v. Horney*, 853 N.E.2d 1115, 1145-46 (Ohio 2006), in which the court held:

> "A fundamental determination that must be made before permitting the appropriation of a slum or a blighted or deteriorated property for redevelopment is that the property, because of its existing state of disrepair or dangerousness, poses a threat to the public's health, safety, or general welfare. Although we adhere to a broad construction of 'public use,' we hold that government does not have the authority to appropriate private

> property based on mere belief, supposition, or speculation that the property may pose such a threat in the future. To hold otherwise would permit the derogation of a cherished and venerable individual right based on nothing more than 'a plank of hypothesis flung across an abyss of uncertainty.' To permit a taking of private property based solely on a finding that the property is deteriorating or in danger of deteriorating would grant an impermissible, unfettered power to the government to appropriate." (Citations omitted.)

Plaintiff's failure to proffer any evidence of social liability, standing alone, defeats the finding of blight and renders the enactment of the ordinance arbitrary. *See Maryland Plaza v. Greenberg,* 594 S.W.2d at 290. But, in addition to this fundamental flaw, there is obviously not substantial evidence in the record of any social liability.

Plaintiff attempted to overcome this fatal flaw below by arguing that, although the Redevelopment Area is not a social liability, the finding of economic liability is the equivalent of social liability for purposes of § 353.020(2). (Def. Ex. B-2, p. 7.) This interpretation would render meaningless the social liability requirement, in violation of the rules of statutory construction. Missouri courts have consistently held, "We should not interpret statutes in such a way which will render some of their phrases to be mere surplusage, but rather, we must presume that every word of a statute was included for a purpose and has meaning." *Crack Team USA, Inc.*, 128 S.W.3d at 581-82; *accord*, *Kansas City Star Co. v. Fulson*, 859 S.W.2d 934, 938 (Mo. App. W.D. 1993) ("It is

presumed that all words utilized by the legislature have a separate and individual meaning.").

Furthermore, PGAV's position here is undermined by its blighting studies in other Chapter 353 redevelopments. Defendants subpoenaed and offered into evidence all of the Chapter 353 blighting studies PGAV has performed in the last five years. (Def. Ex. E-2.) In all of them, a total of seventeen, PGAV made ***a specific, separate finding that the area was a social liability in addition to a separate finding of economic liability.*** (Def. Ex. E-2.) This runs contrary to the suggestion that findings of social liability and economic liability can or should be considered one and the same.

Finally, another rule of statutory construction confirms that it was the legislature's intent that Chapter 353 redevelopments require findings of both economic and social liability to find areas blighted. "Disparate inclusion or exclusion of language in different portions of the same statute is evidence of legislative intent." *Feld v. Treasurer of Missouri as Custodian of Second Injury Fund*, 203 S.W.3d 230, 233 (Mo. App. E.D. 2006). Two other laws that allow for condemnation of blighted areas are TIF (§ 99.805(1)) and PIEA (§ 100.310(2)). In those statutes, the definitions of blight specifically require a finding of only one of the two requirements, economic ***or*** social liability. Thus, the threshold for finding an area to be blighted is lower under those statutes.

In both TIF and PIEA cases, the condemning authority is a public or quasi-public body. Chapter 353 is different. It is the only redevelopment statute in which the power

of eminent domain is conferred upon a *private* corporation.[14] Thus, this distinction, carefully crafted by the legislature, must be enforced by the courts.

II. The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not enacted arbitrarily or capriciously in that there was not substantial evidence of one of the preconditions of a blighting determination: that Defendants' properties in the heart of Clayton were an "economic liability."

As established above, § 353.020(2) sets forth certain requirements that must exist for a property to be a "blighted area" pursuant to Chapter 353. Section 353.020(2) requires that the physical condition of the property causes it to be an "economic liability." No one could reasonably contend that commercial properties with the highest purchase price per acre in the St. Louis area are an economic liability. If that were the case, then **any** property can be found to be an economic liability, and therefore blighted pursuant to Chapter 353.

Richard Ward, who holds a Masters Degree in Architecture and Urban Design from Washington University, as well as a Masters of Urban and Regional Planning degree, testified that none of the properties in question, including the Library Limited Property, constituted an economic liability or was blighted. (Def. Ex. R; Tr. 356-367.)

[14] In fact, the Assembly stripped Chapter 353 corporations of this power through the 2006 revisions to § 353.130, so that the power of eminent domain lies solely with public bodies from now on.

He noted that the Library Limited Property sold twice in the space of one year – the first time to Summit for $7,268,660 (or $4 million per acre) and the second time to Centene for $12.25 million (or $7 million per acre) – at a 70 percent increase in purchase price.

These transactions did not surprise Ward, given the prime location involved. He called the Library Limited location the "100 percent corner" in Clayton. Summit's John Ross described the same property as "one of the best sites in the region and the best site in Clayton." (Def. Ex. D.) Even City Manager Schoedel admitted that the Library Limited Property is one of the premier locations in downtown Clayton. (Tr. 86-87.)

The fact that the current building on the Library Limited Property was not utilized in either of the proposed new developments after Borders Bookstore closed does not make the property an economic liability. In fact, it establishes just the opposite. Ward testified that the property is so valuable that a 70,000 square-foot building is not a cost-effective use of the property. (Tr. 359, 372-373.) This is borne out by the fact that both Summit and Centene planned to develop high-rise office towers on the Library Limited Property.

In an attempt to establish some type of economic justification for its finding of blight, Clayton claims that it would like to promote high density commercial and retail uses of the Redevelopment Area. Clayton's desire for more high density retail or commercial uses does not make the **current** use (that which is at issue when the finding of blight occurs) an "economic liability" as contemplated by § 353.020(2). Ward said: "To date, the City of Clayton has been able to remain largely detached from the quest for retail development by virtue of containing a disproportionate share of the region's office

inventory and hence property and utility tax revenues." (Def. Ex. P, p. 18.) Ward noted that Clayton is one of the wealthiest communities in the bi-state St. Louis metropolitan region, regardless of how one might choose to measure that wealth: "This would include average household or personal income of its residents; daytime employment and jobs hosted by the city; taxable real and personal property value per resident or per school student; and school expenditures per student. . . ." (*Id* . at p. 3.)

Moreover, as set forth below, the properties in the Redevelopment Area have increased in assessed value in the last five years equal to that of all commercial properties in Clayton. Thus, these valuable commercial properties that make up the Redevelopment Area – in the heart of one of the wealthiest communities in St. Louis – are not an economic liability just because Clayton has determined that it would like to change their use.

III. The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not arbitrary or capricious in that there was not substantial evidence – or any evidence – of one of the preconditions of a blighting determination: that conditions in the "Redevelopment Area" in the heart of Clayton were conducive to "ill health, transmission of disease, crime or inability to pay reasonable taxes."

One of the four distinct prongs for a finding of blight is that conditions in the purportedly blighted area "are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes." § 353.020(2). The trial court did not make a finding on the presence of **"**ill health, transmission of disease, crime or inability to pay

reasonable taxes." As discussed above, Centene did not, and could not, contend that conditions in the Redevelopment Area were conducive to ill health, disease, or crime. The **only** evidence Centene offered on the "conduciveness" requirements presented to Clayton prior to the passage of Ordinance 5911 went to an alleged "inability to pay reasonable taxes."

Although couched in such terms, Centene's argument was not that the Redevelopment Area has an inability to pay reasonable taxes, but instead that the Redevelopment Area could generate **more** taxes. This is true of almost every piece of property. But the fact that taxes could be higher does not mean the taxes being paid are "unreasonable." Since the Redevelopment Area's ability to pay property taxes has essentially kept pace with the rest of Clayton, the Redevelopment Area does not have an inability to pay reasonable taxes unless current taxes for Clayton are unreasonably low. If this were the case, under PGAV's analysis, all of Clayton could meet the statutory requirements of blight. This is an amazing result given that Clayton is one of the wealthiest communities in Missouri – and clearly a result unintended by the Missouri General Assembly given its recent legislation designed to limit abuses of the power of eminent domain.

The concept of "economic underutilization" set forth in *Tierney v. Planned Industrial Expansion Authority of Kansas City, Missouri*, 742 S.W.2d 146, 151 (Mo. banc 1987), is not applicable to the § 353.020(2) requirement that the blighted area is not able to pay reasonable taxes. In other words, Centene cannot argue that the "inability to pay reasonable taxes" requirement is met by a showing that an area simply could pay more

taxes. As explained in the preceding section, the use of the conjunctive "and" in § 353.020(2) establishes separate requirements for a finding of blight under the statute. Although an inability to pay reasonable taxes may be **evidence of** economic liability, § 353.020 requires a distinct finding of an "inability to pay reasonable taxes."

The concept of economic underutilization discussed in *Tierney* was pursuant to the Planned Industrial Expansion Act, § 100.310, *et seq*. ("PIEA"). Although the definition of "blighted area" under the PIEA requires a finding of either economic or social liability, there is no requirement in the statute that there be an inability to pay reasonable taxes. The concept of economic underutilization cannot be used to alter the plain language of § 353.020(2), which requires that an area have an inability to pay "reasonable" taxes. The mere fact that an area could pay more taxes does not satisfy the requirements of § 353.020(2).

The only evidence before Clayton regarding an "inability to pay reasonable taxes" was in the PGAV Blighting Study. (Def. Ex. R2; Pl. Ex. 12, p. 15-20). Clayton, without the report of PGAV, did not reach that conclusion on its own. City Manager Schoedel stated in a memo presented to the Board prior to the passage of Ordinance 5911:

> "I fully expect that at sometime in the course of considering this project, the Board of Aldermen will be asked by their constituents how a portion of Clayton's central business district could be blighted. We have hired experts to analyze this project – I think their reports stand on their own." (Pl. Ex. 6, p. 3)

PGAV's analysis of the inability to pay reasonable taxes was based on its analysis of equalized assessed values of the properties in the Redevelopment Area and a sales tax analysis of the Redevelopment Area. In analyzing the increase in equalized assessed value of the property in the Redevelopment Area, PGAV's only standard of comparison was the increase in assessed value for the remainder of the block.

Testimony from land use specialist Ward showed the reason for the differential between the increases in assessed value. The improvements in the Redevelopment Area and the remainder of the block increased in assessed value by 56.45% and 56.63% respectively, from 2000-2005. (Def. Ex. P, Attachment 3.) The ground value for the Redevelopment Area inexplicably increased 12.08% while the ground value for the remainder of the block increased 18.76%, thus accounting for the discrepancy in assessed value increase for the time period 2000-2005. (Tr. 385.) There was no explanation why land values in the same block increased at such disparate rates.

Centene's own expert acknowledged that the Redevelopment Area should be compared to Clayton as a whole and that there cannot be a finding of an inability to pay reasonable taxes if the Redevelopment Area keeps pace with the remainder of Clayton:

> Q. Do you typically . . . look at the City where the property is located and the increase in the value of the commercial property within the entire City in performing your 353 analysis?
>
> A. You always look . . . at the City as a whole, but then I think you also look at similar, in other words, you always look at other commercial

areas, other commercial properties; I mean, in other words, using the City as a whole is usually one thing you look at.

Q. So you couldn't reach a conclusion on the ability of the area to pay reasonable taxes if, in fact, the area kept up with the remainder of the City of Clayton's increase in property taxes?

A. Yes, I think that's a reasonable characterization. (Ex. B-2, p. 9)

Compared to Clayton as a whole, Centene's own evidence showed robust (and more than reasonable) payments of taxes by Defendants' properties and others in the Redevelopment Area. Clayton, which is the top office market in the St. Louis area, had an increase of 25.7% in equalized assessed value for commercial properties from 2000 to 2005. (Def. Ex. P, Attachment 3) PGAV's own calculations show that the Redevelopment Area – with an increase of 24.83% – kept pace with the rest of the City. (Pl. Ex. 12, p. 17)

The strong tax base of the Redevelopment Area is further shown when its rate of increase is compared to adjacent blocks: the block north of the Redevelopment Area (which includes the Pierre Laclede Center and the Clayton City Hall), had only a 3.5% increase during the time period. The block to the west had a decline of assessed value of 11.8%; and the block to the south had an 11.3% increase in assessed value. (Def. Ex. P, Attachment 6) Under Centene's view of what constitutes "reasonable" taxes, most of downtown Clayton would be underpaying.

Not only did the increase in assessed value in the Redevelopment Area keep pace with the remainder of Clayton, but the evidence at the hearing was that the increase was

more than double that of the increase in the Consumer Price Index ("CPI") during the same time period. Centene's own expert testified that another acceptable method of determining an alleged inability to pay reasonable taxes was the failure of a Redevelopment Area's property taxes to keep pace with an increase in the CPI. (Def. Ex. B-2, p. 8-9.) An early draft of the PGAV Blighting Study showed a 10.55% change in the CPI from 2000 to 2005 compared to the 24.83% increase in the equalized assessed value of the properties in the Redevelopment Area. (Def. Ex. G-2, p. 15.) Not surprisingly, this was another compelling statistic that was literally removed from the PGAV final study.

The Blighting Study is further flawed in that PGAV claimed it was "unaware" when it drafted the study that the supposedly "blighted" Library Limited Property had sold twice in the two years following the closing of the Borders Bookstore. Summit's purchase price and the purchase price paid by Centene were publicly available at the St. Louis County Assessor's office. If the equalized assessed value data had included the sale of Library Limited Property for $12,250,000 in 2004, the increase in assessed value for the Redevelopment Area would be 104%, or four times the increase in the rest of Clayton. PGAV admitted that the amount of the purchase price paid by Summit and Centene could affect its opinion of the ability of the Redevelopment Area to pay reasonable taxes. (Pl. Ex. 53, p. 15.)

PGAV's only other rationale for finding that the Redevelopment Area had an inability to pay reasonable taxes was an 89.1% drop in sales taxes between 1996 and 2004. (Pl. Ex. 12, p. 20.) This drop in sales tax is attributable to the closing of one large

scale retailer in the Redevelopment Area. The Library Limited/Borders Bookstore closed in 2002, and it had accounted for almost 86% of the retail sales tax in the Redevelopment Area for the two years previous to closing. Thus, the drop in sales taxes is not due to an inability to pay reasonable taxes: it is simply tied to the closing of one store.

The closing of that store does not show an inability to pay taxes or any type of economic liability. Since Borders closed in 2002, the property has been targeted for large scale redevelopment in the open market. Both Summit and Centene were ready to develop the Library Limited site without seizing the private property of others. But for Clayton's decision to issue an RFP, development of the site would be underway by now. Furthermore, the Centene proposal calls for office space to be the primary component of the redevelopment.

No Missouri case has interpreted the meaning of the phrase "inability to pay reasonable taxes." This Court should therefore rely on the plain and ordinary meaning of the phrase "reasonable taxes" in determining whether Clayton's finding of inability to pay reasonable taxes was supported by substantial evidence or was not arbitrary and capricious. "When construing a statute, we attempt to ascertain the intent of the lawmakers by giving the words in the statute their plain and ordinary meaning. . . . Courts are not authorized to read into a statute a legislative intent that is contrary to the intent made evident by the plain and ordinary meaning of the language in the statute." *Abbott Ambulance***,** 193 S.W.3d at 358. When plain language and common sense are employed, there is a mammoth gap between the ability to pay more taxes and the inability to pay reasonable taxes.

In summary, when the plain meaning of the phrase "reasonable taxes" is applied, the finding that conditions were conducive to an inability to pay reasonable taxes is not supported by substantial evidence and is arbitrary and capricious.

IV. The trial court erred in holding that the Clayton blighting ordinance was supported by substantial evidence and was not arbitrary or capricious in that there was not substantial evidence – or any evidence – of one of the preconditions of a blighting determination: that Defendants' properties were "necessary" for the "effective clearance, replanning reconstruction or rehabilitation" of the blighted property.

The final flaw in Centene's blighting scheme is the issue of necessity. There is not substantial evidence – nor any evidence – that Defendants' properties are necessary for redevelopment of the allegedly blighted property – the Library Limited Property.[15] As set forth above, neither PGAV nor Clayton contends that Defendants' properties themselves are blighted. Since Defendants' properties were not found to be blighted, the only way they can be condemned is if they are part of a blighted area as set forth in § 353.020(1):

> ". . . [A]ny such area may include buildings or improvements not in themselves blighted, and any real property, whether improved or

[15] Centene's case is premised on the correctness of a finding of blight of the Library Limited Property. As discussed in the preceding sections, Defendants disagree that the Library Limited Property is blighted.

unimproved, the inclusion of which is deemed necessary for the effective clearance, replanning, reconstruction or rehabilitation of the area of which such buildings, improvements or real property form a part."

Courts have held that non-blighted parcels are "necessary" if such parcels "are necessary to provide a tract of sufficient size or accessibility to attract redevelopers." *Tierney*, 742 S.W.2d at 151 (*citing Allright Missouri, Inc. v. Civic Plaza Redevelopment Corporation,* 538 S.W.2d 320 (Mo. banc 1976); *State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis,* 517 S.W.2d 36 (Mo. banc 1975)). Such is not the case here. The evidence at trial established that: (1) the Library Limited Property was of sufficient size and accessibility to attract two separate developers who intended to redevelop the property without the use of Defendants' properties; and (2) Clayton was well aware prior to issuing the RFP that two developers were willing to develop the Library Limited Property without the use of any other properties, but wanted to leverage Centene's original project into a larger development.

Since the issuance of the RFP, Clayton and Centene have offered conflicting reasons why Defendants' properties – which everyone admits were not included in Centene's original development plans – are now "necessary" for Centene to construct its corporate headquarters.

A. The Library Limited Property Can be Developed without Defendants' Properties, thus, there is No Necessity to Acquire Defendants' Properties to Cure the Alleged Blight.

The evidence at trial established that both Summit and Centene were ready, willing and able to develop the Library Limited Property – the arguably blighted property – without Defendants' properties. Summit purchased the Library Limited Property with the intent of developing a high-density, mixed-use hotel/office/retail development. The Summit project included a 380,000 square foot office tower and a 285,000 square foot hotel to be built entirely on the Library Limited Property. (Tr. 539; Def. Ex. S-2, CEN 00784.)

Summit's Ross testified that Summit was in the process of signing a major tenant and was close to breaking ground on its project when it was approached by Centene regarding purchasing the Library Limited Property. (Tr. 520.) In 2003, Centene, whose current headquarters is located next to the Library Limited Property, decided that it wanted to acquire that property so that it could expand its corporate headquarters. (Tr. 253-254.) Although the Summit project was financially feasible and Summit expected to generate ten to fifteen million dollars in profit from the project, Centene was willing to pay $12.25 million – an increase of 70% in only one year – to purchase the property. Ross testified that this was "an offer he couldn't refuse," and he sold the Library Limited Property to Centene in November 2004. (Tr. 522-527, 545.)

Like Summit, Centene purchased the Library Limited Property with the intent of building a high-density, mixed-use development on only the Library Limited Property. Reh testified that when Centene purchased the Library Limited Property, it had absolutely no intention of utilizing Defendants' properties in its development. Rather,

Centene intended to construct two mixed-use towers totaling approximately 500,000 square feet, plus 50,000 square feet of retail space. (Tr. 273-275.)

There was absolutely no evidence at trial that Centene deemed Defendants' properties "necessary" to develop the Library Limited Property prior to the issuance of the RFP. In fact, the evidence established just the contrary. In late 2004, Centene retained Clayco Construction Company to draw plans for the project. (Tr. 204-05.) These drawings prepared by Clayco show construction on only the Library Limited Property and made no use of Defendants' properties. (Tr. 177-178, 281-282.)

Moreover, various representatives of Centene, including Reh, CEO Michael Niedorff and Centene's attorneys, had numerous meetings with representatives of Clayton through April 2005 regarding the purchase of the City Garage and Centene's plans to develop its headquarters on the Library Limited Property. Both Reh and Schoedel testified that, despite the fact that there were a number of meetings between representatives of Centene and Clayton during this five month time period, there was never any discussion regarding expanding the scope of Centene's project to include any properties other than the Library Limited Property and the City Garage. (Tr. 114-115, 265-270.)

Thus, it was undisputed that the Library Limited Property was of sufficient size and accessibility to attract two separate developers who intended to redevelop the property without the use of Defendants' properties.

B. Clayton's Desire to Leverage Centene's Project into a Larger Development Does Not Make the Defendants' Properties Necessary to Cure Blight.

Clayton was well aware that the Library Limited Property could be developed without the inclusion of any other properties. In fact, Clayton was willing to – and did – previously approve development of the Library Limited Property without the inclusion of Defendants' properties. (Def. Ex. S-2.) Clayton enacted an ordinance approving Summit's project as a Planned Unit Development ("PUD"). Ross testified that there was never any discussion with anyone from Clayton about expanding the Summit project to include other properties. (Tr. 544.)

Prior to being approached by Centene about purchasing the City Garage, Clayton had absolutely no plans to subsidize development of the Library Limited Property or encourage redevelopment of Defendants' properties. In a June 2004 memorandum, the City's Director of Planning identified a number of areas in Clayton targeted for redevelopment, and neither the Library Limited Property nor Defendants' properties were identified. (Tr. 100; Def. Ex. B.) Clayton was more than willing to allow the Library Limited Property to be developed in the open market process. It approved Summit's PUD without requiring Summit to expand the scope of its project to include any other properties or more retail space.

It is only after Centene and Clayton entered into negotiations for the sale of the City Garage that Clayton decided to leverage the sale of the City Garage into a larger development. Schoedel specifically stated in a memorandum dated December 13, 2005,

"While the proposed purchase of the City garage and new office buildings are important, the ability to leverage this momentum into a more comprehensive development is critical to the City's long-term viability." (Pl. Ex. 13, p. 1-2.)

The holding in *City Center Redevelopment Corp. v. Foxland, Inc.*, 180 S.W.2d 13, 17 (Mo. App. E.D. 2005), establishes that Missouri courts will not countenance such efforts to condemn property:

> "While we find CCRC's failure to strictly follow the guidelines set forth in the 1984 Ordinance forecloses its ability to exercise the power of eminent domain, we also note its attempt to condemn Foxland's interest is specious."

C. Evidence that it is "Convenient" for Centene to Acquire Defendants' Properties is Insufficient to Establish that Defendants' Properties are "Necessary" within the Meaning of § 353.020(1).

Given that the Library Limited Property could be developed without Defendants' properties, Centene simply cannot establish that Defendants' properties are necessary to cure the alleged blight as required under § 353.020(1). While Centene has advanced several different reasons for the acquisition of Defendants' properties, the legal issue for this Court is not whether such uses, assuming their sincerity, would be nice. The issue is

whether they are "necessary" for the "effective, clearance, replanning, reconstruction or rehabilitation" of the area. § 353.020(1).[16]

The case *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002), is instructive on this issue. Similar to the Missouri statute, the Connecticut statute limits the ability to include non-blighted property in a redevelopment area to instances where the properties "'are found to be essential to complete an adequate unit of development.'" *Id.* at 1184. The property sought to be condemned in the *Pequonnock* case was a two-acre parcel of property owned and operated by the plaintiff as a 250-member private yacht club and marina for nearly 95 years. *Id.* at 1181. The yacht club, which was not found to be blighted, was surrounded by property that was deteriorating and in need of redevelopment. *Id.* at 1186. Plaintiff argued that there was no evidence in the record that its land was essential for the redevelopment of the blighted property. *Id.* at 1187. The Connecticut Supreme Court agreed, stating:

> "As the trial court indicated, waterfront property is a shrinking commodity and in short supply. As that court noted in its memorandum of decision, '[j]ust because the property may be desirable to the defendants does not justify its taking by eminent domain.'"

Id. at 1187.

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[16] The trial court did not specifically address the issue. Instead, it merely referred generally to the acquisition being "necessary for a public purpose" and to "effectuate the purpose of the Redevelopment Agreement."

Similarly, Centene may not acquire Defendants' properties through the use of eminent domain just because it has now decided that it wants to have them. Centene appears to claim that Defendants' properties are necessary in order for it to build a six to eight story parking garage for its corporate headquarters. (Tr. 191-92, 213.) Clayco's Chapman testified that he told representatives of Centene in November 2004 that it would reduce the cost of parking to build a separate, above-ground garage. (Tr. 198-199.) Despite this, Reh testified that Centene still intended to proceed with building its project only on the Library Limited Property until April 22, 2005. (Tr. 269.) Clearly, the cost of parking did not deter Centene from its plans to develop the property. Just because Centene is now able to reduce the cost of parking by attempting to acquire Defendants' properties through the use of eminent domain does not make Defendants' properties "necessary" within the meaning of § 353.020(1).

There was additional evidence at trial as to why acquisition of Defendants' properties would be "convenient" for Centene. Michael Neidorff, CEO of Centene, gave the owner of the Kohner building the following reasons for wanting her property:

> "And he said I have to have a nice retail buffer for my headquarters. And, not just any buffer, I'm thinking of an ice cream parlor. Have you ever heard of Oliver's Ice Cream? I'm thinking of coming out (of) my office and getting an ice cream. And I'm thinking of a nice haberdashery so I don't have to go over to the Galleria to get my shirts fixed." (Tr. 565.)

This reasoning hardly establishes the necessity for taking a neighbor's property.

Similarly, the evidence at trial was that it was simply "convenient" – not necessary – for Clayton to leverage Centene's redevelopment project into a larger project. Clayton and Centene attempt to justify the taking of Defendants' properties on the basis that Clayton determined that it wanted high density commercial and retail development and that such development is consistent with its Master Plan. Significantly, Centene's response to the RFP did not include the entire block as requested in the RFP. Instead, its redevelopment plan included only the properties owned by Centene (7711 Forsyth and the Library Limited Property), the City Garage and the Forsyth Properties. Centene effectively set the boundaries of the redevelopment area, not Clayton.

City Manager Schoedel also testified that redevelopment of the Forsyth Properties was necessary to conform to and be consistent with the Clayton's Central Business District Master Plan. This claim is inconsistent with the plain language of the Master Plan. In a memorandum dated June 10, 2004, Catherine Powers, Director of Planning and Development Services for Clayton, noted that changes were made to the Clayton's zoning ordinances in 2001, and "an overlay zone" encompassing the 7700 and 7800 blocks of Forsyth Avenue was established. (Def. Ex. B, p. 2.) According to Powers, "The overlay district seeks to preserve the pedestrian friendly nature of this mostly one and two-story section of the CBD. The overlay district does allow a PUD if the project is appropriate to the goal of preservation of the existing area." Centene's plan to construct a six to eight story parking garage on Defendants' properties in that very overlay district is inconsistent with the Clayton's current zoning, which seeks to preserve the current

environment in the 7700 block of Forsyth. *See City of St. Charles v. DeVault Management*, 959 S.W.2d 815 (Mo. App. E.D. 1997).

Thus, although there is evidence that Clayton and Centene "desire" to expand the scope of the redevelopment area to include Defendants' properties, there is not substantial evidence that condemning Defendants' non-blighted properties on which successful businesses are located was "necessary" for the redevelopment of a property that Centene itself bought at a record-high price, particularly when there were two redevelopment plans for the "blighted" property that did not include Defendants' properties.

In light of the foregoing, the Clayton's legislative determination that the Redevelopment Area is a blighted within the meaning of Chapter 353 is arbitrary and capricious because there is no evidence that the Forsyth Properties are necessary for the redevelopment of the blighted area as required pursuant to § 353.020(1). Furthermore, there was not substantial evidence before the Board of Aldermen that the Forsyth Properties were necessary, nor was there substantial evidence adduced at the hearing that the Forsyth Properties were necessary for redevelopment of the Library Limited Property.

CONCLUSION

This condemnation attempt stretches the concept of blight to a level never contemplated by the legislature. The thought that the heart of the most vibrant community in the entire region is blighted defies common sense as well as controlling statutes. The unbridled efforts of municipal bodies to deed away their constituents' properties in the hope of generating more dollars must be reigned in. The public has demanded it, the general assembly has legislated it, and the facts of this case mandate it.

The order of condemnation should be reversed and the condemnation action should be dismissed.

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RULE 84.06(c) CERTIFICATION AND CERFTICATE OF SERVICE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains no more than 13,983 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 31,000 limit in the rules). The font is Times New Roman, proportional spacing, 13-point type. A CD-ROM (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

I hereby certify that one true and correct copy of the foregoing and a CD-ROM containing the same was mailed, postage prepaid, this 4th day of May, 2007, addressed to the following:

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APPENDIX

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