

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC87121**

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**STATE ex rel. BROADWAY-WASHINGTON,  
ASSOCIATES, LTD.,**

**Relator,**

**vs.**

**THE HONORABLE MICHAEL W. MANNERS,  
Judge of the Circuit Court of Jackson County, Missouri, Division 2,**

**Respondent.**

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**BRIEF ON BEHALF OF RESPONDENT**

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## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION .....	6
JURISDICTIONAL STATEMENT .....	7
STATEMENT OF FACTS.....	8
RESPONSE TO POINTS RELIED ON.....	10
ARGUMENT .....	11
I.    Acquisition of Condemned Property Must be Initiated, Not Completed, Within Five Years – Responding to Relator’s Point I.....	11
A.    Broadway’s Interpretation of RSMo. § 99.810 is Illogical.....	12
B.    Broadway’s Interpretation Produces Absurd Results. ....	15
1.    Changes of judge and venue. ....	16
2.    Motions to dismiss and extraordinary writs.....	17
3.    The condemnation hearing and commissioners’ award.....	18
C.    The Plain and Ordinary Meaning of RSMo. § 99.810.....	18
D.    Other Statutes Allow, and May Even Require, an Extensive Process to Acquire Property. ....	20
1.    RSMo. § 99.810 requires estimated dates not strict deadlines. ....	21
2.    Takings may be lengthy because RSMo. § 523.045 allows a trial on damages prior to payment of compensation. ....	22
3.    Condemnation allows abandonment and refile after two years....	22

II. Relator’s Newly Asserted Arguments and Issues Should be Quashed in Accordance with Supreme Court Rules or Dismissed as Meritless – Responding to Relator’s Points II and III..... 23

A. The Property at Issue is Within the Redevelopment Area. .... 24

B. The TIF Commission Made a Good Faith Offer..... 26

C. The Amended Petition for Condemnation Listed all Defendants. .... 27

D. The Property is Within a Conservation Area. .... 28

CONCLUSION ..... 29

**TABLE OF AUTHORITIES**

*American Healthcare Mgmt., Inc. v. Director of Revenue*, 984 S.W.2d 496 (Mo. 1999)..... 7, 10

*In re Beyersdorfer*, 59 S.W.3d 523 (Mo. banc 2001)..... 15

*Cox v. Director of Revenue*, 98 S.W.3d 548 (Mo. banc 2003) ..... 19

*Derfelt v. Yocom*, 692 S.W.2d 300 (Mo. banc 1985) ..... 11

*Elrod v. Treasurer of Mo.*, 138 S.W.3d 714 (Mo. banc 2004)..... 15

*Harris v. L. P. & H. Const. Co.*, 441 S.W.2d 377 (Mo. Ct. App. 1969)..... 19

*Household Fin. Corp. v. Robertson*, 364 S.W.2d 595 (Mo. banc 1963)..... 21

*J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183 (Mo. 2001) ..... 23

*Jedlicka v. State*, 24 Ill. Ct. Cl. 52 (Ill. Ct. Cl. 1961) ..... 13

*Knob Noster Educ. v. Knob Noster R-VIII Sch. Dist.*, 101 S.W.3d 356 (Mo. Ct. App. 2003)..... 12, 21

*Land Clearance for Redevelopment Auth. of St. Louis v. Dehco, Inc.*, 773 S.W.2d 883 (Mo. Ct. App. 1989) ..... 13

*Lia v. Broadway/Olive Redevelopment Corp.*, 647 S.W.2d 189 (Mo. Ct. App. 1983)..... 16

*Murray v. Missouri Highway & Transp. Comm’n*, 37 S.W.3d 228 (Mo. banc 2001) ..... 7, 10, 12, 15, 23

*Reeves v. Snider*, 115 S.W.3d 375 (Mo. Ct. App. 2003)..... 19

*Ryder v. St. Charles County*, 552 S.W.2d 705 (Mo. banc 1977) ..... 27

<i>State ex rel. Casey's Gen. Stores, Inc. v. City of W. Plains</i> , 9 S.W.3d 712 (Mo. Ct. App. 1999).....	21
<i>State ex rel. Chassaing v. Mummert</i> , 887 S.W.2d 573 (Mo. 1994) .....	11
<i>State ex rel. Cohen v. Riley</i> , 994 S.W.2d 546 (Mo. 1999) .....	16
<i>State ex rel. Devanssay v. McGuire</i> , 622 S.W.2d 323 (Mo. Ct. App. 1981) .....	16
<i>State ex rel. Missouri Water Co. v. Bostian</i> , 280 S.W.2d 663 (Mo. banc 1955) .....	18
<i>State ex rel. Nixon v. Blunt</i> , 135 S.W.3d 416 (Mo. banc 2004) .....	7, 10, 24
<i>State ex. rel. Rantz v. Sweeney</i> , 901 S.W.2d 289 (Mo. Ct. App. 1995) .....	16
<i>State ex rel. Schwab v. Riley</i> , 417 S.W.2d 1 (Mo. 1967) .....	21
<i>State ex rel. Siegel v. Grimm</i> , 284 S.W. 490 (Mo. 1926).....	19
<i>State ex rel. Smithco Transp. Co. v. Pub. Serv. Comm'n</i> , 316 S.W.2d 6 (Mo. 1958) .....	21
<i>State ex rel. Missouri Highway &amp; Transp. Comm'n v. Moulder</i> , 726 S.W.2d 812 (Mo. Ct. App. 1987) .....	13
<i>State ex rel. State Highway Comm'n v. Pinkley</i> , 474 S.W.2d 46 (Mo. Ct. App. 1971).....	26
<i>State ex. rel. Reser v. Rush</i> , 562 S.W.2d 365 (Mo. banc 1978) .....	27
<i>State v. Blocker</i> , 133 S.W.3d 502 (Mo. 2004) .....	15
<i>State v. Grubb</i> , 120 S.W.3d 737 (Mo. banc 2003).....	18
<i>State v. Withrow</i> , 8 S.W.3d 75 (Mo. banc 1999).....	7, 10, 21

*Tax Increment Fin. Comm’n v. J.E. Dunn Constr. Co., Inc.*, 781 S.W.2d 70 (Mo. 1989)..... 28

*Teague v. Missouri Gaming Comm’n*, 127 S.W.3d 679 (Mo. Ct. App. 2003) ..... 12

*Washington Univ. Med. Ctr. Redevelopment Corp. v. See*, 654 S.W.2d 192 (Mo. Ct. App. 1983) ..... 22

**MISCELLANEOUS**

24 MISSOURI PRACTICE, APPELLATE PRACTICE 2<sup>nd</sup> ed., § 12.13, p. 516 (2001)..... 24

Final Report and Recommendations of the Missouri Eminent Domain Task Force, [www.mo.gov/mo/eminentdomain](http://www.mo.gov/mo/eminentdomain)..... 7, 10, 20

Mo. R. Civ. P. 84.22 ..... 7, 23

Mo. R.Civ. P. 86.06 ..... 22

I Mo. Real Estate Practice § 3.7 (MoBar 4<sup>th</sup> ed. 2000) ..... 26

RSMo. § 99.805 ..... 28

RSMo. § 99.810 ..... *Passim*

RSMo. §§ 523 *et seq.* ..... *Passim*

## **INTRODUCTION**

The Tax Increment Financing Commission of Kansas City (“TIF Commission”) timely filed its petition for condemnation within five years of its authorization to condemn the property at issue. Relator Broadway-Washington Associates, Ltd. (“Broadway”) seeks to impose a new and extraordinary limitation on the authority granted by the Missouri legislature for redevelopment. Broadway argues that pursuant to RSMo. § 99.810 the takings portion of the condemnation action must be completed within five years.

Broadway’s proposed limitation is illogical, contrary to the plain and ordinary meaning of the statute and unsupported by the statutory framework for condemnation. Moreover, such a limitation would dramatically alter the law and practice of condemning property. The limitation removes control from the condemning authority and creates the necessity to race against an unpredictable clock. This Court should resist Broadway’s urging to rewrite the law and quash the Preliminary Writ.

## **JURISDICTIONAL STATEMENT**

Only one of the issues Broadway raises is properly before this Court. As this Court's Preliminary Writ makes clear, it is directed solely to the Respondent's order of March 25, 2005, denying Broadway's motion to dismiss. Broadway's motion to dismiss raised only one issue – whether RSMo. § 99.810.1(3) requires the completion of a taking within five years. This one issue was also the only issue raised in Broadway's Petition for Writ of Prohibition to the Missouri Court of Appeals, Western District.

In accordance with Rule 84.22, and as set forth more fully below in Point II, these Writ proceedings should be limited to the sole issue raised in Broadway's motion to dismiss before the trial court and Petition for Writ of Prohibition to the Missouri Court of Appeals for the Western District. *See* Mo. R. Civ. P. 84.22; *see also State ex rel. Nixon v. Blunt*, 135 S.W.3d 416 (Mo. banc 2004). Accordingly, all other issues and arguments should be quashed.

## STATEMENT OF FACTS

At issue is the condemnation of real property located at 1200 Broadway, Kansas City, Missouri (the “Property”). The Property is a dilapidated surface parking lot owned, in part, by Broadway. There is no house or other improvements built on the Property. The Property is across the street from the City’s Bartle Hall convention center which serves as a tourist destination and hosts thousands of visitors every year. In its present condition, the Property is a safety hazard and eyesore for tourists, conventioners and other visitors. *See* Respondent’s Appendix (“Resp’t App.”) A-1 – A-5.

The City has attempted to correct this problem for several years, by negotiating with the Property owners to acquire the Property. However, on September 9, 2004, the TIF Commission made final good faith offers to the Property owners to purchase the Property. *See* Relator’s Appendix (“Relator’s App.”), A-53 – A-64; Resp’t App. A-6 – A-9. The Property owners rejected the TIF Commission’s offers and on September 13, 2004, the TIF Commission filed the underlying petition for condemnation. *See* Relator’s App. A-15- A-29.

After several months, Broadway filed a motion to dismiss with the trial court contending the court lacked subject matter jurisdiction because the TIF Commission had only five years from the effective date of the authorizing ordinance to complete the taking of the Property. Resp’t App. A-10 – A-15. On March 25, 2005 the trial court denied Broadway’s motion to dismiss. Resp’t App. A-16. Broadway then sought a Writ of Prohibition from the Missouri Court of Appeals, Western District on

April 7, 2005. Resp't App. A-17 – A-29. The court of appeals denied the Petition for Writ of Prohibition on April 18, 2005. Resp't App. A-30 - A-31.

On May 24, 2005, the TIF Commission amended its petition for condemnation. *See* Relator's App. A-30- A-42. Broadway filed a second motion to dismiss on May 31, 2005, which was also denied by the trial court. Resp't App. A-32 – A-38. Also on May 31, 2005, the trial court held an evidentiary hearing regarding whether the TIF Commission satisfied the requirements for condemnation. Resp't App. A-39. The trial court then requested the parties submit findings of fact and conclusions of law.

The trial court entered its order of condemnation on July 13, 2005. Resp't App. A-39 – A-51. Five months after the court of appeals denied Broadway's Petition for Writ of Prohibition and two months after the order of condemnation was entered, Broadway filed a Petition for Writ of Prohibition with the Missouri Supreme Court. Broadway did not seek a stay in the underlying proceedings. Thus the commissioners' hearing was held on September 30, 2005, to assess the award for condemnation of the Property. The TIF Commission paid the \$3.23 million commissioners' award into the trial court on October 19, 2005. Resp't App. A-52 – A-55. This Court then issued its Preliminary Writ on November 1, 2005.

**RESPONSE TO POINTS RELIED ON**

**I. THE TRIAL COURT CORRECTLY OVERRULED RELATOR’S MOTION TO DISMISS BECAUSE RSMO. § 99.810 ESTABLISHES NO DEADLINE FOR THE CONDEMNING AUTHORITY TO COMPLETE THE TAKINGS PORTION OF THE ACTION – RESPONDING TO RELATOR’S POINT I.**

RSMo. § 99.810.

*American Healthcare Mgmt., Inc. v. Director of Revenue*, 984 S.W.2d 496 (Mo. 1999).

*State v. Withrow*, 8 S.W.3d 75 (Mo. banc 1999).

*Murray v. Missouri Highway & Transp. Comm’n*, 37 S.W.3d 228 (Mo. banc 2001).

Final Report and Recommendations of the Missouri Eminent Domain Task Force, [www.mo.gov/mo/eminentdomain](http://www.mo.gov/mo/eminentdomain).

**II. RELATOR’S NEWLY ASSERTED ARGUMENTS AND ISSUES SHOULD BE QUASHED OR DISMISSED BECAUSE RULE 84.22 REQUIRES THAT THEY BE RAISED FIRST IN LOWER COURTS IN THAT THEY SHOULD BE GIVEN THE OPPORTUNITY TO AFFORD ADEQUATE RELIEF IF THE ARGUMENTS HAVE MERIT – RESPONDING TO RELATOR’S POINTS II AND III.**

*Mo. R. Civ. P. 84.22.*

*State ex rel. Nixon v. Blunt*, 135 S.W.3d 416 (Mo. banc 2004).

## **ARGUMENT**

### ***Standards for Writ Of Prohibition***

A writ of prohibition is an extraordinary remedy to be used with great caution and in cases of extreme necessity. *See Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). The Missouri Supreme Court has established three limited circumstances when a writ is appropriate: 1) trial court's order was a clear abuse of discretion beyond the court's power; 2) trial court lacks jurisdiction; 3) absolute, irreparable harm will occur if relief is not granted. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 577 (Mo. 1994). None of these circumstances are present in this case.

#### **I. Acquisition of Condemned Property Must be Initiated, Not Completed, Within Five Years – Responding to Relator's Point I**

At issue is an interlocutory order denying Broadway's motion to dismiss. Broadway's sole argument stems from RSMo. § 99.810, which states in part "that no property for a redevelopment project shall be acquired by eminent domain later than five years from the adoption of the ordinance approving such redevelopment project." Broadway interprets this statute and its use of the work "acquired" to mean the takings portion of the condemnation must be completed within five years. However, this argument ignores logic, produces absurd results, misconstrues the statutory language, and disregards the other rules and statutes which govern the condemnation process. Accordingly, the trial court's decision to deny Broadway's motion to dismiss should be upheld and the Preliminary Writ quashed.

**A. Broadway’s Interpretation of RSMo. § 99.810 is Illogical.**

“The legislature is presumed, when enacting a statute, to intend a logical result, and courts endeavor to avoid unreasonable and illogical results.” *Teague v. Missouri Gaming Comm’n*, 127 S.W.3d 679, 687 (Mo. Ct. App. 2003) (citing *Murray v. Missouri Highway & Transp. Comm’n*, 37 S.W.3d 228, 234 (Mo. banc 2001)). Rules of statutory construction apply even if the terms of a statute “are unambiguous, but, when given their ordinary meaning, produce an illogical or absurd result in light of the statute’s purpose.” *Knob Noster Educ. v. Knob Noster R-VIII Sch. Dist.*, 101 S.W.3d 356, 361 (Mo. Ct. App. 2003). If the TIF Commission was required to complete the takings portion of a condemnation action within five years, this would result in:

- No extensive negotiations prior to the petition for condemnation being filed;
- Encouraging the condemning authority to take all property in the redevelopment area, and only after trial on the damages determine whether to keep the property or abandon the condemnation; and
- Unfair advantage to some property owners in a redevelopment area.

Broadway’s interpretation of RSMo. § 99.810 leads to illogical results because of the uncertainty in litigation and how the redevelopment process operates.

Generally, the TIF Commission fosters redevelopment of blighted and conservation areas through a redevelopment plan. The redevelopment plan must be approved by the City Council of Kansas City (“City Council”) by ordinance. After the City Council passes the ordinance, negotiations occur between developers and current

landowners to acquire the property. Typically, developers progress in stages for redevelopment. If the developer is unsuccessful in acquiring the property the TIF Commission then engages in another round of good faith negotiations with the property owners. Only if this second round of negotiations fails does the TIF Commission utilize its condemnation powers. Given the uncertain nature of litigation, if Broadway's interpretation was correct and the TIF Commission had to complete the takings portion of the condemnation within five years, this process would be dramatically altered.

If Broadway's interpretation is upheld and property must be "taken" within five years, condemning authorities will shorten negotiations and file the actions almost immediately. This is because a condemning authority could file a condemnation petition within a few days of the effective date of the ordinance authorizing condemnation and still not be completed within five years. *See, e.g., State ex rel. Missouri Highway & Transp. Comm'n v. Moulder*, 726 S.W.2d 812, 814 (Mo. Ct. App. 1987) (condemnation action pending trial on damages for 16 years); *Land Clearance for Redevelopment Auth. of St. Louis v. Dehco, Inc.*, 773 S.W.2d 883, 884 (Mo. Ct. App. 1989) (condemnation action pending trial on damages for 11 years); *Jedlicka v. State*, 24 Ill. Ct. Cl. 52, 57 (Ill. Ct. Cl. 1961) (condemnation suit pending for 11 years, including 5 years of negotiation for acquisition of the property at issue).

In this case, the TIF Commission and private developers have sought numerous times to negotiate with the Property owners.<sup>1/</sup> Broadway's interpretation would punish condemning authorities, like the TIF Commission, who invest time in negotiating with property owners and use condemnation only as a last resort. This illogical result could not be what the legislature intended.

Broadway's interpretation would also encourage the condemning authority to condemn all property in the redevelopment area shortly after the ordinance becomes effective. Then later, after trial on the damages, the condemning authority could determine whether they actually need the property or instead whether they should abandon the condemnation. A "condemn first, asks questions later" approach, as suggested by Broadway, would have a negative impact on property owners. For example, if the takings portion of a condemnation is completed and the condemning authority pays the commissioners' award into the court (to ensure the property is "taken" within 5 years) the property owner could withdraw the funds and purchase property elsewhere. The condemning authority could then leave the property as is and complete a trial on the damages. Should the condemning authority chose to abandon the property after trial, the property owner would have to return the commissioners' award, which the

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<sup>1/</sup> However, given there are currently at least two lawsuits pending between the Property owners, one which has been pending for ten years, all efforts at negotiation have failed.

property owner already used to purchase new property. Thus, Broadway's interpretation leads to uncertain and illogical results for property owners.

Finally, Broadway's interpretation provides an unfair advantage to some property owners in a redevelopment area. Critical to the redevelopment process is the ability to acquire land, construct buildings and enter into development agreements in stages. For example, in this case the redevelopment plan contemplated the revitalization of the Missouri Southern Building prior to the redevelopment of the Property. Because redevelopment of the Property is slated to occur later in the process, the property owners are even more likely to be able to "delay" themselves out of condemnation. Broadway's interpretation creates an unfair advantage to the property owners who fall later in the development scheme. Thus, Broadway's interpretation leads to unfair and illogical results for property owners.

**B. Broadway's Interpretation Produces Absurd Results.**

Important in statutory construction is to construe the statute in a way that avoids "unreasonable or absurd results." *Murray*, 37 S.W.3d at 233; *see State v. Blocker*, 133 S.W.3d 502, 504 (Mo. 2004); *In re Beyersdorfer*, 59 S.W.3d 523, 526 (Mo. banc 2001). Indeed, courts are to use "rules of statutory construction that subserve rather than subvert legislative intent." *Elrod v. Treasurer of Mo.*, 138 S.W.3d 714, 716 (Mo. banc 2004) ("In addition, we will not construe the statute so as to work unreasonable, oppressive, or absurd results."). To require condemnation proceedings to be completed within a specific deadline would produce absurd and undesirable results.

Once a condemning authority files a condemnation petition, actions of the property owner and the judicial system can delay the process. Given Broadway's reading of the statute, the defendant would inevitably engage in a pattern of delay to thwart the condemnation. For example, parties may file a motion for change of judge or change of venue. *See* Rule 51.06(c). Property owners may seek discovery prior to the condemnation hearing. *State ex. rel. Rantz v. Sweeney*, 901 S.W.2d 289 (Mo. Ct. App. 1995). Property owners may file a motion to dismiss the petition for condemnation on procedural or statutory grounds and owners may attempt to file a Writ of Prohibition if their motion to dismiss is unsuccessful. *See e.g., State ex rel. Devanssay v. McGuire*, 622 S.W.2d 323, 326 (Mo. Ct. App. 1981). Property owners may further seek to circumvent the condemnation process by filing civil actions for injunctions or declaratory relief. *See Lia v. Broadway/Olive Redevelopment Corp.*, 647 S.W.2d 189, 190 (Mo. Ct. App. 1983).

A good example of the numerous types of delays that can occur in a condemnation action is the very case at hand. The TIF Commission filed its petition for condemnation on September 13, 2004, and the following ensued:

**1. Changes of judge and venue.**

- November 4, 2004- Theodora Carpenter submitted a motion for change of judge and venue. Although Judge Scoville only had jurisdiction to grant the motion for change of judge not the motion for change of venue, *see State ex rel. Cohen v. Riley*, 994 S.W.2d 546, 547 (Mo. 1999) (Upon the filing of an application for

change of judge, the court has no jurisdiction to grant change of venue.), the case was transferred to Judge Daugherty for reassignment in the Kansas City Division.

- November 10, 2004- The case was reassigned to Judge Bob Beard, who recused himself. The case was then transferred back to Judge Daugherty.
- November 17, 2004- The case was assigned to Judge Clark. Based on Judge Clark's involvement with a prior condemnation of the Property, the TIF Commission requested a change of judge. The case was again transferred back to Judge Daugherty.
- December 13, 2005- The case was assigned to Judge Moorhouse. On January 14, 2005, Judge Moorhouse granted motion to transfer to the Independence Division.
- March 1, 2005- The case was assigned to Judge Manners in the Independence Division. In total, five judges were assigned resulting in a five month delay.

## **2. Motions to dismiss and extraordinary writs.**

- February 14, 2005- Broadway filed a motion to dismiss.
- March 25, 2005- The trial court denied Broadway's motion to dismiss.
- April 4, 2005- Broadway filed a Petition for Writ of Prohibition with the Western District of the Missouri Court of Appeals, which was denied on April 18, 2005.
- May 31, 2005- Broadway filed a motion to dismiss the amended petition, which was denied by the trial court the same day.
- September 20, 2005- Broadway filed a Petition for Writ of Prohibition with the Supreme Court of Missouri.

### **3. The condemnation hearing and commissioners' award.**

- May 31, 2005- Condemnation hearing held 8 ½ months after petition filed.
- July 13, 2005- Order of condemnation was entered.
- September 30, 2005- Commissioners' hearing was held to assess value.
- October 18, 2005- Commissioners awarded \$3,230,000 for the Property.
- October 19, 2005- TIF Commission paid the \$3,230,000 commissioners' award.

As set forth above, it is perfectly conceivable that a condemnation action could be filed within days of the effective date of the ordinance authorizing condemnation and still not be completed within five years. Thus, compelling completion of the takings portion of a condemnation within five years, as Broadway suggests, presents a significant potential for litigation abuse and produces absurd and unreasonable results.

#### **C. The Plain and Ordinary Meaning of RSMo. § 99.810.**

Not only does Broadway's interpretation produce illogical and absurd results, but Broadway misconstrues the plain and ordinary meaning of RSMo. § 99.810. The primary rule of statutory construction is to ascertain the intent of the lawmakers by construing words used in the statute in their plain and ordinary meaning. *American Healthcare Mgmt., Inc. v. Director of Revenue*, 984 S.W.2d 496, 498 (Mo. 1999); *State v. Grubb*, 120 S.W.3d 737, 739 (Mo. banc 2003). In doing so, courts should give a reasonable and sound construction to the statute under consideration. *State ex rel. Missouri Water Co. v. Bostian*, 280 S.W.2d 663, 666 (Mo. banc 1955). Indeed, eminent

domain statutes are not to be construed so as to defeat the evident purpose of the legislature. *See State ex rel. Siegel v. Grimm*, 284 S.W. 490, 493 (Mo. 1926).

The statutory language at issue in RSMo. § 99.810(3), provides in relevant part as follows:

**The estimated dates**, which shall not be more than twenty-three years from the adoption of the ordinance approving a redevelopment project within a redevelopment area, . . . and provided that no property **for a redevelopment project shall be acquired** by eminent domain later than five years from the adoption of the ordinance approving such redevelopment project (emphasis added).

The term “acquired” is the word Broadway seizes upon in this statute. Yet, the statute does not define the word acquired.

“Absent a statutory definition, the plain and ordinary meaning of a word is derived from the dictionary.” *Reeves v. Snider*, 115 S.W.3d 375, 382 (Mo. Ct. App. 2003) (citing *Cox v. Director of Revenue*, 98 S.W.3d 548, 550 (Mo. banc 2003)). Here, “acquire” means “to come into possession, ownership, or control of: obtain as one's own.” *Merriam-Webster's Dictionary of Law*, (1996) (emphasis added). Thus, the plain meaning of “acquire” in the context of condemnation reflects a process of obtaining property. *See Harris v. L. P. & H. Const. Co.*, 441 S.W.2d 377 (Mo. Ct. App. 1969) (Condemnation is a statutory proceeding by which land needed for a public use is acquired). Condemnation certainly does not happen at once.

Broadway contends that “[a]cquire” means, in this context, ‘take title to.’” Broadway Brief, p. 27. For its sole support, Broadway cites a recent Missouri Eminent Domain Task Force Report (“Report”). *See* Broadway’s Brief, p. 19 (citing [www.mo.gov/mo/eminentdomain](http://www.mo.gov/mo/eminentdomain) (December 30, 2005)). This Report is not helpful to Broadway, and in fact, is contrary to Broadway’s interpretation.

The Report, prepared with the assistance of Missouri legislators, lists the following action item: “The authorization to acquire land which has been blighted should be limited to five years.” Task Force Report p. 23 (emphasis added). The Task Force then discusses the action item and states that “if the condemnation petition has not been filed within five years after the project has been authorized, the authority to acquire the property should expire.” *Id.* (emphasis added). Finally, in their proposed action step the Task Force concludes that “[t]he General Assembly should enact legislation to limit to five years the time to acquire, through the use of eminent domain, land which has been blighted. . . . The time limit should be five years mimicking the existing language in the TIF statutes.” *Id.* (emphasis added). Thus, the Report supports the trial court and defeats Broadway’s interpretation. The Task Force reads the plain language of RSMo, § 99.810 just as the trial court did.

**D. Other Statutes Allow, and May Even Require, an Extensive Process to Acquire Property.**

In the process of statutory interpretation, courts also look to the entire statutory framework, including related statutes, to further clarify the meaning of a statute.

*See State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999); *Knob Noster Educ.*, 101 S.W.3d at 361 (“We construe the provisions of a legislative act together and if reasonably possible, all provisions must be harmonized.”); *see also Household Fin. Corp. v. Robertson*, 364 S.W.2d 595, 602 (Mo. banc 1963); *State ex rel. Casey's Gen. Stores, Inc. v. City of W. Plains*, 9 S.W.3d 712, 717 (Mo. Ct. App. 1999).

“This rule applies even though the statutes are found in different chapters and were enacted at different times.” *State ex rel. Smithco Transp. Co. v. Pub. Serv. Comm'n*, 316 S.W.2d 6, 12 (Mo. 1958); *State ex rel. Schwab v. Riley*, 417 S.W.2d 1, 3-4 (Mo. 1967). In this case, the entire statute, RSMo. §§ 99.800 *et seq.*, other condemnation statutes, including RSMo. §§ 523 *et seq.*, and court rules such as Rule 86 demonstrate the meaning of the words in question. The condemnation statutes and court rules make it clear that the legislature could not have intended to require completion of the takings within five years.

**1. RSMo. § 99.810 requires estimated dates not strict deadlines.**

The statute in question, RSMo. § 99.810, is directed to the requirements of a redevelopment plan, not to time limitations on takings. Generally, the statute describes the contents, adoption and required findings for a redevelopment plan. The statute sets forth the required findings for municipalities adopting a redevelopment plan, including a section on “estimated dates” for the redevelopment plan.

It is under the “estimated dates” section that the term “acquired” is used. RSMo. § 99.810(3). The placement by the legislature of the term “acquired” in the

paragraph for “estimated dates” makes sense given the uncertain length of condemnation proceedings. Indeed, while a condemning authority can control the date on which it files a petition for condemnation, it does not have control over when the condemnation proceedings will be completed.

**2. Takings may be lengthy because RSMo. § 523.045 allows a trial on damages prior to payment of compensation.**

Broadway’s interpretation of RSMo. § 99.810, which requires that the takings portion be completed and the commissioners’ award paid within five years is directly contrary to Missouri condemnation law which allows the condemning authority to postpone the payment of compensation for the taking until after a trial on the amount of damages. *See* RSMo. § 523.045; *Washington Univ. Med. Ctr. Redevelopment Corp. v. See*, 654 S.W.2d 192, 194 (Mo. Ct. App. 1983). As demonstrated above in Section IA, trials on damages can and have exceeded Broadway’s proposed five year “limitation.” Thus, Broadway’s interpretation is inconsistent with the condemning authority’s statutory right to postpone payment of compensation for the taking until after a trial on the amount of damages.

**3. Condemnation allows abandonment and refile after two years.**

Broadway’s interpretation is also inconsistent with another statutory provision for condemnation. Condemnation rules and statutes specifically provide for abandonment of condemnation proceedings. *See* RSMo. § 523.040; Rule 86.06. If a condemnation is abandoned, the condemning authority must wait two years before

restarting the condemnation process. *Id.* The existence of this statutory provision establishes there must be sufficient time for a condemning authority to initiate a first condemnation action, abandon that condemnation and then initiate a second condemnation two years later. Broadway's interpretation of "acquire" renders RSMo. § 523.040 meaningless. See *J.B. Vending Co. v. Director of Revenue*, 54 S.W.3d 183, 189 (Mo. 2001); *Murray*, 37 S.W.3d at 233 (finding the "legislature is not presumed to have intended a meaningless act"). The Missouri legislature anticipated that a condemning authority may need to abandon a condemnation and specifically provided for restarting the condemnation after a two year waiting period. RSMo. § 99.810 must be interpreted consistent with this provision. Accordingly, the trial court's decision should be upheld and the Preliminary Writ quashed.

**II. Relator's Newly Asserted Arguments and Issues Should be Quashed in Accordance with Supreme Court Rules or Dismissed as Meritless – Responding to Relator's Points II and III**

Broadway's Brief is procedurally defective because it raises new arguments and issues never asserted before, never considered by Respondent nor raised in the prior Writ proceedings in the Missouri Court of Appeals, Western District. The Supreme Court has by rule limited the application of extraordinary writs. "No original remedial writ shall be issued by any appellate court in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a lower court." Mo. R. Civ. P. 84.22. Thus, "application for the writ generally must be first presented to the appropriate

district of the Court of Appeals.” Daniel P. Card II & Alan E. Freed, 24 MISSOURI PRACTICE, APPELLATE PRACTICE 2<sup>nd</sup> ed., § 12.13, p. 516 (2001). This requirement is “strictly enforced and will be waived only under the most extraordinary circumstances.” *Id.* (2006pocket part) (citing *State ex rel. Nixon v. Blunt*, 135 S.W.3d 416 (Mo. banc 2004)).

Contrary to Rule 84.22, Broadway’s Brief raises several arguments and issues not raised before. Specifically, Broadway raises the following in its Points Relied On II-III: A) the TIF Commission was never properly authorized by the City Council to condemn the Property; B) the TIF Commission never made a good faith offer to purchase the Property before initiating condemnation proceedings; C) the TIF Commission omitted a record co-owner of the Property as a defendant in the amended petition for condemnation; and D) the City Council failed to find a sufficient number of factors in authorizing the ordinance to justify designation of the Property as a conservation area pursuant to RSMo. § 99.805(3).

These arguments and issues were not raised in Broadway’s Petition for Writ of Prohibition in the Missouri Court of Appeals. Furthermore, the motion to dismiss, which is the subject of the Preliminary Writ, does not address these issues. Thus, in accordance with Rule 84.22, these newly asserted arguments and issues should be quashed. In the alternative, the arguments and issues should be denied as meritless.

**A. The Property at Issue is Within the Redevelopment Area.**

Broadway admits that the petition and amended petition for condemnation accurately describe the Property at issue. *See* Broadway’s Brief, pp. 31-32. However, Broadway claims that Ordinance No. 991015, which provides the TIF Commission’s authority to condemn the Property, does not include the Property in the “redevelopment area.” Not only is this argument untimely, but it is just wrong. This is the first time Broadway has made such an argument. At the condemnation hearing the TIF Commission’s witness, Ms. Michelle Wilson, testified regarding the redevelopment area of the Eleventh Street Corridor TIF Plan (“TIF Plan”) and the Property’s inclusion in such redevelopment area. Resp’t App. A-56 – A-57. Moreover, Ms. Wilson identified the redevelopment area of the TIF Plan and the Property’s inclusion in such area on a map. Resp’t App. A-60.

Broadway had the opportunity to raise an objection to this issue at the condemnation hearing in its cross examination of Ms. Wilson or offer evidence of its own. It did not. Instead, Broadway chose not to object or provide evidence to the contrary before the trial court. Because the trial court (and the court of appeals) never had an opportunity to consider this argument it is improper for a Petition for Writ of Prohibition to this Court.

Even if Broadway had previously raised this issue, the Property is plainly within the Plan area set forth by the Ordinance. The Ordinance generally describes the Plan area as “bound on the north by West 6<sup>th</sup> Street, on the east by Wyandotte Street, on the south by 13<sup>th</sup> and Bee Line Street, and on the west by Interstate 29.” Relator’s App.

A-43 – A-52. The Property is squarely within that redevelopment area as the redevelopment area is located within the City block bordered on the North by 12<sup>th</sup> Street, on the South by 13<sup>th</sup> Street, on the East by Broadway, and on the West by Washington Street. Resp't App. A-16. Thus, this argument should be denied and the Preliminary Writ quashed.

**B. The TIF Commission Made a Good Faith Offer.**

Despite Broadway's allegations to the contrary, the TIF Commission made good faith offers to all record property owners prior to filing the petition for condemnation. *See* Relator's App. A-53 – A-64; Resp't App. A-6- A-9. Land sale contracts need only include the parties, a description of the land, performance factors (time, place and manner of performance) and a price. *See* I Mo. Real Estate Practice § 3.7 (MoBar 4<sup>th</sup> ed. 2000). All of these elements were present in the TIF Commission's offers. Broadway chose to reject the TIF Commission's offer. However, now Broadway asserts the offer was deficient, contending it was conditional. This argument is unfounded.

Broadway alleges the TIF Commission offered to pay for the Property “upon the condition” that those defendants “indemnify and hold harmless” the TIF Commission and its agents and employees “for any claims, loss or damage during the continued occupancy of the property.” *See* Broadway's Brief, pp. 35-36. Broadway argues these “offers” are conditional and thus fail to comply with the jurisdictional

requirement. In support of its argument, Broadway cites *State ex. rel. State Highway Comm'n v. Pinkley*. *Pinkley* is inapplicable.

In *Pinkley*, a district engineer sent out offer letters “subject to the approval of the State Highway Commission.” *See* 474 S.W.2d 46, 49 (Mo. Ct. App. 1971). The court held the offers were invalid because they were subject to the State Highway Commission’s subsequent approval. *Id.* Thus, the court deemed the offer conditional because later approval of the condemning authority did not constitute a good faith offer. In this case, the TIF Commission’s offers were not conditional since they were made under the authority of the Ordinance and signed by Mr. Peter Yelorado, Chairman of the TIF Commission, who was authorized to make such an offer. If these offers were accepted they would have been binding on the TIF Commission in accordance with the terms. The TIF Commission made a good faith offer and Broadway has failed to demonstrate otherwise. Thus, this argument should be denied and the Preliminary Writ quashed.

**C. The Amended Petition for Condemnation Listed all Defendants.**

Broadway next argues the TIF Commission omitted the Dale E. Fredericks IRA Rollover Account No. 324-14957-1-6 as a defendant in the amended petition for condemnation. Broadway does not have standing to bring such a claim. One of the primary objectives of the standing doctrine is to prevent parties from creating controversies in matters in which they are not involved and which do not directly affect them. *See Ryder v. St. Charles County*, 552 S.W.2d 705, 707 (Mo. banc 1977). A

litigant must be hurt by the unconstitutional exercise of power before they may be heard to complain. *See State ex rel. Reser v. Rush*, 562 S.W.2d 365 (Mo. banc 1978). In this case the only party with a possible cause to complain would be Dale E. Fredericks or the Dale E. Fredericks IRA Rollover Account.

In an Opposition filed in this Court on October 17, 2005, Dale E. Fredericks, Carol Fredericks and the Dale E. Fredericks IRA Rollover Account conceded to the Court that the Dale E. Fredericks IRA Rollover Account is not a separate party but in any event has entered its appearance and consents to the jurisdiction of both the trial court and this Court with respect to the petition for condemnation and the judgment of condemnation of July 13, 2005. Resp't App. A-61 – A-65. Thus, Broadway's argument is without merit and the Preliminary Writ should be quashed.

**D. The Property is Within a Conservation Area.**

Broadway also alleges Ordinance No. 991015 fails to designate a conservation area because the City Council failed to find sufficient number of factors in the authorizing ordinance to justify designation of any property as a conservation area pursuant to RSMo. § 99.805(3). Such allegation is without merit. Legislative findings of conservation areas will be accepted by the courts as conclusive evidence of a public use, unless it further appears by allegation and clear proof that the legislative finding was arbitrary or was induced by fraud, collusion or bad faith. *See Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co., Inc.*, 781 S.W.2d 70, 79 (Mo. 1989).

In approving the sixth amendment for the redevelopment plan, the City Council, among other things, found that the Redevelopment Area qualifies as a conservation area because it is an improved area located within the territorial limits of Kansas City, Missouri; 50% or more of the structures in the Redevelopment Area have an age of 35 years or more; the Redevelopment Area is not yet blighted but is detrimental to the public health, safety, welfare and may become blighted because of any one or more of the following: 1) excessive vacancies within the Redevelopment Area and nearly 300,000 square feet of rentable area within the Plan area is currently vacant; 2) several buildings for a period of years have been and currently are dilapidated, functionally obsolete and in poor physical condition; and 3) streetscapes suffering from significant deterioration. *See* Relator's App. A43 - A52. At the condemnation hearing the TIF Commission provided evidence of a public use by demonstrating that the redevelopment area was found to be a conservation area by the City Council. Resp't App. A-58 – A-59. Broadway failed to demonstrate the City Council's finding was arbitrary or was induced by fraud, collusion or bad faith. Thus, the Preliminary Writ should be quashed.

### **CONCLUSION**

For the reasons set forth herein, the Tax Increment Financing Commission of Kansas City, on behalf of Respondent, the Honorable Michael W. Manners, prays this Court enter an Order quashing the Preliminary Writ, and for such other and further relief as the Court deems appropriate.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Missouri Rule of Civil Procedure 84.06(c), that the TIF Commission's Brief on Behalf of Respondent in the above-captioned appeal complies with the limitations contained in Rule 84.06(b), was prepared using Microsoft Word in 13-point Times New Roman font and contains 6,352 words, from the Table of Contents through the Conclusion, as determined by the Microsoft Word counting system. I also certify that the diskettes of the brief filed with the Court and served on all parties have been scanned for viruses and are virus-free.

/s/ Jeremiah J. Morgan  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing was served via U.S. Mail, this 1st day of February, 2006, to:

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