
IN THE SUPREME COURT OF MISSOURI

CAUSE NO. SC88287

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

Relators,

v.

THE HONORABLE EVELYN M. BAKER,

Respondent.

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

Honorable Evelyn M. Baker, Circuit Judge Division 21

Cause No. 0622-CC05527

REPLY BRIEF OF ALL RELATORS

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ARGUMENT

I. THE BOARD’S FINDING OF BLIGHT WAS UNSUPPORTED BY ANY EVIDENCE THAT THE REDEVELOPMENT AREA WAS BLIGHTED. EVIDENCE THAT “COULD” HAVE BEEN PRESENTED TO THE BOARD CANNOT NOW BE USED BY THE LCRA TO UPHOLD THE BOARD’S FINDING.

The LCRA presents a number of “facts” irrelevant to this proceeding in an effort to convince this Court that the circuit court had jurisdiction over the condemnation petition.¹ However, irrelevant facts does not negate the fact that the

¹ For example, The LCRA now claims based upon an email from Alderwoman Phyllis Young that Relators’ property is located within a prior redevelopment area, the Stadium South Redvelopment Area. See Respondent’s Brief, pp. 1 and 2. Ironically, the Stadium South Redevelopment Area is itself evidence of the problems that result when the LCRA blights an area without a plan for redevelopment and/or the financial ability to carry it out. In 1987 the City of St. Louis apparently originally approved a redevelopment plan for the Stadium South Redevelopment Area. Twenty years later, the City claims that the area remains blighted, showing the consequences of eminent domain abuse. Nothing in the record supports the LCRA’s claim that the Stadium South Redvelopment Area was declared blighted only months before Alderwoman Young requested the LCRA to blight the area at issue. Respondent’s Brief, p. 26. The LCRA also

Board of Aldermen was presented with no evidence to support its finding of blight. A finding by the Board without a factual foundation is arbitrary. Maryland Plaza Redevelopment Corp. v. Greenberg, 594 S.W.2d 284, 290-91 (Mo. App. E.D. 1979). The LCRA agrees that when a legislative finding is arbitrary, it is not binding upon the reviewing court. See Respondent’s Brief, p. 10.

A question that must initially be resolved by this Court is the proper standard of review to apply to the Board’s purported finding of blight. Section §523.261 R.S.Mo. specifically prohibits a legislative finding of blight from being “arbitrary or capricious or induced by fraud, collusion, or bad faith” and further requires that such a finding “be supported by substantial evidence.” § 523.261 R.S.Mo., Relators’ App. A12. Arguably the standard of review set forth in § 523.261 R.S.Mo. applies in this case because the statute is procedural in nature and does not affect the substantive rights of the parties. Pierce v. State Dept. of Social Services, 969 S.W.2d 814, 822 (Mo. App. W.D. 1998). The LCRA cannot credibly claim that the Board’s finding of blight was supported by substantial evidence, and therefore, primarily argues that the common law standard continues

claims that it made good faith offers to purchase the property. Respondent’s Brief, pp. 4-5. Evidence shows that other “good faith” offers made by the LCRA were 10% of the market value of the property. Relators’ Appendix (hereinafter “App.”) A61-A62.

to apply in this case..² Respondent's Brief, p. 11. Applying a substantial evidence test to blighting ordinances enacted before the passage of §523.261 R.S.Mo. would not be unfair to the Board (as the LCRA claims) because the Board always had to have a factual foundation to make a finding of blight – the legislature has simply made it clear that it wants Missouri's courts to provide meaningful review of blighting ordinances. Cf. Respondent's Brief, p. 10, citing State ex rel. U.S. Steel v. Koehr, 811 S.W.2d 385, 390 (Mo. banc 1991).

Even if this Court should apply the more stringent common law standard to its review of this case, the finding of blight was without a factual foundation because no evidence of blight was presented to the Board, and therefore, arbitrary. Maryland Plaza, 594 S.W.2d at 290-91. That the Blighting Study and Plan declared the area blighted is not a factual foundation for finding blight but a legal conclusion. See Respondent's Brief, p. 2 & 12.

The purported evidence that the LCRA now attempts to present to this Court to support the Board's finding of blight is not evidence of blight considered

² Respondent's reliance upon State ex rel Atmos Energy Corp. v. Public Service Comm., 103 S.W.3d 753, 762 (Mo. banc 2003), is misplaced. It addressed changes in the way an agency proposes rules under the Administrative Procedure Act, which the Court concluded could not be applied retrospectively after rules had already been proposed. It did not address the retroactive application of a change in the standard of review.

by the Board. The “true, correct and complete copy of the proceedings of the Board regarding Board Bill No. 253 Committee Substitute, now known as Ordinance Number 66499” was admitted into evidence at the condemnation hearing. Petition Exhibit 3, pp. 10-62. The complete copy of the proceedings shows that none of the evidence the LCRA attempts to present to this Court was presented to the Board. For example, the LCRA now presents evidence as to the nature of Henderson’s business. Respondent’s Brief, p. 13. Even if this evidence was presented to the Board, the operation of an automobile salvage yard by Henderson is not evidence of blight. Similarly, no evidence was presented to the Board as to the purported condition of the former “Ice House,” which the LCRA asks this Court to now consider to uphold the Board’s finding of blight.

Respondent’s Brief, p. 13.³ The LCRA further asks this Court to find it “self-evident” that evidence that a junkyard was in the area, which was never presented to the Board, supported a finding that the area constituted an “economic liability.” Respondent’s Brief, p. 14. There is nothing self-evident in the claim that a business that has successfully operated within the City of St. Louis for over fifty (50) years, contributing to the City’s tax base, is an “economic liability.” Rather,

³ Respondent’s leap of logic defies logic by claiming that Alderwoman Young’s email to Rodney Crim, which was never presented to the Board, can somehow support the Board’s finding of blight. Respondent’s Brief, p. 13, n. 5.

given the fleeting nature of bars and restaurants, the Disper Schmitt property is more likely to be an economic liability than Henderson's.

While the LCRA further claims that a public hearing was held before the Housing, Urban Development and Zoning Committee, it does not appear that any evidence of blight was presented to this committee, and even if it was, it certainly was not presented to the Board to support its finding of blight. The LCRA would like this Court to believe that Dale Ruthsatz (or Alderwoman Young) "would" have testified at the committee hearing and that Mr. Ruthsatz "would" have passed around photographs. Respondent's Brief, p. 15. Mr. Ruthsatz testified that he could not recall what happened at the public hearing involving this redevelopment area. Respondent's App. A146, 97:24-98:22. Henderson's appearance at this hearing, through counsel, certainly does not provide evidence of blight in the area. Respondent's Brief, p. 15. Testimony that **might** have been presented to a committee of the Board cannot substitute for the evidence that was required to be presented to the Board to support a finding of blight.⁴

While it is true that the Blighting Study and Plan concluded that the area was in "poor to fair condition," which conclusions were defined in the Board Bill, this conclusion remained unsupported by any evidence or testimony. Conclusions cannot substitute for evidence or for the factual foundation necessary to support a

⁴ If the LCRA is claiming that the Board held a hearing on Board Bill No. 253, this is not the case. See Respondent's Brief, p. 17.

finding of blight by the Board. Instead of identifying evidence on the record to support the Board's finding of blight, the LCRA asks this Court to "presume" that the Board was familiar with the area. Respondent's Brief, p. 17. In its sheer desperation to convince this Court that there was a factual foundation to support the Board's finding of blight, the LCRA must resort to asking this Court to presume what the Board may have known and to consider evidence never presented to it. Clearly, this Court cannot do what the LCRA asks of it in determining whether the Board's finding of blight was arbitrary because without a factual foundation.

While the LCRA also claims that its recommendation of blight was all the evidence the Board needed, such is not the case, or there would be no reason for blighting ordinances to be approved by the Board. Respondent's Brief, p. 16. A finding by the Board without a factual foundation is arbitrary and unreasonable because unsupported by any evidence. Maryland Plaza, 594 S.W.2d at 290-91. The LCRA's recommendation cannot substitute for the factual foundation required to support the Board's finding of blight. Because the Board's finding of blight (a necessary condition precedent to the taking) was arbitrary and unreasonable, the circuit court was without jurisdiction over the condemnation action. State ex rel. Terrell v. Nicholls, 719 S.W.2d 862, 866 (Mo. App. E.D. 1986).

II. BECAUSE THE PASSAGE OF ORDINANCE 66499 WAS PROCURED BY FRAUD, COLLUSION AND BAD FAITH, IT WAS INVALID, DEPRIVING THE CIRCUIT COURT OF JURISDICTION OVER THE CONDEMNATION PETITION.

The LCRA initially attempts to persuade this Court that the circuit court was permitted to abdicate its duties because there is no evidence of self-dealing in this case and the finding of blight (itself invalid because unsupported by evidence) established that the taking was for a “public use.” Respondent’s Brief, p. 19. The purpose of the first phase of a condemnation hearing is to conduct “an evidentiary hearing in which the right or power of the condemnor to condemn the property in question is finally adjudicated” to include whether fraud, bad faith or an arbitrary and unwarranted abuse of discretion in the taking deprives the circuit court of jurisdiction over the condemnation. State ex rel. Rantz v. Sweeney, 901 S.W.2d 289, 291 & 293 (Mo. App. S.D. 1995). Therefore, the Missouri Supreme Court’s admonition in Kansas City v. Hyde, 96 S.W. 201, 205 (Mo. 1906), remains valid, particularly in light of § 523.261 R.S.Mo.

Perhaps the best evidence of the LCRA’s bad faith from the passage of Ordinance No. 66499 through this appeal is its successful effort to prevent the circuit court from considering relevant and material evidence (testimony and documents) of fraud, collusion and bad faith, discussed in more detail below. Ironically, the LCRA now complains that evidence it successfully excluded cannot be considered by this Court because not presented to circuit court due to the

LCRA's own bad faith tactics. Respondent's Brief, p. 20. The LCRA's claim that Relators failed to exercise "reasonable diligence" in preparing for the condemnation hearing is a smokescreen designed to cover-up its own questionable conduct in preventing Relators from obtaining reasonable discovery and presenting evidence in this case. There can be no dispute that Realtors attempted to obtain discovery before the condemnation hearing, which was prohibited by an order of the court at the LCRA's request. Respondent's App. A104. The LCRA then prevented Relator's from presenting any evidence at the condemnation hearing.⁵ Relators should not have had to resort to the Missouri Sunshine Law after the hearing to obtain evidence when Missouri's Rules of Civil Procedure afforded Relators both reasonable discovery and the opportunity to present evidence at the condemnation hearing. See State ex rel. Rantz, 901 S.W.2d at 292-93 ("landowners were entitled to have access to relevant information prior to trial relating to issues they wished to argue in defense of the condemnation action.").

The failure and refusal of the circuit court to allow Relators the opportunity to engage in reasonable discovery before the hearing and to present evidence at it allowed Dale Ruthsatz, the only witness to give testimony and an agent of the

⁵ As has been previously explained, Relators could not effectively examine Alderwoman Young without the documents requested in the subpoena duces tecum directed to the LCRA's custodian of records.

LCRA to mislead the court unchallenged. Specifically, in response to questioning by the LCRA's attorney, Mr. Ruthsatz testified that **after** the redevelopment plan was approved by the Board, it advertised for developers and ultimately entered into a redevelopment agreement with Ice House . Respondent's App. A132, 43:5-12. This claim was apparently made to dispel the allegations of fraud, collusion and bad faith. The LCRA's own documents admitted at the condemnation hearing, which were deemed irrelevant for purposes of Relator's case both as evidence and discovery, refuted this testimony. See Respondent's App. A29-A31. Relators were denied a meaningful opportunity to cross-examine Ruthsatz because deprived of any discovery before the hearing.

A. The Fraud Allegation

The LCRA misstates the law by citing State ex rel. U.S. Steel, 811 S.W.2d at 389, for the proposition that an allegation of fraud in a condemnation action must be pled with the particularity required by Missouri Supreme Court Rule 55.15. Respondent's Brief, p. 20. Koehr did not even discuss the pleading requirements of a claim of fraud in a condemnation action, other than to state fraud, collusion and/or bad faith must appear by "allegation and clear proof." *Id.* Relators could find no case law addressing the sufficiency of a fraud pleading in a condemnation action under Missouri law. More troubling is the LCRA's sleight of hand trick to suggest that if "fraud" was not alleged with particularity, the circuit court was not obligated to allow Relators to present evidence in support of

their claims of collusion and bad faith, which have no specific pleading requirement.

B. Evidence of Fraud, Collusion and Bad Faith

In support of their claim of fraud, collusion and bad faith, Relators alleged much more than the twenty-year harassment campaign to get Henderson out of the area by Board Bill No. 253's sponsor, Alderwoman Young, and the more recent harassment campaign of Mark Disper to force Henderson from her property.

Relators alleged that Ordinance 66499 was approved without any evidence of a plan for the redevelopment of the area or that Ice House had the financial means to redevelop the entire area to allow the taking of private property for a private use through fraud, collusion and bad faith. Petition, Exhibit 6, p. 76, ¶ 33.

Additionally, the Board's finding of blight was made without any evidence to support it. Petition, Exhibit 6, p. 73, ¶ 20. The fact that Disper Schmitt bought property next to a "junkyard" to operate a "martini bar" prior to the passage of Ordinance No. 66499 is also evidence that its passage was a foregone conclusion due to fraud, collusion and bad faith. Petition, Exhibit 6, pp. 69-70, ¶¶ 1 & 5.

Because Relators set forth the facts in support of their claim of fraud, collusion and bad faith in their original brief, they are not repeated herein. Realtors' Brief, pp. 2-18 and 26-31. However, distortions of the record contained in the LCRA's response to Relators' Brief must be corrected. While the LCRA would like this Court to believe that the collusive scheme to get Henderson off her property both before and after the passage of Ordinance No. 66499 was limited to

falsely reporting code violations, this is not the case. See Respondent's Appendix, A151, 118:9-18 & 121:6-15.

Relators would not have been invited to any meetings/discussions at which plans were made to fraudulently and collusively take their property both before and after the passage of Ordinance No. 66499. Therefore, additional evidence to support these claims/defenses could only be obtained through discovery or trial testimony, both denied to Relators by the circuit court. Nonetheless, the Board's failure to comply with Chapter 99 as set forth herein, together with the evidence of ongoing collusion to force Henderson from her property is circumstantial evidence of fraud, collusion and bad faith. Direct evidence of fraud or collusion is rare, and therefore, it has long been held that fraud and collusion may be proven by circumstantial evidence. Herrold v. Hart, 290 S.W.2d 49, 55 (Mo. 1956).

While Mr. Dalton claims to have no interest in Disper Schmitt Properties, this does not appear to be the case. Relators' App. A44. Mr. Dalton publicly announces his financial connections with Mark Disper and Daniel Schmitt when it is to his benefit to do so (for example, when Disper Schmitt and/or Ice House is looking for investors to complete a project it does not have the financial means to complete), but denies these connections when he believes it is prudent to do so. It was Mr. Dalton, representing Disper Schmitt (whose law firm now represents both the LCRA and Disper Schmitt), who threatened to take Henderson's property by eminent domain if she did not sell it to Disper Schmitt. Respondent's App. A129, 32:16-25. Clearly, he did not have the power or authority to take Henderson's

property unless he was acting in fraud and collusion with the LCRA. At a minimum, Relators should have been permitted to examine Dalton as to his financial interest in the redevelopment area, as well as any communications with and/or financial contributions made to members of the Board of Alderman before the passage of Board Bill No. 253 as relevant and material to their claims/defenses

While the LCRA claims that Relators stated that a redeveloper was selected before the LCRA declared the area blighted (apparently to suggest that Relators have distorted the facts), this is not the case. Respondent's Brief, p. 24. Relators claimed that a redeveloper was selected before the area was blighted by the Board, showing that the finding of blight was a foregone conclusion. Relators' Brief, pp. 6-7. There can be no dispute that the area was blighted at the request of the redeveloper, not because the LCRA made an independent determination of blight. Despite the LCRA's protestations to the contrary, no fair and open process was used to select a developer for this project, just the pretext thereof as part of the fraud and collusion. Advertising for redevelopers began on August 31, 2004. Reply Brief, App A1. A redeveloper was selected on September 24, 2004. No developer except the one that had requested the area be blighted, had already been chosen by the LCRA to redevelop the area and already prepared a "plan" (albeit incomplete) for the redevelopment area would have had the ability to submit a plan for the redevelopment of the area in three weeks it took the LCRA to finalize a redeveloper for the project. There was never any intention on the part of the LCRA for this area to be redeveloped by any group other than Ice House – further

evidence of the sham process the LCRA sought to conceal. Additionally, it is unclear why a \$2,000.00 developer's fee was paid to the LCRA by Fred Barrera, a partner in Ice House, **before** Ice House's selection as the redeveloper, particularly when Redeveloper Kits cost only \$20.00. Reply Brief, App. A2-A3. Relators could not question Ruthsatz about this payment as evidence of fraud, collusion and bad faith because Relators were not permitted to conduct discovery or subpoena evidence for trial. Relators have presented evidence of much more than "some preliminary legislative negotiations" permitted by Kintzele v. City of St. Louis, 347 S.W.2d 695, 701 (Mo. 1961). They have presented evidence that the developers dictated this process from its inception in collusion with the LCRA.

C. Modification of the Redevelopment Area

The LCRA still offers not credible explanation as to how or why the "true, correct and complete copy of the proceedings of the Board regarding Board Bill # 253 Committee Substitute, now known as Ordinance No. 66499" included a redevelopment area different from the one contained in Ordinance No. 66499 or how provisions from the missing bill ended up in the final ordinance.

Respondent's Brief, p. 26-27. The LCRA asks the Court to simply ignore these discrepancies and conclude that they are immaterial and no evidence that the Board was defrauded in passing Ordinance No. 66499, even though there can be no dispute that what the Board thought it passed and what it did pass were different. Respondent's Brief, pp. 26-27. The Court cannot do this. Any modification to the redevelopment area required the Board's approval.

Respondent's App. A33, § H. There is no evidence that such approval was given in this case, further evidence of fraud in the passage of Ordinance No. 66499.

III. THE LCRA'S FAILURE TO STRICTLY COMPLY WITH THE REQUIREMENTS OF CHAPTER 99 DEPRIVED THE CIRCUIT COURT OF JURISDICTION OVER THE CONDEMNATION PETITION.

A. Land Use Plan

Initially, it must be noted that the exercise of the power of eminent domain must be in **strict compliance** with the strictures under which it is granted. State ex rel. Terrel, 719 S.W.2d at 866. Because the LCRA seeks to exercise the power of eminent domain under Chapter 99 R.S.Mo., it and the Board must strictly comply with the provisions of this chapter. Absent strict compliance with the statutory/ordinance prerequisites to the exercise of the power of eminent domain, a circuit court is without jurisdiction to order condemnation on the petition. *Id.*

The LCRA claims that it complied with the requirements of § 99.430.1(4) by presenting an adequate land use plan. The land use plan states only that the area will be redeveloped for Commercial/Residential/Office use. The LCRA contends that this is a "sufficiently detailed plan to allow the Board to determine the redevelopment area's relationship to definite local objectives as to the appropriate land uses ... and the proposed land uses and building requirements in the project area." See Section 99.430.1(4), Relator's App. A7-A8. Relator's do not now and have never claimed that the statute requires the Council to be

informed of the precise placement of each brick. Respondent's Brief, p. 31.

However, the statute requires the land use plan to provide certain information such as the building requirements in the project area and proposed land uses with sufficient detail to enable the Board to determine whether the plan is consistent with other objectives in the area. For example, in Tierney v. Planned Industrial Expansion Authority, 742 S.W.2d 146, 153 (Mo. banc 1987), relied upon by the LCRA, the plan included a specific estimate that 500,000 feet of office space would be built. Here there is no specific detail as to the building requirements in the area or how the land would be used. In other words, there was no "sufficiently detailed plan" when the Board approved Ordinance No. 66499 in violation of § 99.430.1(4) R.S.Mo.

B. Redevelopment Schedule

Relators have never claimed that the Blighting Plan and Study lacked a redevelopment schedule. Respondent's Brief, p. 31. Relators claim that the LCRA's misrepresentation of this schedule to the Board and its complete indifference to it after the passage of Ordinance 66499 is evidence of the fraud, collusion, and bad faith that induced the passage of Ordinance No. 66499, as well as noncompliance with the ordinance, a condition precedent to the exercise of the power of eminent domain. While the LCRA claims that it can now ignore the schedule the Board approved because "economic conditions warrant" it, this claim ignores the fact that the LCRA knew at the time Board Bill No. 253 was introduced and certainly before the passage of Ordinance No. 66499 that it did not

intend to abide by the schedule approved by the Board. The LCRA's indifference to the schedule also ignores the fact that the plan, including the schedule, can only be modified by the LCRA with the Board's approval (substantial changes) or the consent of the Planning Commission of the City (other changes). Relators'

App. A33, § H. The LCRA presented no evidence that the Board or Planning Commission consented to/approved this modification in the schedule. Ironically, the LCRA takes the position that there is no need to rush the completion of this redevelopment area (even though it was supposed to be fully completed in December 2006 and still is no where near completion), while insisting that the condemnation hearing needed to be completed quickly, suggesting an urgency to the project now lacking. It remains unclear as to why the LCRA needed to rush the completion of the condemnation hearing, except that the more time Relators had to prepare for the hearing, the more likely it would be that they would uncover additional evidence of the fraud, collusion and bad faith alleged.

C. Estimated Costs and Proposed Method of Financing the Project

To comply with § 99.430.1(7) the redevelopment plan must contain a statement of the proposed method and estimated cost of acquiring and preparing for redevelopment the redevelopment area, as well as a statement of the proposed method of financing the project. § 99.430.1(7) R.S.Mo., Relator's App. A8. The LCRA's proposed method of financing the redevelopment of the area was that all costs would be borne by the redeveloper. Relators' App. A31. The LCRA's plan contained no statement of the estimated cost of acquiring the property and

preparing it for redevelopment, which it claims was unnecessary because someone else was going to pay for this. Respondent's Brief, p. 33. As a result, at the time the plan was approved by the Board, it did not even know how much it would cost to purchase the property within the redevelopment area (a necessary condition of the plan), much less the ultimate cost of redeveloping the area. Nonetheless, without any evidence as to the cost of acquiring the property within the redevelopment area or preparing it for redevelopment or any evidence that the developers had a proposed method for financing the project as required by § 99.430.1(7), the Board found that "the proposed financing plan for the Area is feasible." Relator's App. A13. Once again, a Board finding must be supported by some evidence or it is arbitrary. Maryland Plaza, 594 S.W.2d at 290-91.. Here there is no evidence to support the Board's finding of a feasible financial plan, itself evidence that Ordinance 66499 was procured by fraud, collusion, and bad faith.

The LCRA claims that because the plan was submitted to the Board on September 21, 2004, the same day it appointed Ice House as the redeveloper, it would have been impossible to submit a more detailed plan for the method of financing the area. However, this is not true. On September 8, 2004, Ice House submitted its Statement of Experience and Qualifications to the LCRA. Relators' App. A45-A53. This statement estimated the cost of redeveloping the area at One Hundred Million Dollars, with Eighty Million of this cost to come from loans. App. A46. No explanation was provided as to how the redeveloper would obtain

the additional Twenty Million Dollars needed to redevelop the area. The Statement listed developer equity in the project at only One Hundred Thousand Dollars. Relators' App. A50. The Statement provided information as to the estimated cost and proposed method of financing only one portion of the redevelopment area, Ice House #6.

If this Court should consider Resolution 04-LCRA-7748 in determining Ordinance No. 66499's compliance with § 99.430.1(7) as the LCRA requests, this Court must further recognize the trick that LCRA attempts to pull. The LCRA contends that because Resolution No. 04-LCRA-7748 provides that "[s]ources of funding include Redeveloper equity, bank financing and use of Historic Tax Credits," a proposed method of financing the project was presented to the Board. Respondent's Brief, p. 34. However, this statement relates only to the Eight Million Dollars needed to redevelop Ice House #6. Respondent's App. A29. It provides no information as to the developer's proposed method of financing the additional Ninety-Two Million Dollars needed to redevelop the entire area. The Ice House District redevelopment plan is nothing but a "wish list" at best and a joke at worst, which does not comply with §99.430.1(7). See e.g. State ex rel. Devanssay v. McGuire, 622 S.W.2d 323, 327 (Mo. App. E.D. 1981) (while a statement of proposed method of financing is not synonymous with financing, it must still be more than a "wish list"). Two and one-half years after the passage of Ordinance No. 66499 through fraud, collusion and bad faith, Ice House apparently still does not have a plan for the redevelopment of the area, including no idea how

much it will cost to redevelop it or how long it will take to complete. See Reply Brief, App. A4-A5.

By statute, the legislative body must have before it information to determine the availability of adequate means of financing the project to completion. “To approve a redevelopment plan without such information would be arbitrary.” *Id.* at 326. The LCRA’s proposal that the redeveloper would pay all of the costs associated with the redevelopment area did not provide the Board with any information to enable it to determine an adequate method of financing this One Hundred Million Dollar project to successful completion and could not constitute the statement of the method of financing contemplated by the statute.

D. Legal & Financial Ability of Ice House to Complete Project

The LCRA contends that it complied with § 99.450(2) because Resolution 04-LCRA-7748 establishes the legal and financial abilities of Ice House to carry out its “redevelopment proposal.” Respondent’s Brief, p. 34. This Resolution contained no plan for the redevelopment of the entire area but only two corners of the redevelopment area. Respondent’s App. A29-A31. Resolution 04-LCRA-7748 establishes only what Relators claim: that Ice House has no plan to redevelop the entire redevelopment area but only the properties it desires within it, showing that the blighting of the area by the Board was nothing but a sham to allow Ice House to take isolated properties in the area for their private purpose, clearly eminent domain abuse. As to its financial ability to carry out the redevelopment, at best, Ice House presented some evidence that it had the financial ability to

finance approximately Eight Million Dollars of this One Hundred Million Dollar project. *Id.* Clearly, § 99.450(2) was not enacted to allow the taking of private property through the mighty power of eminent domain when a redeveloper could establish only that it had the financial ability to complete less than 10% of the project proposed. This is the same type of eminent domain abuse that has occurred all too often because cities and public agencies that are supposed to protect the public interest are aligned with the redevelopers making financial contributions to the elected officials charged with making these decisions.

IV. THE CIRCUIT COURT ABUSED ITS DISCRETION IN QUASHING THE TRIAL SUBPOENAS ISSUED BY RELATORS, WHICH PREJUDICED RELATORS BY PREVENTING THEM FROM PRESENTING EVIDENCE TO PROVE THEIR CLAIMS/ DEFENSES.

A. Standard of Review

The LCRA quotes isolated language from Nelson v. Waxman, 9 S.W.3d 601, 603 (Mo. banc 2000) to convince this Court to affirm the trial court's decision to prohibit Relators from presenting any evidence in support of their claims/defenses. The entire quote from Nelson is:

The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.

Id.

It was against the logic of the circumstances and a shock to the sense of justice to allow only one party to present evidence in this case, particularly when the Relators had raised issue requiring evidence in both their motions to dismiss and answers. To prove their claims/defenses, Relators subpoenaed for the hearing on the condemnation petition the LCRA's custodian of records, Rodney Crim (the LCRA's executive director), Jonathan Dalton and Mark Disper (investors in Ice House, who have a financial interest in the project), Alderwoman Phyllis Young, and various code and law enforcement officials. All of the subpoenas issued by Relators were quashed by the trial court (either before the hearing or at it) with the exception of Alderwoman Young, who was not called at the hearing because she could not be effectively examined without the documents subpoenaed from the LCRA. The LCRA tries to gloss over the quashing of trial subpoenas issued to the LCRA witnesses and Mr. Dalton at its request as "served for improper purposes." Respondent's Brief, p. 38. The LCRA convinced the trial court that requiring these witnesses to testify at the hearing would constitute discovery not evidence. It defies the logic of the circumstances to prohibit a party from presenting evidence in support of their claims/defenses during the phase of the proceeding specifically designed for such purpose. As a result of the circuit court's actions, only the documents the LCRA wanted admitted were admitted at the proceeding, preventing Relators from presenting the evidence of fraud, collusion and bad faith detailed in their original brief.

Even after the trial of a case, appellate courts have held that it is an abuse of discretion “to refuse to permit the introduction of material evidence that might substantially affect the merits of the case.” Parmenter v. Parmenter, 81 S.W.3d 234, 240 (Mo. App. S.D. 2002). Clearly, the LCRA’s documents evidencing: (1) the developers’ contacts with Young before the passage of Ordinance No. 66499 (particularly Alderwoman Young’s instruction to the LCRA to create a redevelopment plan without ever asking the LCRA to determine whether the area was blighted within the meaning of Missouri law); (2) that the redevelopment proposal was put forward even though the LCRA knew that the developers lacked a plan for or the financial means to redevelop the entire area; and (3) the bait and switch plan to complete the project in phases and well after the deadline for completion contained in the ordinance, as well as Dalton and Disper’s contacts with Young and other members of the Board (and/or financial contributions made to them) would substantially effect the merits of this case. It was clearly an abuse of discretion to quash the subpoenas issued to Dalton, Disper, Crim and the LCRA’s custodian of records because permitting only one party to present evidence in a case “shocks the sense of justice and indicates a lack of careful deliberate consideration.” Nelson, 9 S.W.3d at 603.

B. Denial of Discovery

The LCRA argues that the circuit court’s ruling relative to the denial of discovery in this case is not before the Court because not contained in the writ petition. It is true that the discovery issue was not presented to the Court because

the first phase of the condemnation hearing had already been completed (after the Court of Appeals denied a preliminary writ of prohibition to prevent the condemnation hearing from taking place until after reasonable and limited discovery was completed), and therefore, this Court could not prohibit the first phase of the condemnation hearing from occurring until reasonable discovery was completed. However, should this Court makes its preliminary writ absolute because the trial court abused its discretion in denying Relators the opportunity to present evidence in this case, the issue of whether discovery should be permitted before the hearing of this case will again arise, and therefore, should be addressed by this Court.

In a desperate effort to avoid scrutiny of its actions, the LCRA misrepresents the applicable case law. Specifically, the LCRA contends that State ex rel. Rantz, 901 S.W.2d at 289, stands for the proposition that discovery is not allowed in a condemnation action unless the landowner can “allege and prove ... fraud, bad, faith or an arbitrary and unwarranted abuse of discretion.” Respondent’s Brief, p. 38. Clearly, if a landowner was required to prove his/her claim before discovery would be permitted, discovery would be unnecessary. State ex rel. Rantz defines the landowner’s burden of proof before a trial court considers the issue of the “necessity of the taking.” This is not a requirement for obtaining discovery in a condemnation action as the LCRA claims.

The LCRA’s reliance upon State ex rel. Missouri Highway and Transportation Comm v. Bush, 911 S.W.2d 690 (Mo. App. E.D. 1995), is also

misplaced. In Bush, the court concluded that there was nothing in the record to show that the Commission had acted arbitrarily, capriciously or in violation of the law to justify discovery. *Id.* at 692. The facts of this case are more comparable to City of Wentzville v. Dodson, 133 S.W.3d 543 (Mo. App. E.D. 2004), in which the Court concluded that the circuit court abused its discretion when it denied a continuance to permit reasonable discovery. The Court concluded that Dodson was distinguishable from Bush in that there was no evidence that the landowner sought discovery to unnecessarily delay the proceeding by engaging in a fishing expedition. *Id.* at 550. Here Relators were not engaging in a fishing expedition but seeking evidence to support their specific claims and defenses that Ordinance 66499 was passed by the Board with no evidence of blight presented to it, no evidence that the redevelopers had a plan to redevelop the entire area, and no evidence of a method of financing the redevelopment area, evidencing the passage of the ordinance through fraud, collusion and bad faith.

This case, like Dodson, involved a situation where the condemnation action was filed shortly before the hearing. Relator Henderson was served with the petition only thirty-seven (37) days before the hearing. The Dennises were served forty-six (46) days before the hearing but all live out of town. While the circuit court continued the hearing for one week to consider the motions to dismiss, it specifically prohibited any discovery during this period at the LCRA's request. Respondent's App. A104.

The attorneys for the LCRA, who also represent and are paid by the redeveloper, presented no evidence that the LCRA needed to condemn the property at issue immediately, or that it would be prejudiced if the motion to continue to conduct limited discovery was granted. Instead the LCRA simply wanted to prevent Relators from obtaining evidence in support of their claims/defenses, which they successfully did. Now the LCRA claims that their success in preventing the circuit court from allowing the discovery of and/or consideration of this evidence precludes this Court from considering Relators' claims. Given the substantial delay that the LCRA has permitted the redeveloper in completing even the initial phases of this redevelopment, apparently because they are unable to secure the necessary financing, the LCRA could not claim prejudice in delaying the condemnation action for a short period of time to permit reasonable discovery. See Relators' App. A44. Rather, the LCRA opposed the granting of a continuance and reasonable discovery only because it has a great deal to hide with respect to the passage of Ordinance 66499.

C. The Harassment Campaign

The LCRA focuses its attention on the witnesses supporting the harassment scheme designed to force Henderson from her property to suggest that the trial court did not abuse its discretion in preventing Relators from presenting any evidence in support of their claims/defenses. This ignores Relators efforts to call Rodney Crim and the LCRA's custodian of records because it knows these witnesses were clearly relevant and material to this case. Mr. Dalton, a lawyer

whose firm represents the LCRA, and who has been less than candid with respect to his financial connections with Mark Disper and Daniel Schmitt, threatened to simply take Henderson's property by eminent domain if she did not sell it to his client, Disper Schmitt Properties, LLC. See Respondent's App. 129, 32:16-25. Clearly, Mr. Dalton did not have the power or authority to take anything by eminent domain unless he was acting fraudulently, collusively and in bad faith with City officials, which cannot be proven by Relators if the circuit court does not permit them to present evidence in support of their claims/defenses. Similarly, Mr. Dalton's contacts and contributions to City officials prior to the passage of Ordinance No. 66499 are relevant to this proceeding. The LCRA attempts to place Relators in a "Catch 22" to deprive them of due process by preventing reasonable discovery in this case and then claiming that calling witnesses at trial would be impermissible discovery.

Mark Disper, who has been less than candid about the subpoena he claims was never served upon him (which he actually refused),⁶ is also a key witness to the claims/defenses raised in this proceeding. See Reply Brief, App. A6-A9. His

⁶ As this Court is well aware, there is a huge difference between never being served a subpoena and a witness refusing to accept service of a subpoena tendered, which refusal constitutes valid service. See Respondent's Brief, p. 41, n. 9. Mr. Disper's refusal to accept the subpoena served upon him is itself evidence that his testimony would support Relators' claims/defenses.

testimony would show that he conspired and colluded with various City officials to get rid of Henderson both before and after the passage of Ordinance No. 66499 and that when he purchased the property next to Henderson's "junkyard" before the passage of Ordinance No. 66499, its passage was a foregone conclusion.

The relevancy of the testimony of the other witnesses: Sgt. Steve Serraco, Johnny Bruce, Alverta Opperman, and Jonathan Kennedy proffered by Relators must be considered under the totality of these circumstances. As set forth above, Relators allege that Disper Schmitt properties has engaged in a conspiracy with various City officials to force her from her property both before and after the passage of Ordinance No. 66499. The offer of proof shows that these officials confirm this ongoing scheme, and Alderwoman Young's participation in it. Respondent's App. A151-A152, 119:25-122:1. This evidence does not stand in isolation. When coupled with the Board's failure to require any evidence of blight before the passage of Board Bill No. 253, as well as its failure to require any evidence of a plan to redevelop the area or the financial ability to do so, there is significant evidence of fraud, collusion and bad faith between the LCRA, Disper Scmitt, Mr. Dalton and the Board in the passage of Ordinance No. 66499, which continues to this day.

**D. This Evidence Prohibited Goes to the Purpose of the
Condemnation Action**

The evidence set forth above does not only establish that Disper Schmitt, Young and others wanted Relators' (and specifically Henderson's) property but

that the taking at issue was for a private purpose because not for the public purpose of redeveloping the entire area to cure blight in it. As set forth above this evidence shows that Ice House does not and never had a plan for the redevelopment of the entire redevelopment area or the financial ability to finance such redevelopment, which resulted in Disper Schmitt engaging in a scheme to force Henderson from her property so that it would not have to pay her fair market value for it. Partial or incomplete development of a redevelopment area may actually exacerbate blight and does not serve a public purpose. State ex rel. Devanssay, 622 S.W.2d at 326. Here the Court arbitrarily refused to consider evidence to aid in its determination as to whether the taking was for a public purpose (curing the purported blight in the entire redevelopment area), and therefore, whether it had jurisdiction to order condemnation on the petition.

Relators do not miss a fine part in condemnation law as to the difference between motive and purpose, as the LCRA contends, rather the LCRA attempts to obscure the lack of a public **purpose** for this condemnation. Respondent’s Brief, p. 44. Generally, the purpose of a condemnation action is open to judicial investigation. Dodson, 133 S.W.3d at 548. Purpose “refers to that which one sets before himself as the end, aim, effect, or result to be kept in view or object to be attained.” *Id.* Here the evidence supports Relators’ claim that the purpose of blighting the Chouteau Avenue/South Seventh Street/I-55 Redevelopment Area was to allow certain developers to “grab” land they wanted in the area, without any real plan or ability to redevelop the entire area, which does not serve a public

purpose. The trial court clearly abused its discretion in refusing to hear evidence regarding the purpose of this condemnation. *Id.*

E. The Board Was Presented With No Evidence of Blight, And Therefore, The Purpose of the Condemnation Hearing Could Not Be “Conclusively Established” By Such Finding

Finally, the LCRA claims that the public purpose of the condemnation at issue was conclusively established by the Board’s finding of blight. Respondent’s Brief, p. 44-46. However, this claim ignores the fact that the Board’s finding of blight was arbitrary because unsupported by any evidence. In essence, the LCRA asks this Court to abdicate its role in this condemnation action. The Missouri legislature has made it clear that the court’s should not abandon their oversight role in this type of proceeding. See § 523.261 R.S.Mo.

It was for the court to determine whether the condemnation was authorized by law. City Center Redevelopment Corp. v. Foxland, Inc., 180 S.W.3d 13, 15 (Mo. App. E.D. 2005). While a legislative finding of blight will generally be accepted by the courts as evidence that the contemplated use is public, such is not the case when there is an allegation and evidence that the legislative finding was arbitrary or was induced by fraud, collusion and bad faith. State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36, 45 (Mo. banc 1975). When the court denies property owners the opportunity to present evidence in support of their claims/defenses (thereby allowing only one party to present evidence in the case), the court not only abuses its discretion, but denies

the most basic due process right: the opportunity to be heard. The court's decision to deny Relators the opportunity to present relevant evidence in support of their claims/defenses at the time specifically designated for such evidence was against the logic under the circumstances, amounting to an abuse of discretion.

CONCLUSION

Relators previously detailed the eminent domain abuses the legislature was apparently attempting to curtail in its 2006 amendments to Missouri's eminent domain laws in their original brief. Such abuse is real and is clearly evidenced in the LCRA's conduct in this case. This Court's preliminary writ of prohibition should be made absolute and the circuit court ordered to dismiss the condemnation action styled Land Clearance for Redevelopment Authority of the City of St. Louis v. John and Regina Dennis, et al., et al., Cause No. 0622-CC05527 as beyond the jurisdiction of the circuit court for the reasons set forth herein. Alternatively, and without waiver of the foregoing, this Court's preliminary writ of prohibition should be made absolute prohibiting the circuit court from allowing this case to proceed to a commissioner's hearing on value until the court affords Relators a full and fair opportunity to present evidence on their claims and defenses at issue herein.

Respectfully submitted,

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CERTIFICATE PURSUANT TO RULE 84.06
AND CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document contains 7,743 words.

The undersigned further certifies that two (2) true and accurate copies of the foregoing document, the appendix thereto, and a floppy disk version of Relators' Reply Brief were sent by regular mail, postage prepaid, on this 7th day of June, 2007, to:

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