

**IN THE
SUPREME COURT OF MISSOURI**

NO. SC88487

CENTENE PLAZA REDEVELOPMENT CORPORATION,

Plaintiff-Respondent,

v.

MINT PROPERTIES, et al.,

Defendants-Appellants.

SUBSTITUTE BRIEF OF RESPONDENT

Thomas B. Weaver #29176
(tweaver@armstrongteasdale.com)
James E. Mello #37734
(jmello@armstrongteasdale.com)
Jeffery T. McPherson #42825
(jmcpherson@armstrongteasdale.com)
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
314-621-5070 FAX 314-612-2302

ATTORNEYS FOR RESPONDENT

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JURISDICTIONAL STATEMENT

This is an eminent-domain action commenced in the Circuit Court of St. Louis County. On January 19, 2007, the trial court (the Honorable James R. Hartenbach, Circuit Judge) entered an order of condemnation. On January 29, 2007, the defendants filed a notice of appeal to the Missouri Court of Appeals, Eastern District, citing section 523.261, RSMo, as the basis for jurisdiction. On March 14, 2007, Judge Hartenbach entered an Order and Judgment of Condemnation. Supp. L. F. 149.

On April 24, 2007, a panel of the Eastern District transferred the appeal to this Court. Rule 83.02. This Court has jurisdiction to consider appeals on transfer from the Missouri Court of Appeals. Mo. Const. art V, § 10.

INTRODUCTION AND SUMMARY

This case involves the application of the definition of blight under section 353.020, RSMo, to an area consisting of seven parcels in downtown Clayton, Missouri (the “Redevelopment Area” or “Area”). The seven parcels occupy what the defendants celebrate as one of the premier corners in one of the wealthiest municipalities in the state. This case is not, as the defendants would have the Court believe, about only the three properties they own, which make up less than a third of the Redevelopment Area. This case is about the conditions in the entire Redevelopment Area.

The overall conditions of this Redevelopment Area are well established, and they support the Board of Aldermen’s legislative determination of blight. One of the seven parcels is an unused, outmoded parking garage, and two of the parcels have vacant, obsolete, commercially inadequate, and physically deteriorating buildings. Another parcel is partially occupied by a tenant on a month-to-month tenancy, has a building that is inadequate and outmoded for commercial use, and suffers from significant physical deterioration. Other parcels have problems of deferred maintenance or physical deterioration. Five of the properties are poorly platted, involving long and narrow lots that impede redevelopment of the Area, and none have adequate parking. The Area does not produce significant numbers of customers or jobs, and generates negligible sales tax revenues and unacceptably low property taxes. The Area has long been stagnant and, particularly considering its location, is not contributing as it should to the life and well-being of the City.

The condition and performance of this prominent corner are unsatisfactory and unacceptable on any level. The governing statute delegates to the Board of Aldermen the authority to decide what to do about these conditions, and when to do it. Thirteen years after adopting a Master Plan for redevelopment of the Area, and after months of meetings, analysis, and deliberation, relating to this project, the Board of Aldermen exercised its legislative discretion and unanimously determined that the Area was blighted and appropriate for redevelopment under Chapter 353. The elected officials who serve on the Board of Aldermen are accountable for that decision to the city residents they represent.

The defendants, on the other hand, say that the city must wait until things get worse, until there are crime and health problems, or until the defendants decide that they want the narrow lots to be combined and redevelopment to occur. The defendants also say that the Court may second-guess the collective judgment of the legislative body elected by the residents of the city. In asking the Court to invalidate the Board of Aldermen's legislative act, the defendants ignore the evidence supporting Judge Hartenbach's order of condemnation and misinterpret the applicable statutes. While focusing on their three properties, the defendants ignore or minimize the condition of the rest of the Redevelopment Area, and miscast the history that led Clayton to this policy decision.

The Court should affirm the judgment of the circuit court because substantial evidence establishes that, as a result of the conditions in the Area, this prominent corner

is not contributing to the City as it should, and the Board of Aldermen reasonably determined that the Area met the criteria for statutory blight.

STATEMENT OF FACTS

Rule 84.04(c) requires an appellant to provide “a fair and concise statement of the facts relevant to the questions presented for determination without argument.” In this case, the questions presented for determination are those set forth in the appellants’ points relied on, which are couched in the only terms that could permit the appellants any relief. The appellants claim, as they must, that “no evidence” supports the order of the circuit court or the legislative determination of the City of Clayton. But the appellants’ statement of facts does not recite the evidence in the record. Contrary to Rule 84.04 and the standard of review, the appellants repeatedly ignore evidence supporting the Board of Aldermen’s decision and Judge Hartenbach’s judgment, rely on evidence Judge Hartenbach implicitly rejected by his judgment, and mischaracterize the evidence.

I. Introduction.

On December 13, 2004, the City of Clayton’s Board of Aldermen passed Ordinance 5911, declaring an area in Clayton’s business district to be blighted under Chapter 353 of the Missouri Revised Statutes (the “Redevelopment Area” or “Area”) and

approving a Redevelopment Plan and Redevelopment Agreement for the Redevelopment Area. Exhibit 21.¹

The passage of Ordinance 5911 was the culmination of Clayton's nearly yearlong process of investigation, analysis, and deliberation regarding the adverse conditions in the Redevelopment Area and the necessity of using redevelopment tools to address those conditions. This process included a request for proposals to redevelop the area. Centene Corporation ("Centene") responded. What followed were multiple meetings involving the Board of Aldermen, City staff, experts, and private citizens about conditions in the area and redevelopment opportunities; studies and analyses by an experienced urban-planning company; review of written material; extended negotiations between the City and Centene about the nature of a redevelopment plan; and public hearings before the Board of Aldermen. This activity resulted in the formation of Centene Plaza Redevelopment Corporation ("CPRC") to redevelop the Area.

The Redevelopment Area consists of a seven-parcel portion of a block bounded by Hanley, Forsyth, Bemiston, and Carondelet. Exhibit 1; Appendix A1. The Redevelopment Area has not seen any new development in decades and suffers from aging and obsolete buildings, physical deterioration, and outmoded building and lot conditions. Exhibit 12. Consistent with the goals of Clayton's 1993 Master Plan, CPRC

¹ Plaintiff has filed copies of cited exhibits in indexed, tabbed, consecutively paginated volumes of exhibits, paginated "PEX 1," etc. Citations to specific pages of exhibits are to the page number of the bound volume.

has undertaken to build a mixed-use office-and-retail complex in the Redevelopment Area, with the expectation of creating over 800 new jobs in what would be Centene's new corporate headquarters. PEX 490-491, 499.

In 2004, Centene purchased two adjoining parcels in the Area, located at 21 S. Hanley and 7700 Forsyth (the "Library Limited property"). In 2006, CPRC acquired two other properties in the Area, at 7720 Forsyth (Klarfeld) and 7736-38 Forsyth (Voss), pursuant to orders of condemnation in separate proceedings. Tr. 243-44. Four defendants have ownership interests in the remaining three properties, which are at issue in this case. The Turks and Sheehans own 7716-7718 Forsyth; Forsyth Office, LLC (referred to as "Kohner") owns 7730 Forsyth; and Mint Properties, Inc. ("Mint"), owns 7732-34 Forsyth. These three properties make up less than a third of the total square footage in the Redevelopment Area. Exhibit P (PEX 1375). In these consolidated actions, CPRC seeks to acquire these three remaining parcels by eminent domain. The Sheehans, Kohner, and Mint oppose the condemnation. The Turks do not. Tr. 158.

II. The Clayton Master Plan.

In 1993, the City of Clayton, working with Richard Ward's firm Development Strategies, Inc., adopted the Clayton Business District Master Plan ("the Master Plan") for Clayton's central business district. Exhibit 2. Thirteen years later, at the trial of the case, Richard Ward testified as an expert on behalf of the defendant property owners.

The Master Plan described existing concerns about areas of the central business district, and emphasized Clayton's need to revitalize and improve parts of that district, including the defendants' properties along Forsyth Boulevard, in order to maintain the

City's status in the region. Exhibit 2 (PEX 6-8, 17-28, 156-59); Tr. 23, 410. The Master Plan cited the importance of retail development (both to increase tax revenue and to achieve the social benefits of a pedestrian-friendly environment), increased street activity, and social vitality in downtown Clayton. Exhibit 2 (PEX 20); Tr. 634. The Master Plan expressly recognized the propriety of using Chapter 353 and other development tools in areas of the central business district, including the Redevelopment Area. Exhibit 2 (PEX 3, 95, 97-98, 139-40); Tr. 23, 410.

Eleven years after adoption of the Master Plan, the Redevelopment Area had not seen any development. Instead, the situation in the Redevelopment Area had worsened. Exhibit 12 (PEX 603); Tr. 25, 404. The Library Limited bookstore (later renamed Borders) had been identified in the Master Plan as an example of an important retail operation in the central business district. Exhibit 2 (PEX 37). In 2002, that business left Clayton for a redevelopment area in the nearby community of Brentwood. Exhibit 12 (PEX 586); Exhibit 53 (PEX 1321). As of 2004, the Library Limited property (consisting of the old store building and an unused parking lot at 21 S. Hanley) remained vacant. Exhibit 12 (PEX 586, 589); Exhibit 53 (PEX 1321-22, 1336); Tr. 404. Nearby properties also had vacancy problems. Exhibit 12 (PEX 589-90); Tr. 366, 412, 413, 415. Longstanding parking concerns had not been resolved. Exhibit 2 (PEX 40-44, 139); Tr. 411-13. As a result of the vacancies and existing uses, the Area is generating no real pedestrian activity (and relatively few jobs). Tr. 633-34.

III. The Library Limited Property.

In January, 2003, Summit Development Group contracted to buy the Library Limited property from the prior owner. The sale closed in September, 2003. Exhibts F2, I2. Clayton approved Summit's proposal for a hotel/retail development on the site; the approval was for one year. Exhibit S-2. By the summer of 2004, Summit advised Clayton that it was having trouble finding tenants and obtaining financing for its project. Tr. 27, 107, 112; Exhibit U1.

In November, 2004, Centene purchased the Library Limited property from Summit. Tr. 236, 258-60. Centene owned and occupied an adjacent office building at 7711 Carondelet and bought the Library Limited property "opportunistically" as a band-aid for office space needs, but with no defined plan for whether or how to use the property long term. Exhibit 49 (PEX 1219-1221, 1228, 1231); Tr. 176-77, 236, 254, 258-9. Although Centene (which is not a developer) generally considered the possibility of building its headquarters on the Library Limited site, at the time of the purchase it had not decided whether to or how it might develop the property. Exhibit 49 (PEX 1217); Tr. 174, 176-77, 236, 258-59, 263, 288.

The defendants falsely state that "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."

Appellants' Substitute Brief at 5. Though Centene considered buying the property in 2003, the cited transcript pages do not support any suggestion that Centene had plans for redevelopment at that time. Without citation to the record, the defendants then state,

“Centene attempted to persuade Summit to abandon the development plans and sell the site to Centene.” This too is misleading. Centene did not approach Summit about purchasing the site until late in the summer of 2004, after Summit had spent a year unsuccessfully looking for tenants and financing. Exhibits D, U1; Tr. 27, 107, 112.

In late 2004 and early 2005, Centene met with representatives of the City and expressed an interest in acquiring the City’s parking garage on Carondelet (adjacent to the building at 7711 Carondelet that Centene already owned) because Centene’s most pressing need was parking. Tr. 266-67. At that point, Centene had no specific plans for the Library Limited property as it had not hired developers to evaluate what would be necessary to develop the site or to assess the financial feasibility of any particular development. Tr. 28, 174, 263, 288. Although interested in the possibility of Centene’s developing the Library Limited property, the City sought a redevelopment project that would address the broader, longstanding problems within the block. Tr. 116; 171.

IV. The RFP.

On April 22, 2005, Clayton issued a request for proposals (“RFP”) for development of the block bounded by Hanley, Forsyth, Bemiston, and Carondelet. Exhibit 10. The RFP sought proposals for development of all or part of the block to include high-density commercial and retail uses, emphasizing a positive pedestrian environment consistent with the Master Plan’s objectives. Exhibit 10 (PEX 470-473). With the goal of alleviating the Redevelopment Area’s lack of a pedestrian-friendly environment, the RFP stated that any proposal would have to include street-level retail. Exhibit 10 (PEX 471-473). The RFP stated that Clayton would consider all economic

incentives available under Missouri law other than tax-increment financing. Exhibit 10 (PEX 471).

The City provided nine packets of the RFP to various entities, but Centene submitted the only response. Exhibit 30; Tr. 38. In preparing its response and evaluating the appropriate and necessary scope of a mixed-use project, Centene sought the advice of development consultants, including Larry Chapman of Clayco. Tr. 184, 186-94, 201, 237; Exhibit 49 (PEX 1222-4). With the input of experts, Centene concluded that it would not be workable to build only on the Library Limited property and proposed a mixed-use office-and-retail development with necessary above-ground parking. Tr. 186-94, 237; Exhibit 49 (PEX 916, 1222-4, 1231, 1233, 1247, 1249-50, 1272).

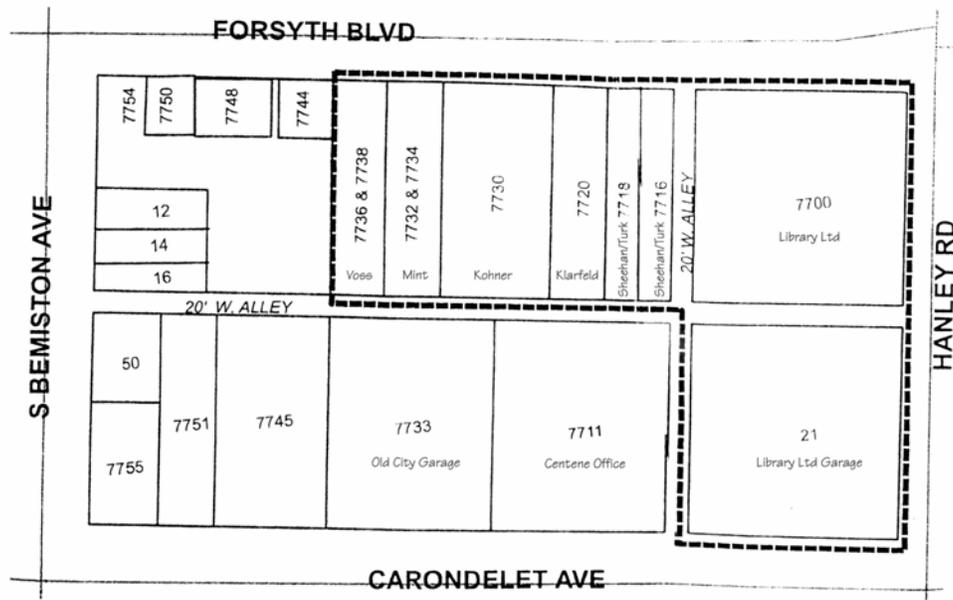
The area identified in Centene's proposal consisted of well over half of the block that was the subject of the RFP and initially included the building Centene already owned at 7711 Carondelet, as well as the parking garage that Centene wanted to purchase from the City. Exhibit 30 (PEX 935). Consistent with the RFP, Centene requested partial tax abatement under Chapter 353, as well as the power of eminent domain if it was unable to acquire any properties by negotiation. Exhibit 30 (PEX 932-33).

The defendants state that a portion of the Area had been the subject of "several redevelopment plans" that did not involve the defendants' properties. Appellants' Substitute Brief at 2. This statement is false. The only redevelopment plan for the Library Limited property was Summit's failed attempt. Although Centene had preliminary discussions with the City about possible uses of the Library Limited

property, the only redevelopment plan it ever prepared was the one it submitted to the City, which included the defendants' properties. Exhibit 30.

V. Evaluation of the proposed project.

In negotiations after Centene responded to the RFP, Clayton and Centene identified the final Redevelopment Area. As reflected in the Redevelopment Agreement, the Redevelopment Area consisted of the two parcels comprising the Library Limited property as well as five properties along Forsyth Boulevard: Sheehan/Turk (7716-18),² Klarfeld (7720), Kohner (7730), Mint (7732-34), and Voss (7736-38). Exhibits 1, 23 (PEX 741, 761). No residential properties are involved. Tr. 470, 486, 552-53. The area is depicted here:



² The Sheehan/Turk property consists of two parcels that are treated as a single property for tax purposes. This combined property was the subject of a single condemnation action and will be addressed as one parcel in this brief.

Mike Schoedel, Clayton's City Manager, testified that Clayton and Centene did not include the Centene building at 7711 Carondelet and the City garage in the Redevelopment Area because those properties were not going to undergo significant development and were not going to be subject to tax abatement. Tr. 627-28. Between June and December, 2005, Clayton and Centene negotiated the terms of a Redevelopment Plan and Redevelopment Agreement. Tr. 34, 237.

At trial, the defendants' witness Richard Ward testified that the RFP process was appropriate. Tr. 456. He found nothing wrong with a city's identifying the scope of the redevelopment project it was seeking, a developer's proposing a project of a different scope, and the parties' negotiating a public-private partnership satisfying the needs and objectives of both. Tr. 457-58.

During the negotiations, the City staff, including Mr. Schoedel, assembled materials for consideration by the Clayton Board of Aldermen. Exhibits 3, 4, 5, 6, 7, 7A, 11, 13; Tr. 34-6. The proposed Centene project was the subject of multiple public business meetings and Board discussions, as well as meetings of the Economic Development Advisory Committee (consisting of residents of Clayton). Exhibits 3, 4, 5, 7, 7A; Tr. 26.

VI. The PGAV Study and other documents regarding the project.

In June, 2005, Clayton requested PGAV, an urban planning company, to conduct a study to determine whether the Redevelopment Area qualified as "a blighted area" under section 353.020, RSMo. Tr. 34. On October 17, 2005, PGAV submitted a draft of its

study containing its preliminary conclusion that the Redevelopment Area was a blighted area as defined in Chapter 353. Ex. 7 (PEX 331). On November 8, 2005, Carol Waggoner, the principal drafter of the PGAV study, made a presentation to the Clayton Board of Aldermen concerning the study. Exhibits 4, 5.³

Mr. Schoedel testified that the PGAV study was an important component of the Board of Aldermen's determination, but that it was not the Board's only source of information. TR. 640. In addition to the PGAV study, the materials formally presented to the Board of Aldermen included requests for Board action and supporting documents assembled or prepared by Mr. Schoedel and City staff. Exhibits 4, 5, 6, 7, 7-A, 9, 13, 14, R2. By stipulation of the parties, the defendants' Exhibit R2 was identified as the project-specific materials submitted to the Board of Aldermen by City staff. Tr. 615-16. Exhibit R2, however, did not reflect all the documents or information available to or reviewed by the Board in making its legislative determination. Tr. 615-616.

VII. Blighting conditions in the Redevelopment Area.

The Redevelopment Area was troubled. The two-parcel Library Limited property, built in 1951, had lost its most recent tenant in 2002 and both parcels remained vacant at the end of 2004. Exhibit 12 (PEX 586, 589); Exhibit 56 (PEX 1341). The Sheehan Property at 7716-18 Forsyth, a 38-year-old, one-story building with a lower level, was

³ Ms. Waggoner suffered a life-threatening illness shortly before discovery began in this case, and, for medical reasons, was unable to testify in support of her report or otherwise assist in preparation for depositions or trial. Exhibit 53 (PEX 1273, 1335).

occupied by two small real-estate offices, a small “financial services office,” and a tailor. Tr. 470. The Klarfeld Property, a century-old home roughly converted to commercial use, had been vacant for over four years. Tr. 484. The Kohner building, a three-story, 43-year-old office building acquired in 1998, was fully occupied in 2005. Tr. 553. The Mint Property at 7732-34 Forsyth, built in 1949, had been over 45% vacant since Mint purchased it for investment purposes in 1999. Tr. 501-502. In 2005, the 55% leased section of the Mint Property was used by a wholesale fabric supplier. Exhibit 12 (PEX 589-90); Tr. 501-02. Mint had attempted to sell the property in the first quarter of 2005, before it became aware of any possible redevelopment in the Area. Tr. 499-501. The westernmost property at 7736-38 Forsyth had recently lost a massage/health spa tenant, was partially vacant, and in 2005 was occupied by a business called Massage Envy on a month-to-month tenancy. Exhibit 12 (PEX 587); Tr. 366.

Ms. Waggoner concluded that the vacancies in the Library Limited, Klarfeld, Mint and Voss properties reflected the presence of blighting factors, including the obsolete and inadequate or outmoded design and platting of these properties. Exhibit 12 (PEX 589-90, 592-93). The defendants’ witness Mr. Ward agreed that a significant degree of vacancy can be a serious sign of obsolescence and outmoded design. Tr. 439-40.

All the buildings in the Redevelopment Area are over 35 years old, all but two are 50 years old or older, and one is over 100 years old. PEX 588. The average age of the buildings is 56 years. PEX 588. According to the PGAV study, a building age of 35 years or older can impact both the physical condition of the building and its “viability for its originally intended use.” Exhibit 12 (PEX 588).

Except for the Library Limited property, all the properties along Forsyth are on long narrow lots. Exhibit 1. The building at 7716-18 Forsyth straddles two narrow tax parcels with different owners.⁴ Exhibit 1; Tr. 158, 483-484. Such platting may reflect an inadequate or outmoded design. Tr. 370-71; Exhibit 53 (PEX 1300).

Ms. Waggoner described the improvements at 21 S. Hanley, 7700 Forsyth, and 7720 Forsyth as functionally obsolete in design and construction and inappropriate for retail or office uses, and she reported that the building at 7736-38 Forsyth was suffering from inadequate and outmoded design. Exhibit 12 (PEX 593-4). Ms. Waggoner described the current lower density of the area as presenting “difficulties in today’s marketplace,” and as both obsolete and “characterized by economic underutilization as well.” Exhibit 12 (PEX 594). She stated that low-rise buildings with parking accessible only from the rear, like those in the Redevelopment Area, reflect an inadequate and outmoded design. Exhibit 12 (PEX 592).

On-site parking (for the properties that have parking) is in the rear of the properties and accessible only by an alley. Exhibit 12 (PEX 592); Tr. 420. All but one of the sites fail to meet the City’s parking requirements. Exhibit 12 (PEX 591-2). The PGAV study noted that repeated attempts by the City to attract new business to the Redevelopment Area were thwarted by these parking limitations. Exhibit 12 (PEX 591).

⁴ The Turks, who did not oppose the condemnation, own the ground at 7718, while the Sheehans own the ground at 7716 and the building that sits on both parcels. Tr. 158, 468, 483-484. Sheehan has a long-term ground lease of the Turk Property. Tr. 468.

The study identified inadequate parking as evidence of the obsolescence and inadequate, outmoded design of the buildings in the area. Exhibit 12 (PEX 591-2, 594). John Brancaglione of PGAV, who did not prepare the study but who testified after Ms. Waggoner became physically unable to do so, testified that the parking inadequacies in the Redevelopment Area are not simply a violation of code requirements, but also a problem of obsolescence, inadequate and outmoded design, and an inability to meet future demand. Exhibit 53 (PEX 1310, 1311-12, 1329-30).

The PGAV study described the physical deterioration of properties in the Redevelopment Area. Ms. Waggoner characterized the Library Limited property and the property at 7720 Forsyth as suffering from widespread deterioration. Exhibit 12 (PEX 594-595). Although the main building at 7730 Forsyth is in good condition, both the garage and storm drains show signs of deterioration, with the garage showing significant structural problems. Exhibit 12 (PEX 595). 7732-34 Forsyth shows signs of deferred maintenance. Exhibit 12 (PEX 595). 7736-38 Forsyth, the westernmost parcel in the Redevelopment Area, suffers from physical deterioration, including evidence of water leaks, separation of the structural components of the building, shifting of a parapet wall, a defective fire escape, and cracked ceiling support beams. Exhibit 12 (PEX 595).⁵

Mr. Brancaglione agreed with Ms. Waggoner's conclusions that the conditions of the property supported a determination of blight under Chapter 353. Referring to the

⁵ The conditions described as reflecting physical deterioration are similar to those in Mr. Wards' blighting studies. *See, e.g.* PEX 972, 1006, 1169.

study and supporting Ms. Waggoner's conclusions, he identified conditions of statutory blight in the properties at 21 S. Hanley, 7700 Forsyth, 7720 Forsyth, 7730 Forsyth, 7732 Forsyth, and 7736 Forsyth. Exhibit 53 (PEX 1279, 1282-83, 1308-12). He testified that some of these buildings are of such an obsolete nature and configuration that they will not justify normal rents for Clayton office or rental space, a situation he identified as an economic liability. He concluded that the properties, for the most part, are not modern commercial space. Exhibit 53 (PEX 1279-1281). He testified that the platting – long, narrow lots – is a detriment that might result in the properties' not appreciating in value. Exhibit 53 (PEX 1300). The defendants' expert Mr. Ward agreed that inadequate or outmoded design can include poor platting and lot sizes. Tr. 370-71.

Mr. Brancaglione testified that obsolescence is determined by a building's configuration, its former use, and its suitability for other purposes. Exhibit 53 (PEX 1332). According to Mr. Brancaglione, obsolescence or deterioration of the kind present in these properties not only affects current uses and values but also prevents alternative land uses that would increase property values and generate additional taxes. Exhibit 53 (PEX 1305-07). Mr. Brancaglione stated that no retail use would occupy the Library Limited building and that, based on a discussion with an architect at PGAV, he did not think it had any historical value. Exhibit 53 (PEX 1321, 1324-25).

Ms. Waggoner discussed the decline or insufficient increase in the assessed value of improvements in the Redevelopment Area. Exhibit 12 (PEX 596-601). Assessed values are commonly relied on in determining an inability to pay reasonable taxes because the assessed values are the basis on which property taxes are calculated.

Exhibit 53 (PEX 1288); Tr. 435. Ms. Waggoner noted that, from 2000 to 2005, “properties within the Area are not even increasing in assessed value as the balance of the properties in the same block.” Exhibit 12 (PEX 600). The rest of the block increased in value over that period by 46.46%, while the assessed value of the property within the Redevelopment Area increased by 24.83%, despite the already low assessed values of the properties in the Area. Exhibit 12 (PEX 600). Mr. Brancaglione testified that Ms. Waggoner’s method of comparing the increase in assessed value in the Redevelopment Area with the increase in the rest of the block was an appropriate methodology. Exhibit 53 (PEX 1284).

In assessing the Redevelopment Area’s inability to pay reasonable taxes, Ms. Waggoner also evaluated the data regarding sales taxes generated by the properties in the Redevelopment Area. Exhibit 12 (PEX 600-02). Mr. Brancaglione and Mr. Ward agreed that the inability to pay sales tax is relevant to a determination of blight under Chapter 353. Tr. 455. The data in the PGAV study reflected a dramatic decline in sales taxes in the Redevelopment Area between 1995 and 2004. Exhibit 12 (PEX 600); Tr. 630. The PGAV study concluded, and Mr. Brancaglione testified, that this decline supported the conclusion that the conditions in the Redevelopment Area reflected an inability to pay reasonable taxes. Exhibit 12 (PEX 600-02); Exhibit 53 (PEX 1334).

In the PGAV study, Ms. Waggoner explained that the parcels in the Redevelopment Area “are no longer supporting significant retail use, and have not been redeveloped to meet the needs of a changing marketplace.” Exhibit 12 (PEX 585). She defined Clayton’s goal as rebuilding “portions of its retail base in order to provide for a

vibrant City center and to provide support goods, services, and restaurants for both the employment base and the residential community of Clayton.” Exhibit 12 (PEX 585). She found that the Redevelopment Area currently does not provide this support to the City. Exhibit 12 (PEX 602-03). She noted that “smart growth principles call for high density uses with a mix of office, retail, and residential uses which support shared structured parking for an efficient use of land and resources.” Exhibit 12 (PEX 586). The Redevelopment Area currently lacks this mix of uses, provides no substantial number of jobs, and attracts no pedestrian or social activity. Exhibit 12 (PEX 585, 603); *see* pages 20-21, *supra* (describing current vacancies and uses of property).

Mr. Schoedel expressed the City’s concerns about the negative impact of the vacancies in the area. He testified that the lack of pedestrian activity or any energy or vitality in the Redevelopment Area adversely affects the City’s ability to attract and maintain business. Tr. 630, 631, 633, 634. In addition to these concerns, Mr. Brancaglione testified that the factors supporting a finding of social liability included the adverse effect that poor economic conditions have on the City’s ability to provide social services, and the overall negative effect that vacant and under-performing properties in a prominent location have on the City and its image. PEX 1334-36.

Based on the conditions in the Redevelopment Area, PGAV concluded that the Area satisfies all criteria for a finding of blight under Chapter 353. Exhibit 12 (PEX 602-03). Mr. Brancaglione agreed with this conclusion. Exhibit 53 (PEX 1294-95).

VIII. The actions of the Board of Aldermen.

On November 22 and December 13, 2005, the Clayton Board of Aldermen discussed the proposed Centene project at public hearings. Exhibits 5, 8, 15. At these hearings, some members of the public – mostly the owners of property within the Redevelopment Area – expressed opposition to the Redevelopment Project, while others spoke in favor of it. Exhibit (PEX 14, 650-651); Tr. 53. At the November 22 meeting, the Board postponed any vote until December 13 to allow the Board additional time to consider comments and further evaluate Centene’s proposal. Exhibit 8 (PEX 455-62); Tr. 47-48.

After the public hearing on December 13, at which opponents and proponents of the project again presented their differing views, the Board of Aldermen unanimously approved Ordinance 5911 (Exhibit 21), finding that the properties within the Redevelopment Area were blighted within the meaning of Chapter 353, approving the Redevelopment Plan proposed by CPRC (Exhibit 24), and authorizing the City to enter into the Redevelopment Agreement with CPRC (Exhibit 23).⁶ Exhibit 15.

On December 30, 2005, CPRC and Clayton entered into the Redevelopment Agreement approved in Ordinance 5911. Exhibits 23, 24. For twelve years, CPRC will be entitled to a 50% tax abatement on the increase in the assessed valuation of the property in the Redevelopment Area resulting from the Redevelopment Project.

⁶ In January, 2006, Ordinance 5911 was amended by Ordinance 5914 (Exhibit 22), to correct a clerical error. Exhibit 22.

Exhibit 23 (PEX 750-51). For this tax abatement to take effect, however, Centene must meet defined levels of new job creation in Clayton, as detailed in the Redevelopment Agreement and Plan. Exhibit 23 (PEX 750-751), Exhibit 24 (PEX 777). The Redevelopment Plan does not involve any public funding.

As required by the Redevelopment Agreement and Redevelopment Plan, CPRC made good-faith offers to purchase the properties in the Redevelopment Area. The offers exceeded the appraised values of the properties. Exhibits 37, 38, 39, 40, 41. All the owners rejected the offers, and attempts at mediation were unsuccessful. As a result, CPRC's efforts to acquire the properties by negotiation and purchase failed. Tr. 243. These three consolidated condemnation actions followed.

The three defendants filed motions challenging the condemnation, and, after months of discovery, the circuit court held a four-day jurisdictional hearing, which included voluminous exhibits and both live testimony and videotaped depositions. L.F. 8-14. The court denied the defendants' untimely request for findings and conclusions under Rule 73.01, because the request was made after all the evidence had been presented. Tr. 690-93. At the conclusion of the hearing, it was agreed that the parties would file proposed orders and any desired supporting materials. Tr. 690-93. Both parties filed proposed orders. L.F. 66, 108. On January 19, 2007, Judge Hartenbach signed CPRC's proposed order of condemnation. L.F. 138-146. On March 14, 2007, Judge Hartenbach filed an Order and Judgment of Condemnation that, except for the title, was the same as his original order. Supp. L.F. 149.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN ENTERING ITS ORDER OF CONDEMNATION BECAUSE THE DEFENDANTS FAILED TO MEET THEIR BURDEN OF PROVING THAT CLAYTON'S LEGISLATIVE DETERMINATION OF BLIGHT EXCEEDED THE CITY'S POWERS, WAS ARBITRARY, OR WAS INDUCED BY FRAUD, COLLUSION, OR BAD FAITH, IN THAT THE EVIDENCE SHOWS THAT THE CITY'S DETERMINATION OF BLIGHT WAS AT LEAST FAIRLY DEBATABLE.

Despite the defendants' efforts to convince the Court otherwise, this case does not involve groundbreaking legal issues or implicate recent amendments to Missouri eminent domain law. The 2006 amendments to the eminent domain statutes are notable here because the legislature retained the definition of blight unchanged in section 353.020, notwithstanding what the defendants characterize as the public outcry after *Kelo v. City of New London*, 545 U.S. 469 (2005). *Kelo*'s principal relevance to the appeal is its recognition that issues regarding eminent domain are to be determined by state and local legislatures.

The defendants would like the Court to focus only on the condition of their three properties; they never even discuss the condition of the Klarfeld or Voss properties. This appeal, however, requires consideration of the condition of the Redevelopment Area as a whole. Despite the defendants' characterization of the Redevelopment Area as the corner of "Main and Main," the "100 percent corner," and "the most prestigious corner" in Clayton (Tr. 413; Exhibit P (PEX 1348)), the Area in 2005 included vacant, obsolete,

poorly platted, and physically deteriorating properties that, under any reasonable standard, were economic and social liabilities to the City, and far beneath what should be expected of so prominent a corner.

The defendants call for an improperly narrow and rigid definition of blight, a one-size-fits-all blighting analysis that would strip local officials of their discretion and limit Chapter 353 to only certain types of communities. The broad definition of blight under section 353.020, and the discretion given elected municipal officials in applying it, recognize that the determination of statutory blight is a local function, based on local conditions, involving policy decisions to be made by local officials who are accountable to the electorate.

The defendants essentially argue that no matter how significantly a prominent area underperforms, it is immune from a declaration of blight. This argument is based on the notion that, in assessing the existence of statutory blight, the conditions of a prominent corner should be subject to less demanding scrutiny than those of a less prominent area. This absurd argument is unsupported by citation to any authority.

Despite the conditions in the Redevelopment Area, the defendants ask the Court to adopt a definition of blight that is not only contrary to the definition in section 353.020, but would require elected municipal officials to wait until the Area's conditions cause health and safety problems before those officials could use redevelopment tools to prevent further decline. Missouri law has never been guided by a public policy calling for the people to suffer harm before legislative action could be taken.

The defendants invite the Court to adopt an undemocratic and interventionist view of the law. As authorized by the Missouri Constitution, the people's elected representatives in the General Assembly enacted Chapter 353 for the public purpose of eliminating blight, as that term is defined in section 353.020. Under this authority, Clayton's elected Board of Aldermen unanimously passed Ordinance 5911 for the public purpose of redeveloping a part of the City that had not seen development in decades. In this case, the defendants – real-estate investors who refused good-faith offers to buy their business property in the Redevelopment Area – claim that the law permits them to hold up a redevelopment project that will revive the economic and social fabric of the Redevelopment Area and add more than 800 permanent jobs. The Court should reject the defendants' invitation to upset decades of Missouri law and public policy.

Legislative findings are presumptively valid, and the defendants have failed to meet their heavy burden of proving that Clayton's determinations were arbitrary. At trial, CPRC established all prerequisites for the use of eminent domain to acquire the defendants' properties under Chapters 353 and 523. Ignoring the standard of review, the defendants ask the Court to substitute its judgment not only for Judge Hartenbach's evaluation of the evidence and the credibility of witnesses, but also for the discretion conferred by statute on the Board of Aldermen. On this extensive factual record, Judge Hartenbach cannot be convicted of error. The trial court's order should be affirmed.

The defendants assert four points relied on that raise the single issue of whether the trial court erred in finding that the defendants failed to meet their high burden of

proving that Clayton's blight ordinance was void. The four aspects of this issue raised by the defendants will be addressed in turn.

A. The standard of review requires affirmance because the Board of Aldermen's finding of blight was not arbitrary.

By statute, whether a piece of property is blighted is a matter for the legislative body to resolve. § 353.020, RSMo. It has long been settled that judicial review is limited to whether the legislative determination was arbitrary or was induced by fraud, collusion, or bad faith, or whether the City exceeded its powers. *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11, 15 (Mo. 1974); *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320, 324 (Mo. banc 1976). An ordinance is presumed to be valid. *Parking Systems*, 518 S.W.2d at 16. Whether a legislative determination of blight is arbitrary turns upon the facts of each case; the burden of proving arbitrariness is upon the party claiming invalidity. *Allright*, 538 S.W.2d at 324; *Parking Systems*, 518 S.W.2d at 16. Unless the legislative body's conclusion is clearly arbitrary and unreasonable, the court cannot substitute its opinion for the city's. *Allright*, 538 S.W.2d at 324. The legislative determination should prevail if it is reasonably doubtful or even fairly debatable. *Id.*

This standard of review is well illustrated by *Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903 (Mo. App. 1991), in which a city sought to use eminent domain for redevelopment, and the property owner maintained that the city's board of aldermen erred in determining that the property was blighted. The appellate court noted, "If the Board's action is reasonably doubtful or even fairly debatable we

cannot substitute our opinion for that of the Board.” *Id.* at 910. Under this standard, despite evidence going both ways, the court was compelled to reject the landowner’s argument:

The evidence here did not compel a conclusion that the area was blighted and the proposed redevelopment plan necessary and in the public interest. Similarly, the evidence did not compel a decision that it was not. There was room for reasonable differences and fair debate on this issue. From the evidence, the Board reasonably could have concluded both that the area was blighted within the meaning of Section 353.020 and that a redevelopment plan was necessary. Therefore, it may not be said that either the Board’s determination that the 66 Drive-In property was blighted or its approval of Crestwood Commons’ redevelopment plan was an arbitrary exercise of legislative power.

Id. Under this “fairly debatable” standard, the defendants must prove that the *only* reasonable conclusion was that the Redevelopment Area was not blighted.

The defendants have not identified a single case in which a Missouri appellate court has reversed a trial court’s judgment upholding a legislative determination of blight.

In this court-tried case, in reviewing the trial court’s finding that the defendants failed to prove that the legislative determination was arbitrary, the Court reviews under

Rule 84.13 and *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).⁷ The trial court's judgment should be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Brizendine v. Conrad*, 71 S.W.3d 587, 590 (Mo. banc 2002).

This Court defers to the trial court as the finder of fact in determining whether substantial evidence supports the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions. *Id.* The power to set aside a trial court's judgment on the ground that it is against the weight of the evidence should be exercised with caution and with a firm belief that the decree or judgment is wrong. *Id.*

Of course, in reviewing a contention that the evidence is insufficient, this Court defers to the trial court's credibility assessments. *Id.* The evidence and all permissible inferences are viewed in the light most favorable to the judgment, disregarding all

⁷ In the Missouri Court of Appeals, the defendants agreed that *Murphy* was the appropriate standard. Appellants' Brief at 17. The appellants' new claim that the court is to review de novo contradicts their statement to the court of appeals, and they concede elsewhere in their brief that the General Assembly rejected the idea of imposing de novo review. Appellants' Substitute Brief at 22. But their declaration of de novo review amounts to nothing more than a recognition that this Court's review is no more searching than the circuit court's. At both levels, review is for substantial evidence.

contrary evidence and inferences. *Farmers' Elec. Coop., Inc. v. Missouri Dep't of Corrections*, 59 S.W.3d 520, 522 (Mo. banc 2001). In the absence of a timely request for findings of fact, all fact issues upon which no specific findings are made should be considered as having been found in accordance with the result reached. Rule 73.01(c); *Greeno v. State*, 59 S.W.3d 500, 504 (Mo. banc 2001); *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 394 (Mo. banc 2001); *Rombach v. Rombach*, 867 S.W.2d 500, 505 (Mo. banc 1993).

B. This Court should reject the defendants' claims because the blight finding and the trial court's order are amply supported by evidence.

In finding blight, the Board concluded that the Redevelopment Area meets the requirements of section 353.020(2), RSMo, which provides the governing definition: "Blighted area shall mean 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."

This definition of blight requires two determinations by the Board:

1. as a result of one or more of the following conditions – age, obsolescence, inadequate or outmoded design, *or* physical deterioration – the Redevelopment Area has become an economic and social liability for the City; and

2. the existing conditions should be conducive to at least one of the following:
crime, disease, ill health, *or* inability to pay reasonable taxes.

After three months of discovery demanded by the defendants and four days of trial, the trial court held that CPRC had complied with all the requirements to condemn the defendants' properties. Supp. L.F. at 156. The court found that acquisition of the properties was necessary for a public purpose, and that Clayton's passage of the relevant ordinances was amply supported by substantial evidence, was not arbitrary or capricious, and was not induced by fraud, collusion, or bad faith. Supp. L.F. at 155-156.

The trial court's judgment is abundantly supported by the record. In claiming otherwise, the defendants disregard this Court's standard of review, misread the statute, and ignore the evidence in the record contrary to their arguments.

1. The statute allows for local determinations based on local conditions.

Chapter 353 is not available only to communities in widespread decline. Indeed, section 353.020 defines "blighted area" as that "portion of the city" in which the legislature body determines that certain conditions exist. This definition necessarily recognizes that there may be blighted "portions" of an otherwise prosperous city. The statute, case law, and logic do not require the legislative body to ignore adverse conditions in a portion of the city until those conditions become more prevalent. The evident objective of redevelopment tools like Chapter 353 is to address adverse conditions in *portions* of a city before they can propagate and cause more widespread problems to the community in general, requiring more intrusive government action.

Years before this action arose, the defendants' own expert, Richard Ward, rejected any suggestion that there cannot be statutory blight in Clayton. In the 1993 Master Plan, Mr. Ward acknowledged that it would be appropriate to use redevelopment tools like Chapter 353 in Clayton, including along the Forsyth Corridor. Exhibit 2 (PEX 141). At trial, Mr. Ward again admitted that he was not saying Chapter 353 could not be used in Clayton. Tr. 409-410.

The defendants further suggest that the particular conditions supporting blight must be the same for every community and that a legislative body is bound to some lowest common denominator of blight. Again, the statute and logic belie this argument.

In defining "blighted area," the legislature listed four specific conditions and four specific effects, but left the phrase "economic and social liabilities" broad and undefined. This definition of blight is broad and contextual, to be applied by the local legislative body based on local conditions and local needs, and relative to the specific circumstances of a city. *Cf. Berman v. Parker*, 348 U.S. 26, 34 (1954) ("The particular uses to be made of the land in the project were determined with regard to the needs of the particular community."); *Atkinson v. Planned Indus. Expansion Auth.*, 517 S.W.2d 36, 46-7 (Mo. banc 1975) (vacant land may be blighted because it no longer meets the economic and social needs of modern city life). The same property that might be an asset for the poorest and most disadvantaged community can be a liability for a more prosperous community. The legislature knew how to be specific and directive when it wanted to be, as when it required one of four specific conditions and one of four specific effects, but it left a broad measure of collective discretion to cities in determining whether those

conditions result in economic and social liability. To impose narrow or unduly technical definitions of these terms is contrary to the language of the statute and improperly limits the needed discretion of the local elected officials.

2. Ample evidence supports the legislative finding of age, obsolescence, inadequate and outmoded design, or physical deterioration – any one of which would be enough to require affirmance.

The undisputed evidence established that this area in Clayton’s central business district, characterized by Mr. Ward as the corner of “Main and Main” and the “premier” location in Clayton, consists of aged building stock that has not seen development in decades. In addition to physical deterioration, obsolescence, and outmoded design described in the record, there are significant vacancies in the Redevelopment Area. The Library Limited property lost its most recent tenant in 2002, taking away the only true retail business in the Redevelopment Area, and it remained vacant at the end of 2004. Two doors down, the Klarfeld Property, a 100-year-old converted house, had been vacant for over four years, while the Mint Property at 7732-7234 Forsyth had been over 45% vacant since Mint purchased it for investment purposes in 1999. There were also vacancies and turnover in the Voss property at 7736-7738 Forsyth. *See* pages 20-21, *supra*.

Both the PGAV Study and Mr. Brancaglione highlighted significant parking issues – matters of obsolescence and outmoded design – that reflect unresolved problems Mr. Ward and his firm identified in the Master Plan over a decade earlier. Exhibit 12 (PEX 590-93); Exhibit 53 (PEX 1310, 1311-12, 1329-30). Carol Waggoner’s PGAV

Study and Mr. Brancaglione’s testimony identified blighting conditions in 21 S. Hanley, 7700 Forsyth, 7720 Forsyth, 7730 Forsyth (related to the parking garage), 7732-34 Forsyth, and 7736-38 Forsyth. Exhibit 12 (PEX 588-95); Exhibit 53 (PEX 1279, 1282-83, 1308-12). Except for disputing the scope of the parking issue, the defendants presented no evidence contradicting the vacancies and property conditions described in the record.⁸

The defendants argue that none of *their* properties are blighted. The record contains evidence of a substantial vacancy in one of the defendants’ properties, deferred maintenance or physical deterioration on two, and inadequate platting and parking issues on all three. But even if the defendants’ assertion were true, it would not be dispositive. Section 353.020 requires consideration of the Area as a whole, and expressly recognizes that the Redevelopment Area may include properties that are not themselves blighted, “the inclusion of which is *deemed* necessary for the effective clearance, replanning, reconstruction or rehabilitation of the area.” § 353.020(1) (emphasis added); *see State ex rel. Washington Univ. Med. Ctr. v. Gaertner*, 626 S.W. 2d 373, 375 (Mo. banc 1982) (blight designation applies to the area as a whole and “normally includes some parcels of property (frequently much property) which would not by usual definition be considered blighted.”)

⁸ Ward acknowledged that the properties did not meet the parking ratio required by the City, but only claimed that the shortfall of spaces was less than that described by PGAV. Exhibit P (PEX 1356).

Even if the defendants had established that their particular properties, which make up less than a third of the Area, did not display any of the characteristics of blight described in section 353.020, the Court should still affirm Judge Hartenbach’s judgment. The defendants could not prove – and did not prove –that the Redevelopment Area *as a whole* was not statutorily blighted.

3. The legislative finding of economic and social liabilities is abundantly supported by evidence (Appellants’ Points I & II).

In Points I and II, the defendants claim that the trial court erred in rejecting their challenge to the Board’s finding that the properties in the Redevelopment Area have become economic and social liabilities. The record belies this argument. There was substantial evidence that the conditions in the Redevelopment Area are economic and social liabilities to the City. Despite the condition of some properties, the “premier corner” contains aging, obsolete, outmoded, and deteriorating improvements that were underperforming properties in both an economic and social sense. Exhibit 12; Exhibit 53 (PEX 1276-1282, 1283, 1308-13).

Although it uses the conjunctive, section 353.020 does not support the defendants’ extreme interpretation that economic and social liabilities are wholly distinct results of separate sets of conditions. Indeed, the statute requires that one or more of the same four conditions – age, obsolescence, inadequate and outmoded design, and physical deteriorations – have caused the area to become “economic and social liabilities.”⁹ For

⁹ The statute does not refer separately to an economic liability and a social liability.

example, outmoded buildings and vacancies can have a negative impact on jobs and business activity, as well as street traffic and a city's image, all of which may be both economic and social liabilities. The defendants' suggestion that there cannot be substantial overlap is contrary both to common sense and to the language and objectives of the statute. In any event, there is substantial evidence supporting the Board's finding of economic and social liability.

a. The record is replete with evidence of economic liability.

The conditions in the Redevelopment Area have resulted in depressed property values and property taxes, no meaningful sales tax revenue, few jobs, few customers, and lack of economic activity in an area that is supposed to be the most prestigious corner in the region, but has seen no new development for decades and is burdened by vacant and partially vacant, obsolete buildings. Exhibits 12; 53 (PEX 1278-82); *see also supra* at 20-26. On this record, it is impossible to conclude as a matter of law that the Board of Aldermen acted arbitrarily in deciding that a supposedly prominent corner in this condition is an economic liability for the City.

The defendants argue that evidence of a failure to pay reasonable taxes cannot be used to support a finding of economic liability because that is a separate element of the statutory definition of blight. Appellants' Substitute Brief at 34. The defendants again misconstrue the statute. Section 353.020 does not require an existing inability to pay reasonable taxes; explicitly, the statute only requires that the conditions be "conducive" to that inability. The record in this case establishes a *present* failure to pay reasonable taxes, exceeding the requirements of the second part of the definition of blight. In

addition to the other adverse economic conditions described above, certainly a present failure to pay reasonable taxes supports a finding of economic liability.

Consistent with their general disregard for the Court's standard of review, the defendants inappropriately rely on Richard Ward's testimony criticizing PGAV's conclusion and the Board's finding that the Redevelopment Area was an economic liability. This Court should reject Mr. Ward's testimony and opinions to the extent that they are contrary to the evidence supporting the Board's legislative determinations and Judge Hartenbach's judgment upholding those determinations. *Brizendine v. Conrad*, 71 S.W.3d 587, 590 (Mo. banc 2002). The Court should review the evidence in the light most favorable to CPRC as the prevailing party in the circuit court, ignoring all contrary evidence. *Farmers' Elec. Coop., Inc. v. Missouri Dep't of Corrections*, 59 S.W.3d 520, 522 (Mo. banc 2001). In short, the defendants cannot rely on Mr. Ward's testimony as a basis for reversing Judge Hartenbach's judgment.

Even if they were relevant to the Court's review, Mr. Ward's report and testimony do nothing more than express a view contrary to the conclusions of the Board of Aldermen and PGAV. Except for a disagreement about the extent of the undisputed parking deficiency in the Redevelopment Area, Mr. Ward does not contest the conditions of the properties, the existence of vacancies, or the history of use. He does not question the integrity or experience of PGAV, Ms. Waggoner, or Mr. Brancaglione, and he does not suggest that they manipulated information to achieve a desired result. Tr. 402-03.

Mr. Ward disagrees with the conclusions and aspects of the methodology used by PGAV, even though they are similar to the methodology Mr. Ward has employed and

conclusions he has reached in performing his own blighting studies. Exhibit 33 (relying on assessed valuation, referring to economic underutilization as indicative of blight, relying on items of deferred maintenance, and making no reference to social liability); Exhibit 43, Tr. 436-39 (relying on assessed valuation, citing vacancies as an element of blight, and finding blight in a vacant parcel at the corner of Clayton Road and Brentwood Boulevard directly across from a successful shopping center). In two of these studies, Mr. Ward even found vacant farmland to be blighted. *See* Exhibits 34, 42. These reports certainly contradict Mr. Ward's criticism of PGAV's analysis and support Judge Hartenbach's rejection of his testimony. Mr. Ward's difference of opinion with the legislative conclusions of the Board does not prove those conclusions to be arbitrary or rebut the presumptive validity of the Board's actions.

Again citing Mr. Ward's testimony, the defendants state that "properties with the highest purchase price per acre in the St. Louis area" cannot be an economic liability. Appellants' Substitute Brief at 36. The defendants are wrong. First, it is undisputed that the "purchase price" Centene paid for the property was approximately \$10 million, not the \$12 million the defendants state, and included both reimbursement for amounts that Summit purportedly expended in its failed attempt to develop the property and profits that Summit hoped to achieve had it completed its proposed project. Exhibit 49 (PEX 1216-20); Exhibit 50 (PEX 1261-62). Second, Mr. Brancaglione explained why the purchase price paid by Centene or Summit is not inconsistent with a finding of economic liability or blight. Exhibit 53 (PEX 1316-18). Judge Hartenbach rejected Mr. Ward's contrary opinion, as he had a right to do, and this Court should do the same.

Mr. Brancaglione and Mr. Ward recognized that poor platting is an element of inadequate and outmoded design. Tr. 370-71; Exhibits 53 (PEX 1300). It is undeniable that, because of the platting and long, narrow lots, no redevelopment can occur in this Area without consolidation of some or all these parcels. The Master Plan identifies Chapter 353 as a tool available to meet the “real challenge” of assembling land needed for private redevelopment. Exhibit 2 (PEX 139-40). If redevelopment tools are not available to a city in situations like these, the consolidation of lots and redevelopment of the area is at the mercy of the owner of a single, small lot until that owner decides to sell. In *Tierney v. Planned Industrial Expansion Authority of Kansas City*, this Court recognized that the problems of assembling tracts of sufficient size to attract developers and of clearing uneconomic structures are substantial, and stated that the “willingness of owners to sell is not controlling.” 742 S.W.2d 146, 151 (Mo. banc. 1988). As in *Tierney*, the record contained evidence that “redevelopment of this area could promote a higher level of economic activity, increased employment, and greater services to the public.” *Id.*

When asked at trial why there were vacancies at so prominent a corner, Mr. Ward said that the defendants were “waiting for Godot.” Tr. at 413-14. Mr. Ward’s literary allusion is apt. *Waiting for Godot* is a play in which two characters wait for a man named Godot. That is the whole play. In the language of the play, “Nothing happens, nobody comes, nobody goes, it’s awful!” In the end, Godot never appears. Similarly, as shown by their arguments in this case, if it were up to the defendants, they would continue to wait while nothing happened to alleviate the conditions in the Redevelopment Area, to the continued detriment of the City and its residents.

b. The defendants’ proposed standard for social liability should be rejected because section 353.020(2) does not require a city to wait for crime or disease to proliferate before undertaking redevelopment.

The evidence also supported the Board’s determination that the conditions in the Redevelopment Area are a social liability for the City.

Because section 353.020 does not define “social liability,” its meaning may be ascertained from the dictionary definitions of the words used. *United Pharamcal Company of Missouri, Inc. v. Missouri Board of Pharmacy*, 208 S.W.3d 907 (Mo. banc 2006). Although no dictionary defines the phrase “social liability,” the definitions of “social” in *Webster’s Third New International Dictionary* include the following:

- of, relating to, or designed for sociability or social gathering;
- forming or having a tendency to form cooperative or interdependent relationships with ones fellows; and
- of or relating to the interaction of the individual and the group.

The same source defines “liability “ as “something that works as a disadvantage” or a “drawback.” *Webster’s Third New International Dictionary* (1993). Consistent with these definitions, social liability would include anything that is disadvantageous to or interferes with the interaction of individuals with other individuals or groups.

Nothing in section 353.020 restricts social liability to matters of public health or safety. Indeed, limiting social liability to existing public-health or safety problems is directly at odds with the language of the statute. Section 353.020 requires only that the

conditions in the area be *conducive* to crime, disease, ill health, *or* an inability to pay reasonable taxes. Thus, the statute requires neither existing nor threatened safety or health problems for a determination of statutory blight. It is impossible to conclude that social liability requires that there be existing health or safety problems, when the statute does not even require that there be a threat of public health or safety problems. Crime and disease may be social liabilities, but they are not a prerequisite.

Defining “social liability” to require current public health or safety problems would lead to absurd results. Assume that all the properties in a proposed redevelopment area, at the most prestigious corner of a city, had been completely vacant for years, but there were no public health or safety problems because the neighborhood was generally safe, because of the city’s police and fire departments, and the property owners did enough to keep the properties within code, as enforced by the city. Under this scenario, even though there was no economic or social activity in the area, the city would not be able to declare the area blighted because there was no crime or disease. Under the defendants’ proposed definition of social liability requiring existing public health or safety problems, a city would have to wait until the redevelopment area, and presumably the surrounding neighborhood, declined into a state of crime and disease. In addition to being contrary to the language and intent of the statute, this would be woefully bad public policy.

“Although eminent domain statutes are to be strictly construed so far as the power to condemn is concerned, they are not to be construed so as to defeat the intent of the legislature.” *State ex. Rel. Schwab v. Riley*, 417 S.W.2d 1, 3-4 (Mo. banc 1967). The

rule of strict construction is not the opposite of liberal construction, and “does not require such a strained and narrow interpretation of the language as to defeat the object.” *Id.* The defendants propose an interpretation that defeats the object of the statute, which allows all municipalities to address adverse conditions before they result in crime, disease or irrevocable economic decay.

As part of their misguided discussion of public health and safety, the defendants misstate the record concerning the purpose and significance of Mike Schoedel’s request for a tabulation of police, fire, and EMS calls for the Redevelopment Area. Appellants’ Substitute Brief at 32. The City staff did not, as the defendants falsely claim, gather this information for PGAV or the Board to use in determining the existence of statutory blight. Mr. Schoedel specifically testified that he did not request the data for that purpose, and the summaries were prepared in March, 2006 (and include statistics through that time), three months *after* the Board had passed Ordinance 5911. Exhibits X2, Y2; Tr. 644. The reasonable inference, to which CPRC is entitled under the controlling standard of review, is that Mr. Schoedel was comparing the Redevelopment Area’s present demand on public services with the potential demand if there were occupied buildings, like the large office buildings across the street.

In addition, the relative number of police, fire, or EMS calls does not necessarily have anything to do with crime or disease in particular, or social liability in general, as the defendants apparently claim. Under the defendants’ analysis, the well-occupied Pierre Laclede office buildings across Forsyth would meet the definition of social liability because of the number of emergency calls, while the vacant properties in the

Redevelopment Area would not. This is absurd. The absence of emergency calls to the Redevelopment Area is attributable to the small number of people with any reason to go there, reflects the lack of economic and social activity in the area, and supports a finding of social liability.¹⁰

Public welfare, which the defendants also claim may be a necessary component of social liability, is a much broader concept than health or safety, and refers to matters involving the public (as opposed to private) good. *See Diemeke v. State Highway Comm'n*, 444 S.W.2d 480, 482-3 (Mo. 1969) (public welfare is based on the rationale that personal and property rights are subservient and subordinate to the general welfare of society and the community at large). “The concept of the public welfare is broad and inclusive, . . . the values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community

¹⁰ None of Mr. Ward’s blighting studies contain any reference to the crime statistics or number of emergency calls in a blighted area. Exhibits 33, 34, 35, 42, 43. In two of his studies, he finds vacant farmland to be blighted. Exhibits 34, 42. In another of his studies, he finds blight at a major intersection across the street from the Galleria shopping center, the busiest shopping center in St. Louis County, and no doubt the subject of many more emergency calls than the area Mr. Ward was evaluating. Exhibit 43. Under the defendants’ postulation, the larger number of emergency calls to the crowded Galleria would be evidence that the vacant property across the street was not a social liability (or that the Galleria was).

should be beautiful as well as healthy, spacious as well as clean.” *Berman v. Parker*, 348 U.S. 26, 33 (1954). In his own Chapter 353 blighting studies, the defendants’ expert Richard Ward recognizes the broad scope of public welfare:

The terms “public health, safety, morals and welfare” embrace not only the preservation and enhancement of public peace and order and the protection of lives and property, but extend to the promotion of economic welfare, public convenience and general prosperity. This includes, without limitation, the protection and enhancement of property values. Indeed, the term “welfare” is generally held to include the public comfort, prosperity, and financial security of the people. With this in mind, authoritative sources have observed that the proper exercise of police power to promote public health, safety, morals, and welfare extends to “whatever is contrary to the public policy or inimical to the public interest.”

Ex. 33 at 1. If social liability equates to “public welfare,” a premier corner of Clayton that is not contributing as it should to the economic and social health of the city adversely affects the public welfare, and therefore, is a social liability.

c. The evidence of lack of jobs, parking, street life, vitality, and retail, along with the inability to contribute adequate taxes, fully supports the legislative finding of social liability.

In addition to its inventory of areas of concern in the central business district in general, the Master Plan emphasizes the importance of a pedestrian-friendly atmosphere with retail components along Forsyth that would encourage pedestrian traffic and human

interaction, and provide a livelier, more vibrant business and social community in Clayton. Exhibit 2 (PEX 23-28, 156-59). None of these conditions currently exist in the Redevelopment Area, which not only includes vacant buildings but provides neither substantial jobs nor substantial retail, and offers little to generate pedestrian traffic either from employees or customers. The PGAV study describes the absence of a “vibrant” city center, the need to provide a “quality environment” in the area, and efforts necessary to facilitate the “walkable community” that the City has been trying to provide for its residents and patrons. Exhibit 12 (PEX 585-587). The PGAV study also refers to the unsuccessful efforts to “reinvigorate the dynamic of the area . . . despite decades of opportunity.” Exhibit 12 (PEX 603). The descriptions speak to both existing conditions as well as future goals.

In describing the Area, Mr. Schoedel and Mr. Brancaglione both identified obsolete and vacant properties, a lack of street traffic, the lack of economic and social activity, and the negative impact on the City’s image of aging and vacant properties at this prominent intersection in the central business district. Tr. 630, 631, 634, 664; Exhibit 53 (PEX 1335-36). A sharp decline in sales taxes reflected the decline in the Redevelopment Area in retail uses of the type that encourage pedestrian traffic and energize an area. Exhibit 12 (PEX 600-02). Though not required to establish social liability, Mr. Schoedel also testified about public health or safety issues (vandalism, fire, and crime) associated with vacant buildings, concerns discussed with the Board of Aldermen. Tr. 633-34, 664.

Coupled with the lack of anything to attract customers, the inadequate number of jobs currently generated in the Redevelopment Area and the Redevelopment Project's ability to produce hundreds of well-paying new jobs also support the Board's decision that the conditions in the Redevelopment Area are a social liability. Exhibit 6; Exhibit 44. As part of the materials he collected and submitted to the Board, Mr. Schoedel included an article in which the defendants' witness Mr. Ward identified the creation of new jobs as a justification for the use of economic incentives to effect development, even in the absence of blighting conditions like the ones in this case. Exhibit 6, Exhibit 44; Tr. 629-30. Centene's commitment to hundreds of new jobs addresses the significant social liability issue created by the current lack of employment and economic activity in the Area. Similarly, the Clayton School Board, after raising early concerns about the Project, not only approved the Redevelopment Plan and Agreement, but also expressed its appreciation for the City's decision-making process. Exhibit 14; Tr. 635-37.

d. The defendants' emphasis on Mr. Brancaglione's testimony and the PGAV study is both incorrect and an effort to divert the Court's attention from the substantial evidence supporting the legislative finding of social liability.

The defendants fail to bring the evidence discussed above to the Court's attention. Instead, the defendants hang their principal challenge to the Board's determination on two small hooks: Mr. Brancaglione's testimony that he did not think there was social

liability in the sense of crime, disease, or ill health, and the lack of an express reference to social liability in the PGAV study. Neither invalidates the Board's action.

Mr. Brancaglione testified by deposition for three days, and the parties presented hours of that testimony to Judge Hartenbach. The defendants ask the Court to ignore the totality of that testimony. In addition to the testimony cited by the defendants, Mr. Brancaglione testified that social liability may result from a loss of tax revenue that reduces the public funds available for schools and other public services, and from the negative impact of vacant, underperforming properties on a prominent corner of the City. Exhibit 53 (PEX 1282, 1328-29, 1334-38). He expressly concluded that the conditions in the Area were a social liability. Exhibit 53 (PEX 1282, 1329, 1335-36). In addition to these conclusions, the record also identified conditions in the Area justifying a finding of social liability as defined above. Judge Hartenbach watched Mr. Brancaglione testify on videotape, judged his credibility, and, on the record as a whole, correctly concluded that the record supported the Board's finding that the Redevelopment Area has become a social liability, consistent with the finding of blight in the PGAV study.

e. PGAV's study and Mr. Brancaglione's testimony both support the legislative finding of social liability.

The defendants' contention that the PGAV study did not contain a finding of social liability is similarly inaccurate and unavailing. The PGAV study identified a number of conditions supporting a finding of social liability, and concluded that the Area met the definition of statutory blight, which necessarily includes a finding of economic and social liability. Indeed, Mr. Ward's own blighting studies for other redevelopment

areas demonstrate this fact. Mr. Ward's studies conclude that areas are blighted under Chapter 353, but (like the PGAV study here) do not expressly refer to social liability. *See* Exhibits 33, 34, 35, and 42. At trial, Mr. Ward acknowledged that the finding of social liability is implicit in that these studies – two of which involved vacant farmland – found Chapter 353 blight. Tr. 432, 435. The lack of an express reference to social liability does not invalidate the PGAV analysis or the Board's decision, just as it does not invalidate Mr. Ward's studies.

More important, the issue before the Court is not PGAV's conclusions, but whether the defendants conclusively proved that the Board's presumptively valid finding of social liability and blight was arbitrary. The lack of an express reference to social liability in the PGAV report does not undermine the validity of the Board's legislative finding that the Redevelopment Area is blighted. Indeed, even if the PGAV study had made no determination of blight, the Board still could have made a sustainable legislative determination of blight. *See Allright*, 538 S.W.2d at 324 (city planning commission recommendation on blight and necessity is not binding on city; authority and responsibility for that determination is vested exclusively in city legislative body). As the defendants' own cited case recognizes, the Board of Aldermen may properly declare an area blighted despite a *contrary* recommendation. *Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 288 (Mo. App. 1979).

The PGAV study provided part of the information that the Board considered in making its determination of blight, not the only information. Tr. 640. The Board would have considered not only the conclusions reflected in the study, but the information in the

study regarding the condition of the properties in the Area. That information and the other evidence in the record support a finding of social liability. Ordinance 5911 contains an express legislative determination of social liability, and there was substantial evidence supporting this finding.

The record does not clearly establish why the PGAV study does not refer to social liability. Carol Waggoner prepared the PGAV study, but she suffered health problems in October, 2006, that prevented her from participating in discovery or trial, and, unfortunately, from explaining why the study does not expressly refer to social liability. Exhibit 53 (PEX 1273, 1335). Though Mr. Brancaglione, who did not prepare the report, gave speculative deposition testimony that the lack of a reference to social liability may have indicated a conclusion that there was no social liability in the sense of ill health, crime, or disease (Exhibit 53, PEX 1282), he also acknowledged that he did not know whether the lack of a reference to social liability was intentional on Ms. Waggoner's part. Exhibit 53 (PEX 1314-15).

The defendants note that PGAV expressly referred to social liability in other Chapter 353 studies in which it made findings of blight. Judge Hartenbach gave this evidence the weight it deserved. If probative of anything, this history shows that the omission in this case was inadvertent, as apparently it was in Mr. Ward's studies that contain no reference to but implicitly found social liability. This conclusion is especially likely in light of Ms. Waggoner's conclusion that the Redevelopment Area is blighted under Chapter 353.

The defendants would have the Court believe that the Board of Aldermen made a finding of economic and social liability in the face of a contrary determination by PGAV. This simply is not the case. There is no evidence that Ms. Waggoner (or anyone else) ever told the Board that conditions of the property did not support a finding of social liability. To the contrary, the PGAV study informs the Board of PGAV's opinion that the Redevelopment Area is blighted under section 353.020.

f. The defendants' arguments about social liability should be rejected because they are unsupported by their cited authority and are contrary to the evidence.

The defendants have not cited authority to support reversal of the trial court's judgment. Indeed, they cite three cases under their Points I and II as the authority on which they principally rely. Rule 84.04(d)(5). These cases are not even remotely on point. In *Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 291 (Mo. App. 1979), the Missouri Court of Appeals held that an ordinance was void for failure to contain a detailed statement of financing as explicitly required by the city code. The defendants do not point to any similar formal insufficiency in connection with the present development. Similarly, in *City Center Redevelopment Corp. v. Foxland, Inc.*, 180 S.W.3d 13, 16 (Mo. App. 2005), the Court of Appeals held that the condemning authority's failure to strictly follow the applicable guidelines in a city enactment foreclosed its ability to exercise the power of eminent domain on a piece of property that the condemning authority admitted *had already been rehabilitated*. No similar facts exist in this case.

The last case cited by the defendants as their principal authority is *Hoffman v. City of Town & Country*, 831 S.W.2d 223 (Mo. App. 1992), a case that demonstrates why Judge Hartenbach's decision should be affirmed. *Hoffman* emphasizes that a municipal legislative determination is presumed to be valid, with the burden placed upon the challenger to overcome that presumption. *Id.* at 225. Contrary to the defendants' arguments in this case, *Hoffman* confirms that the decision of the legislative body will be upheld if the decision is fairly debatable. *Id.* *Hoffman*, which affirms a trial court's determination, does not aid the defendants.

In summary, the Board of Aldermen was confronted with a prominent corner in the City's central business district that suffered from the following:

- buildings averaging over 55 years old;
- two buildings completely vacant, a third 45% vacant since 1999, and a fourth partially vacant and with tenant-turnover problems;
- obsolete, outmoded buildings not suitable for commercial use;
- poorly-platted, long, narrow lots not suitable for redevelopment without consolidation;
- inadequate parking;
- physical deterioration and deferred maintenance;
- loss of retail in area with no replacement;
- lack of any redevelopment in the Area for decades;
- few jobs and few customers;

- little economic and social activity;
- no pedestrian activity or street life;
- negligible sales taxes;
- depressed property taxes;
- the failure of Summit to find tenants or financing; and
- overall adverse impact on City’s image of prominent corner in this condition.

Based on the evidence of these factors, it is impossible to conclude that the Board of Aldermen acted arbitrarily in finding that the Area as a whole was not contributing nearly what it should to the City on any level, and therefore was an economic and social liability.

4. The opinion of the court of appeals is demonstrably wrong.

Of all the issues raised by the defendants, the opinion of the court of appeals addressed only social liability, citing *Tax Increment Financing Commission v. J.E. Dunn Construction Co.*, 781 S.W.2d 70 (Mo. banc 1989). Slip op at 6. The court’s reliance on *Dunn* is remarkable because *Dunn* does not mention social liability at all, does not involve a challenge to a municipal finding of blight, and does not even mention Chapter 353.

Dunn demonstrates the analysis that the Court should use in this case. In *Dunn*, this Court determined the meaning of a “substandard” area under Article V, Section 21, of the Missouri Constitution. In the absence of a definition in the constitution, the Court

looked to the provision’s plain language as expressed in the dictionary: “We find no Missouri case defining the meaning of ‘substandard’ within art. VI, § 21. The word carries a commonly understood meaning as it relates to structures: ‘deficient in amenities (as sanitary accommodations, living space, safety facilities, or maintenance) in respect to a standard set by legal or other authoritative sources.’ Webster’s Third New International Dictionary 2279-80 (1965).” *Id.* at 78.

Despite this example of the correct analysis of the meaning of statutory terms, the court of appeals did not attempt to determine the plain meaning of social liability as used in section 353.020. Rather, the court looked to an introductory portion of *Dunn* that repeated statements from *Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965) – another case that does not involve a challenge to a municipal finding of blight. In *Annbar*, there was no dispute about whether the property at issue was blighted: “It is agreed between the parties, and the court found, that this area is a blighted area within the meaning of the Redevelopment Law and Redevelopment Ordinance.” *Id.* at 641.

The court of appeals relied on *Dunn*’s paraphrase of this well known statement from *Annbar* about cities’ “growth like Topsy” and the reasons why redevelopment statutes were enacted in the middle of the last century. *Id.* at 639. The court of appeals seized on this historical statement about the conditions that prompted the enactment of redevelopment statutes in general as the basis for its definition of the specific term “social liability” as used in section 353.020: “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. Based upon this standard, we conclude that in this case, there was insufficient evidence before Clayton or in the record before us to support a conclusion that the area in question, including defendants' properties, was a social liability." Slip op at 6. The court of appeals reached this conclusion because it determined that the redevelopment area was not presently afflicted with the kind of crime, fire hazards, or vandalism that would pose an imminent danger to the public's life and health: "[T]his evidence does not support a finding that the welfare and safety of the public was in jeopardy, resulting in a social liability. In addition, there was no evidence presented regarding any public health concerns resulting from the condition of the area." Slip op at 7.

The court of appeals thus arrived at the unprecedented and unsupported conclusion that property can only be blighted under Chapter 353 if it is presently a hazard to life and health. As explained above, this conclusion ignores the plain language of section 353.020(2), which permits redevelopment if the conditions of the area are *conducive* to ill health, transmission of disease, crime, *or* inability to pay reasonable taxes.

There is no clearer evidence of the court's misreading of the statute than its statement, "If evidence to support a finding of economic liability could also constitute evidence to support a finding of social liability, the plain language of section 353.020(2) would be defeated." Slip op at 8. Demonstrably to the contrary, the plain language of the statute *requires* the same conditions in the redevelopment area to support a finding of both economic and social liability. A blighted area is "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.” § 353.020(2). Under this statutory language, the same reasons *must* support a finding of economic and social liability. The opinion of the court of appeals could not be more clearly wrong on this point.

The court of appeals’ own cases required it to view the evidence in the light most favorable to the judgment and ignore all contrary evidence. *See Moschenross v. St. Louis County*, 188 S.W.3d 13, 18 (Mo. App. 2006). But the singular feature of the opinion of the court of appeals is its categorical and erroneous dismissal of all the evidence supporting the judgment of the circuit court: “The evidence cited by Centene focuses upon only the prospective benefits of redevelopment, and not the current state of the properties themselves.” Slip op at 9. The opinion says “there is a lack of evidence of social liability as to any portion of the area.” Slip op at 9.

These blanket declarations are contrary to the record. As discussed at length above, the evidence of the present physical conditions in the redevelopment area (“age, obsolescence, inadequate or outmoded design or physical deterioration”) was both copious and undisputed. The record is also replete with significant, undisputed evidence that the Redevelopment Area is presently generating negligible sales taxes, is presently lagging behind the rest of the city in generation of property taxes, is presently producing few jobs or customers, and is presently creating no social benefits in the form of foot traffic or street life. All this evidence supports the finding of social liability, and all of it was ignored by the court of appeals.

In light of this evidence, the opinion of the court of appeals is misguided in focusing on a part of Mr. Brancaglione’s testimony and on the defendants’ misleading assertion that the PGAV report “did not make any conclusions regarding the social liability of the area.” Slip op at 7. The authority and responsibility for blight determinations is vested exclusively in the city legislative body. *See* § 353.020(2). Regardless of what PGAV found or didn’t find, recommended or didn’t recommend, the issue in this appeal is whether the blight finding by the Board of Aldermen is at least fairly debatable.

5. The evidence supports the legislative finding that conditions are conducive to crime, disease, ill health, or inability to pay reasonable taxes (Appellants’ Point III).

Consistent with section 353.020, the Board made a legislative determination in Ordinance 5911 that the conditions of the Redevelopment Area are “conductive” to ill health, the transmission of disease, crime, or inability to pay reasonable taxes. Exhibit 21 (PEX 731). In their Point III, the defendants claim they conclusively proved that there is no evidence of an inability to pay reasonable taxes. To the contrary, the record amply establishes this element of the statutory blighting analysis.

“Conductive” means “tending to promote or assist,” *Merriam-Webster’s Collegiate Dictionary* 240 (10th ed. 2000), or “tending to cause or bring about; contributive,” *American Heritage College Dictionary* 290 (3d ed. 1993). Thus, the statute does not require the Board to determine that the conditions of the property in the Redevelopment Area have *already* had these effects; rather, these conditions must merely tend to promote

(or assist, or cause, or bring about) crime, disease, ill health, or inability to pay taxes. Section 353.020 lists these factors in the disjunctive, and as Mr. Ward acknowledged, a single factor from this list is enough to satisfy the statute. Tr. 455. Based on the condition and characteristics of the properties, the Board's determination was certainly at least fairly debatable and was far from arbitrary.

There was substantial evidence supporting the legislative determination of both an existing and potential inability to pay reasonable taxes.¹¹ Between 2000 and 2005, the assessed value of the properties in the Redevelopment Area had increased at a lesser rate than the other properties on the block, thereby paying less in property taxes. Exhibit 12 (PEX 596-599). The property at 21 South Hanley increased only 6.34% over 5 years. Exhibit 12 (PEX 596). While the assessed value of the land at 7700 Forsyth had increased, the assessed value of the improvements was less in 2005 than it had been in 2000. Exhibit 12 (PEX 596). The assessed land values at 7720, 7730, and 7732-34 Forsyth were flat from 2000 to 2005, while the assessed land value for 7736-38 was flat

¹¹ Although not the focus of the PGAV Study or plaintiff's evidence, there was also evidence of conditions conducive to disease (large pile of pigeon droppings on one property), ill health (pigeon droppings and deteriorating improvements, including cracked walls and a defective fire escape), and crime (vacant buildings raising concerns about vandalism). Exhibit 12 (PEX 595); Tr. 633. Contrary to the assertions in the defendants' brief, CPRC did not abandon any claim that properties were conducive to ill health, crime, or disease.

from 2003 to 2006. Exhibit 12 (PEX 597-599). The assessed value of the improvements at 7736 Forsyth decreased by almost 19% between 2000 and 2005. Exhibit 12 (PEX 597-599). Mr. Ward conceded that assessed values are the only source of consistent comparable data for use in making comparisons in a blighting study. Tr. at 435.

Mr. Brancaglione testified that it was appropriate to compare the increases in assessed value of the Area with the increases in the rest of the block. Exhibit 53 (PEX 1284).

In addition to property taxes, between 1995 and 2005 the sales taxes generated by the properties in the Redevelopment Area fell dramatically (due in substantial part to the departure of Library Limited/Borders) and showed no signs of recovery with the existing structures and current uses. Exhibit 12 (PEX 601-02). Mr. Brancaglione and Mr. Ward agreed that both property taxes and sales taxes are relevant to an inability to pay reasonable taxes. Exhibit 53 (PEX 1303, 1305-07); Tr. 455. This evidence fully supports the Board's finding of inability to pay reasonable taxes.

The property tax information provided by Mr. Ward's firm and introduced at trial also showed that these properties were not paying and would not generate reasonable taxes. In his report, Mr. Ward compared the average increase in assessed valuation of the Redevelopment Area with the average increase of all commercial properties in Clayton, and also with the increase in assessed valuation for properties in six nearby blocks in the Clayton central business district. Exhibit P (PEX 1360-1363). Based on this evidence, Mr. Ward testified that, between 2000 and 2005, the average increase in assessed value for all commercial properties in Clayton was approximately 26%, compared to the approximately 25% increase for the properties in the Redevelopment Area for the same

time period. Tr. 381-383. Citing the same data, Mr. Brancaglione pointed out that the Redevelopment Area, with its premier location, should be doing much *better* than the average for all commercial properties. Exhibit 53 (PEX 2-3, 10-12, 16-17). The defendants ignore this testimony from Mr. Brancaglione, as they regularly do with evidence that supports the Board's decision and Judge Hartenbach's judgment.

The defendants essentially argue that, as a matter of law, the Board could not find an inability to pay "reasonable" taxes because the average increase in assessed valuation for the properties in the Area was only a little less than the average increase for all commercial property in Clayton. Just as the overall determination of statutory blight is local and contextual, what taxes are "reasonable" is necessarily dependent on location. What might be reasonable taxes for property in one location in a municipality may not be reasonable for property in another location. The Board of Aldermen was certainly justified in concluding that this prominent corner should be leading the City's generation of tax revenue, not trailing behind the average.

Mr. Ward testified that, for the period from 2000 to 2005, only one of six surrounding blocks showed a percentage increase in assessed valuation greater than that of the Redevelopment Area. Tr. 380-81. But Mr. Ward's report also shows that the assessed values of the properties in the Redevelopment Area were significantly less than the assessed values of the properties in five of the six blocks Mr. Ward selected for comparison. Exhibit P (PEX 1361). The average assessed land value for those five surrounding blocks ranges from \$62.57 to \$115.94 per square foot, while the average assessed land value for the Redevelopment Area lags far behind at \$27.87. The average

assessed value of improvements for those five blocks ranges from \$15.65 to \$30.47 per square foot, while the average assessed value of improvements in the Redevelopment Area was \$15.31 per square foot. Exhibit P (PEX 1361). These depressed assessed values in this prominent corner support the conclusion that conditions in the Redevelopment Area are conducive to an inability to pay reasonable taxes. Exhibit P (PEX 1361); Exhibit 53 (PEX 1331-1332).

Only one of the six surrounding blocks showed a higher percentage increase in assessed values than the Redevelopment Area. Exhibit P (PEX 1361). In this block, however, as in the Redevelopment Area, the assessed values were well below the values in nearby blocks. Exhibit P (PEX 1361). This comparison shows that the percentage increases in the assessed values in the Redevelopment Area were a function of the lower property values in that area, so that a smaller dollar increase would cause a larger percentage increase. Mr. Brancaglione testified that this evidence showed that conditions in the Redevelopment Area are conducive to an inability to pay reasonable taxes. Exhibit P (PEX 1361); Exhibit 53 (PEX 1331-32).

The defendants' remarkable contention that there is *no* evidence of an inability to pay reasonable taxes asks the Court to ignore this volume of evidence that the properties are underperforming. Exhibit 12 (PEX 596-602); Exhibit 53 (PEX 1299-1300, 1325-27); Exhibit P (PEX 1360-1361). This evidence amply supports the conclusion that the conditions in the Redevelopment Area are conducive to, and already causing, an inability to pay reasonable taxes. Exhibit 12 (PEX 596-602); Exhibit 53 (PEX 1299-1300).

Citing Mr. Ward's opinion, the defendants claim that PGAV's analysis of the assessed values for the Redevelopment Area did not take into account Centene's purchase of the Library Limited property in 2004 for approximately \$10 million. The defendants ignore Mr. Brancaglione's testimony that the price Centene paid was not indicative of value or an ability to pay reasonable taxes and did not preclude a finding of blight, particularly under the facts of this sale. Exhibit 53 (PEX 1316-18). The undisputed evidence was that Centene paid a premium to acquire the property adjacent to its existing offices at 7711 Carondelet, that it did not attempt to bargain over the price, and that the price included both substantial amounts for costs that Summit incurred in pursuing its failed development project and profits Summit had hoped to earn if its project had succeeded. Exhibit 49 (PEX 1216-1220), Exhibit 50 (PEX 1261-1262). Even taking into account what Summit or Centene paid for the Library Limited property, the average assessed values for the block were still less than the surrounding blocks. PEX 1048-9; Exhibit P. Mr. Brancaglione also identified a property at another corner in Clayton that remains vacant many years after a developer paid millions of dollars to acquire it. Exhibit 53 (PEX 1293-94). Mr. Ward's opinion and the defendants' argument about the significance of the price paid for the property are entitled to no weight.

In their argument under their Point III, the defendants cite *Tierney v. Planned Indus. Expansion Auth.*, 742 S.W.2d 146 (Mo. banc 1987), a case that is completely unhelpful to the defendants. In *Tierney*, this Court reaffirmed that whether a particular area is blighted is a matter for the legislative body to resolve: "Its authority controls

unless its decision is shown to be so arbitrary and unreasonable as to amount to an abuse of the legislative process.” *Id.* at 150.

In *Tierney*, the property owners argued that their unblighted property could not properly be included in the ordinance approving the redevelopment plan. *Id.* The owners’ property was not included in a previous ordinance declaring a smaller tract to be blighted, but was included in the later ordinance, which added only unblighted property to the redevelopment area. *Id.* The owners argued that the addition of the unblighted property, without a finding that the addition was necessary to attract redevelopers, violated the constitution and the statutes. The Court disagreed:

The city council is entitled to consider the area as a whole. Its authority is not limited simply because a part of the area covered by a proposed ordinance has already been declared blighted. Nor do the governing statutes or ordinances require an explicit finding to support the inclusion of properties which are not blighted. ***The conclusion that all included properties are reasonably necessary for the redevelopment of the area is implicit in the declaration of blight.***

Id. at 151 (emphasis added).

Citing *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320 (Mo. banc 1976) (a Chapter 353 case) as support, this Court in *Tierney* rejects the defendants’ argument that recognizing economic underutilization will make every property vulnerable to eminent domain, because every property arguably could be put to a higher use. 742 S.W.2d at 151. The point is not whether the Area ***could*** do better; the

basis for statutory blight here is that this most prestigious corner *should* be doing substantially better, should not be in its deteriorated condition, should be contributing more to the City, should be generating more taxes, and should be leading the City, not detracting from it. The *Tierney* Court’s recognition that redevelopment tools may be used to address problems resulting from economic underutilization, as well as eradicate “slums,” is not limited to planned industrial expansion under Chapter 100.¹² *See Crestwood Commons Redevelopment Corp. v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 910 (Mo. App. 1991) (Chapter 353 case citing *Tierney*’s recognition of economic underutilization).

6. The evidence shows the necessity of redevelopment as well as the necessity of eminent domain.

In their Point IV, the defendants make arguments about necessity. The term “necessity” is relevant in two ways. First, Chapter 353 refers to the necessity evaluation that a redevelopment corporation performs in the exercise of its power of eminent domain: “An urban redevelopment corporation shall have the right to acquire by the exercise of the power of eminent domain any real property in fee simple or other estate which is necessary to accomplish the purpose of this chapter” § 353.130(2), RSMo.

¹² Despite the defendants’ claim that economic underutilization is not an appropriate consideration in this case, Richard Ward discusses economic underutilization in his Chapter 353 blighting studies. *See* Exhibits 33 (PEX 972), 34 (PEX 993), 42 (PEX 1154).

One public purpose of a redevelopment corporation is the rehabilitation of blighted areas. § 353.030(12), RSMo. Any real property, including buildings or improvements not in themselves blighted, may be included in the redevelopment area if they are “*deemed* necessary for the effective clearance, replanning, reconstruction or rehabilitation of the area.” § 353.020(1), RSMo.

Thus, the City’s legislative body should deem that the real property to be taken is necessary for the clearance, replanning, reconstruction, or rehabilitation of blighted areas. This determination is entitled to great deference. As noted above, “a court must defer to a political or legislative determination that the use of eminent domain is necessary to effectuate [the] public purpose unless the objecting landowner proves that the condemning party’s claim of necessity constitutes fraud or bad faith.” *City of Kansas City v. Hon*, 972 S.W.2d 407, 415 (Mo. App. 1998). The defendants have done nothing to refute the City’s legislative determination in this case, which is presumptively correct, and raise no issue of fraud or bad faith.

Second, necessity arises in the context of any condemnation. “The burden is on the party seeking condemnation to prove both that the condemnation is for a public purpose and that it is a matter of public necessity.” *Id.* at 409. After determining that the proposed condemnation is for a public purpose (as the alleviation of blight is in this case), the trial court determines whether there has been a showing that the condemnation is necessary to effectuate the public purpose. *Id.* at 414. A court must defer to a political or legislative determination that the use of eminent domain is necessary to effectuate that public purpose “unless the objecting landowner proves that the condemning party’s claim

of necessity constitutes fraud or bad faith.” *Id.* at 415; *see City of Blue Springs v. Central Development Ass’n.*, 684 S.W.2d 44, 47 (Mo. App. 1984); *Mapco, Inc. v. Williams*, 581 S.W.2d 402, 405 (Mo. App. 1979).

Put another way, “the judiciary considers the question whether the proceedings are for a public use and purpose but will not inquire into the necessity, expediency or propriety of the exercise of the power of eminent domain. The latter are questions for the legislative body to determine and are not the subject of judicial inquiry, absent fraud or bad faith.” *City of Kansas City v. Kindle*, 446 S.W.2d 807, 813 (Mo. 1969). As noted, the defendants make no claim of fraud or bad faith.

Ordinance 5911 authorized the use of eminent domain to acquire properties in the Area if those properties could not be acquired by negotiation and purchase. Exhibit 21. In accordance with the Redevelopment Agreement, CPRC made offers exceeding appraised value to purchase the properties from defendants and offered mediation in an attempt to acquire the properties by purchase. Exhibits 37-41; Tr. 238-43. These efforts were unsuccessful. Tr. 243. Based on this evidence, Judge Hartenbach found that eminent domain was necessary to acquire these properties to accomplish the purposes of Chapter 353. Supp. L.F. at 155.

In an attempt to support their argument about necessity, the defendants mischaracterize PGAV’s conclusions and the evidence about the scope of the properties suffering from blighting conditions. The defendants’ necessity argument is based on the false premise that the only blighted property is the Library Limited property and that redevelopment of that property would eliminate the blight in the entire Redevelopment

Area. Appellants' Substitute Brief at 45 (n. 15). Neither PGAV nor the Board base their conclusions of blight on only the conditions on the Library Limited parcel. This case is not about just the Library Limited property, or just the defendants' three properties; it is about the Redevelopment Area as a whole, consisting of the Library Limited property and all five properties along Forsyth.

PGAV's study concluded, and the Board of Aldermen found, that the Area consisting of the properties at 21 South Hanley and from 7700 Forsyth through 7736-38 Forsyth was blighted within the meaning of section 353.020. Exhibit 12 (PEX 602-03); Exhibit 53 (PEX 1282-83, 1290, 1308-13). The properties within that entire Area identified as having conditions contributing to blight include the easternmost properties at 21 S. Hanley and 7700 Forsyth and the westernmost property in that area at 7736-38 Forsyth, as well as the properties in between at 7720 Forsyth, 7730 Forsyth (related to the garage and parking), and 7732-34 Forsyth. In addition to their age, all the properties along Forsyth are on long, narrow plats and all have parking inadequacies.

The Board of Aldermen acted for a public purpose – alleviating the conditions in the redevelopment area – and found that these takings were necessary to carry out this public purpose. Exhibit 21 (PEX 729). Redevelopment of only the Library Limited property would not remedy the overall conditions of the Redevelopment Area.

The defendants appear to suggest that there is a third necessity consideration. Based on preliminary Centene discussions about building a headquarters on the Library Limited site, the defendants claim that Centene does not *really* need the entire Redevelopment Area or the use of eminent domain in order to build a headquarters. This

is the reddest of herrings. The only necessity determination at issue is the City's. The undisputed facts show that the City determined that it was necessary to redevelop the entire area and sought proposals from developers to that end. Exhibit 12 (PEX 580). After Centene made its proposal, it entered into negotiations with the City leading to a Redevelopment Agreement that was acceptable to both parties. Exhibit 23 (PEX 735); Tr. 237.¹³ The City has never wavered from its determination that the entire redevelopment area should be the subject of efforts to alleviate its conditions, and CPRC has never wavered in its willingness to perform its obligations under the Redevelopment Agreement.

Attempting to bolster their baseless necessity argument, the defendants repeatedly mischaracterize the evidence of Centene's pre-RFP discussions about using the Library Limited site for its headquarters. These early discussions were general and preliminary in nature and did not involve experts like outside real-estate, construction, design, or financing consultants. Before the RFP, no detailed analysis was undertaken to determine the feasibility of a limited development on that site. Tr. 28-30. Mr. Neidorff, Mr. Reh, and Mr. Chapman all consistently testified that, as they continued to analyze the possible scope of any project, they concluded that they needed the properties along Forsyth to accomplish the project's objectives, including economic viability. Exhibit 49 (PEX

¹³ Contrary to the defendants' argument, there was evidence that the Redevelopment Plan is compatible with the Overlay District and the Master Plan. Exhibit 12 (PEX 603); Exhibit 53 (PEX 1336-37).

1223-1226), Exhibit 52 (PEX 1272); Tr. 267, 273-76, 280-81). Centene did not, as the defendants state, retain Clayco in 2004 to draw plans for the project. Appellants' Substitute Brief at 48. Centene did not hire Clayco until after it received the RFP. Tr. 174, 176-78, 179, 183-84, 231-32.

Finally, the defendants cite the deposition testimony of John Ross about Summit's efforts to develop the Library Limited site with a hotel and office building as evidence that the Library Limited site could have been developed without including their properties along Forsyth. Tr. 520. This evidence has no relevance to any of the issues in this litigation. Summit's failed attempt to develop the Library Limited property would not have eliminated the blighting conditions in the Redevelopment Area. Further, there was ample evidence that Summit's project was in trouble, because it had been unable to find tenants and financing for its project, and that Clayton was again confronted with vacant buildings at a prominent downtown corner. Exhibit T. 2; Tr. 625-6, 655-6. To the extent there was an issue of fact as to the reasons Summit did not begin its project, the trial court resolved that issue in CPRC's favor. The failed Summit project supports the Board's conclusion about the impact of the adverse conditions long-plaguing the Redevelopment Area, and the use of development tools to address those conditions.

C. H.B. 1944 does not retroactively invalidate Ordinance 5911.

Facing substantial evidence supporting the Board of Aldermen's decision, and well-established judicial deference to legislative determinations, the defendants are left to argue that there has been a fundamental change in the law that now purportedly allows judicial intervention. H.B. 1944 was passed in the 2006 legislative session and became

effective on August 28, 2006, after these cases were filed. H.B. 1944 changed several aspects of the law of eminent domain, adopting a new system for determining the value to be paid by condemning authorities,¹⁴ specifying new procedures for commissioners' hearings,¹⁵ providing additional relocation assistance¹⁶ and notices¹⁷ to landowners, and prohibiting an authority from declaring farmland blighted,¹⁸ among other changes. While H.B. 1944 was a significant piece of legislation, it did not sweep as broadly as the defendants claim. Notably, H.B. 1944 did not change or narrow the definition of statutory blight under section 353.020.

The defendants argue that a portion of H.B. 1944 applies retroactively, that section 523.261, RSMo, can render invalid the proceedings that led to the passage of Ordinance 5911 more than eight months earlier, on December 13, 2005.¹⁹

The first sentence of section 523.261, on which the defendants rely, plainly relates to standards applicable to a city in passing an ordinance. Section 523.261 declares that “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

¹⁴ See §§ 523.031, 523.039, 523.061, RSMo.

¹⁵ See § 523.040, RSMo.

¹⁶ See § 523.205, RSMo.

¹⁷ See § 523.250, RSMo.

¹⁸ See § 523.286, RSMo.

¹⁹ The entire text of section 523.261 is included in the Appendix at A2.

supported by substantial evidence.” The subject of the first sentence is the municipality’s “*legislative determination*.” The next sentence provides what can happen *after* the legislative determination – parties “may seek a determination as to whether these standards *have been met*.” The remainder of the section relates to court procedures for interlocutory and expedited appeals. While these new court procedures may or may not apply to this pending action, the portion of section 523.261 that explicitly refers to legislative determinations became effective too late to call into question the procedures in passing Ordinance 5911. *See State ex rel. Atmos Energy Corp. v. Pub. Serv. Comm’n*, 103 S.W.3d 753, 761-62 (Mo. banc 2003).

The plain and obvious meaning of section 523.261 is highlighted by a recent article published by the defendants’ counsel:

The Task Force recommended that findings of blight be subjected to expedited court and appellate review under a de novo standard, which would give courts greater independence to review blight determinations. In H.B. 1944, the General Assembly provided for expedited court and appellate review but did not make that review de novo. Instead, § 523.261 says, “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,” and the court’s duty is to determine whether this standard has been met.

Gerard T. Carmody & Jeffrey L. Wax, *Missouri’s Reaction to Kelo: The Governor’s Task Force & H.B. 1944*, 53 St. Louis Bar J. 8 (Spring 2007) (emphasis added).

This is precisely the construction advocated by CPRC – section 523.261 codifies standards for legislative bodies to apply, with the courts to determine afterward whether the standards have been met. This article does not embrace the new theory advanced by the defendants in this appeal.

In addition to the statute’s plain language, the course of H.B. 1944’s enactment shows the General Assembly’s intent that the first sentence of section 523.261 created standards for municipalities in the enactment of ordinances. Section 523.261 first appeared in the House Committee Substitute for House Bill 1944, and the first sentence of the new section made it clear that cities were to apply its requirements: “Solely with regard to condemnation actions pursuant to the authority granted by section 21, article VI, Constitution of Missouri and laws enacted pursuant thereto, any legislative determination that an area is blighted, substandard, or insanitary shall not be arbitrary or capricious and shall be supported by substantial evidence; that such procedural and evidentiary standards have been met shall be reviewable by a court of competent jurisdiction.”²⁰ This first appearance of section 523.261 plainly established standards for legislative bodies, with compliance to be reviewed by courts. In the version passed by the Senate, the provisions for legislative action and judicial review were divided into the two sentences that now begin section 523.261.²¹ These two sentences appeared

²⁰ Available at <http://www.house.mo.gov/bills061/biltxt/commit/HB1944C.HTM>.

²¹ Available at <http://www.house.mo.gov/bills061/biltxt/senate/4100S.21F.htm>.

unchanged in the Conference Committee Substitute (the version finally passed by both houses).²²

The statute's terms and history make it apparent that the General Assembly intended the first sentence of section 523.261 to consist of standards to govern legislative bodies in passing ordinances, and intended the second sentence to provide for judicial review. The first sentence of section 523.261 does not, as the defendants claim, set new standards for courts.

Contrary to the defendants' unsupported assertion, section 523.261 cannot invalidate ordinances that were enacted before its effective date. It is settled that procedural statutes can be enacted to govern future proceedings, but not to undo or invalidate acts that have already been completed under prior procedure: "[T]he steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and *all things done under the late law will stand unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened.*" *Clark v. Kansas City, St. L. & C. R.R.*, 118 S.W. 40, 43 (Mo. 1909) (emphasis added).

This point is even more succinctly summarized in the defendants' own cited case: "Procedural or remedial amendments do not apply to any part of a proceeding completed prior to the effective date of the amendment." *Jones v. Missouri Dep't of Social Serv.*, 966 S.W.2d 324, 329 (Mo. App. 1998).

²² Available at <http://www.house.mo.gov/bills061/biltxt/truly/HB1944T.HTM>.

Thus, it is plain that section 523.261 cannot go back in time to specify and alter the standards by which Ordinance 5911 was enacted. The ordinance was passed and effective before the statute's enactment. The trial court properly rejected the defendants' effort to fault the City for failing to follow a statute that was not extant or effective when the ordinance was passed. *See State ex rel. Atmos Energy Corp. v. Public Service Comm'n*, 103 S.W.3d 753, 762 (Mo. banc 2003) (citing *Clark and Jones*).

Further, even if section 523.261 changed the standards for legislative bodies, and even if it could apply retroactively to legislative proceedings that were already concluded when it became effective, the trial court found that the defendants would still lose: "The City's passages of the Redevelopment Ordinances, including, without limitation, its approval of the Redevelopment Agreement and legislative determination of blight in the Redevelopment Area, were not arbitrary or capricious or induced by fraud, collusion, or bad faith and were amply supported by substantial evidence. Thus, if section 523.261, RSMo, were applicable, it would not aid defendants." Supp. L.F. 155-156. As the defendants' own cited case shows, "Substantial evidence is that which a reasonable mind would accept as sufficient to support a particular conclusion, granting all reasonable inferences which can be drawn from it, and deferring all issues of weight and credibility, to the fact finder." *Fujita v. Jeffries*, 714 S.W.2d 202, 206 (Mo. App. 1986). The evidence detailed above clearly demonstrates that the trial court's judgment and the Board's decision were supported by substantial evidence.

D. Section 523.261 does not alter the judicial standard of review.

Contrary to the plain language of the statute, as explained above, the defendants assert that section 523.261 does not codify standards for municipalities to apply in passing blighting ordinances, stating that section 523.261 “does not affect what the legislative body must do.” Appellants’ Substitute Brief at 25. The defendants claim that section 523.261 alters the standard of review or the burden of proof in this case, although they are notably vague about the nature of the purported change. By its plain terms, however, the statute does not disturb the ordinance’s presumption of validity, and it does not impose any additional burden of proof on a condemning authority. Indeed, the only burden of proof mentioned in H.B. 1944 is a *property owner’s* “burden of proving . . . that the property has been owned within the same family for fifty or more years” in some cases. *See* § 523.039(3), RSMo.

The primary rule of statutory construction is to consider words in their plain and ordinary meaning. *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 902 (Mo. banc 2006). When a term is undefined, the Court looks to its plain and ordinary meaning as found in the dictionary. *Id.*

As a law professor who participated in the drafting of H.B. 1944 explained, section 523.261 does not change the Court’s standard of review: “This language would make no discernable change in the standard of review that Missouri courts have been using for more than fifty years. The courts have generally treated the phrases ‘not arbitrary and capricious’ and ‘supported by substantial evidence’ as two ways of saying the same thing. It is difficult to see how this language would have any effect at all on

judicial review of blight determinations.” Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 Mo. L. Rev. 721, 738 (2006); see *JG St. Louis West Ltd. Liab. Co. v. City of Des Peres*, 41 S.W.2d 513, 516 (Mo. App. 2001) (approving blighting ordinance that was not arbitrary, was fairly debatable, and was supported by substantial evidence).

The defendants do not cite any part of the plain language of section 523.261 that purports to alter the presumption that Ordinance 5911 is valid or the heavy burden on a party challenging a blighting ordinance. When the General Assembly intends to overrule a case or line of cases, it says so. See, e.g., § 105.726.3, RSMo (legislatively overruling *Smith v. State*, 152 S.W.3d 275, 279 (Mo. banc 2005)); § 287.020.10, RSMo (stating “it is the intent of the legislature to reject and abrogate earlier case law” and citing a specific line of cases); § 287.043, RSMo (same); § 288.046, RSMo (same). The General Assembly did not change the longstanding standard of review or burden of proof in cases like this one. As Professor Whitman’s article shows, despite the defendants’ disappointment, nothing in the statute changes the Court’s review of blight determinations. 71 Mo. L. Rev. at 738, 765.

According to the defendants, “The ‘substantial evidence’ test was a compromise between de novo review recommended by the Task Force and the previous test.” Appellants’ Substitute Brief at 22. This statement is simply false. In support of this contention, the defendants cite only the Final Report and Recommendations of the

Missouri Eminent Domain Task Force,²³ which merely calls for “judicial review of the condemning authority’s designation of blight, with a *de novo* standard of review.” The General Assembly rejected this recommendation – H.B. 1944 does not mention *de novo* review. The report says that some members of the task force sought “some intermediate standard of review, rather than *de novo*,” but these members were evidently voted down. Nothing in section 523.261 calls for a standard of review other than the one employed by Missouri courts for decades, or changes the standards set out in *Allright, Parking Systems*, and *Crestwood Commons*.

The defendants’ own cited case demonstrates that the Court cannot engraft terms onto a statute. In *Crack Team USA, Inc. v. American Arbitration Ass’n*, 128 S.W.3d 580, 583 (Mo. App. 2004), the appellant claimed that section 435.440.1, RSMo, authorized appeal of an order vacating an arbitration award that remanded the dispute for additional arbitration proceedings. The Missouri Court of Appeals held that no such authority could be implied in the statute, which provides for an appeal only from an order vacating an award *without* directing a rehearing. § 435.440.1(5), RSMo.

The defendants’ other cited authority is all irrelevant. In claiming that section 523.261 changes the Court’s standard of review, the defendants cite a number of cases on the issue of whether a statute is substantive or procedural in nature. Appellants’ Substitute Brief at 23. The defendants’ reliance on these citations ignores the fact that

²³ Available at <http://www.mo.gov/mo/eminentdomain/finalrpt.pdf>.

section 523.261 – regardless of whether it is substantive or procedural – by its plain terms does not purport to change the standard of review.

In both *Mendelsohn v. State Bd. of Registration for the Healing Arts*, 3 S.W.3d 783 (Mo. banc 1999), and *State Bd. of Registration for the Healing Arts v. Boston*, 72 S.W.3d 260 (Mo. App. 2002), cited by defendants, the legislature had created new procedures that the complaining party claimed should not apply to them. While *Mendelsohn* and *Boston* accurately state the law, they are readily distinguishable in that the defendants have failed to point to any new procedural rules for this Court to apply.

The defendants also cite a skein of choice-of-law cases holding that a forum state applies its own procedural rules. Appellants' Substitute Brief at 25. There are no choice-of-law issues in this case, and, regardless of whether the Court's standard of review is substantive or procedural, it has not changed.

City of St. Charles v. DeVault Management, 959 S.W.2d 815 (Mo. App. 1997) does not aid the defendants. A city's redevelopment plan in the *DeVault* case called for commercial development of an area that the comprehensive plan had designated for residential use, and the Missouri Court of Appeals affirmed the trial court's denial of condemnation because the redevelopment plan failed to conform to the city's comprehensive plan. That situation indisputably is not present here. To the contrary, CPRC's redevelopment project conforms to the Master Plan for Clayton that was prepared by the defendants' own expert witness, Mr. Ward. Like the other cases cited by the defendants, *DeVault* is unavailing.

CONCLUSION

The Redevelopment Area suffers from adverse conditions that prevent it from making an overall positive contribution to the welfare of the City. By any measure, the Area is significantly underperforming, and, instead of elevating the community, has become a liability. Confronted with these circumstance, Clayton's Board of Aldermen passed Ordinance 5911, finding the Area to be blighted under section 353.020, and approving its redevelopment.

The settled law disfavors attempts to invalidate municipal ordinances. Clayton's determinations of blight could only be set aside if the defendants proved a negative: that Clayton's blight determination was not at least fairly debatable or not at least reasonably doubtful. H.B. 1944 did not relieve them of this burden, which they were unable to carry. Judge Hartenbach's order of condemnation should be affirmed because it is amply supported by the evidence and the law.

Respectfully submitted,

By: _____
Thomas B. Weaver #29176
(tweaver@armstrongteasdale.com)
James E. Mello #37734
(jmello@armstrongteasdale.com)
Jeffery T. McPherson #42825
(jmcpherson@armstrongteasdale.com)
ARMSTRONG TEASDALE LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
314-621-5070 FAX 314-612-2302

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

A copy of this Substitute Brief of Respondent, and a disk containing the brief, were hand-delivered on May 14, 2007, to the following:

Gerard T. Carmody
Kevin M. Cushing
Teresa Dale Pupillo
120 South Central Ave., Suite 1800
St. Louis, MO 63105-1705

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief of Respondent includes the information required by Rule 55.03, and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 13,553, exclusive of the cover, table of contents, table of authorities, signature block, and certificates of service and compliance.

The undersigned further certifies that the disks filed with the Brief of Respondent and served on appellants were scanned for viruses and found virus-free through the Symantec anti-virus program.