

IN THE MISSOURI SUPREME COURT

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NO. SC88487

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CENTENE PLAZA REDEVELOPMENT CORPORATION,

*Plaintiff-Respondent,*

v.

MINT PROPERTIES, INC., et al.,

*Defendants-Appellants.*

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

The Honorable James R. Hartenbach

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SUBSTITUTE REPLY BRIEF OF APPELLANTS

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CARMODY MacDONALD P.C.

GERARD T. CARMODY, Mo. Bar No. 24769

KEVIN M. CUSHING, Mo. Bar No. 27930

TERESA DALE PUPILLO, Mo. Bar No. 42975

120 South Central Avenue

Suite 1800

St. Louis, Missouri 63105-1705

Telephone: 314-854-8600

Facsimile: 314-854-8660

Attorneys for Defendants/Appellants

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## INTRODUCTION AND SUMMARY

The essence of this case is Centene's belief that the City of Clayton can, by dint of allegedly vast and unlimited municipal powers, transform day into night, apples into oranges and prosperity into blight. The exercise of this power, it says, is impervious to judicial scrutiny, no matter how arbitrary or baseless. Clayton's eagerness to please one corporate resident at the expense of others, coupled with its quixotic desire to create a nebulous "vibrancy" in its Central Business District, allows its chosen one to condemn properties that are admittedly devoid of the required statutory components.

Centene argues that meaningful judicial scrutiny of a blight finding is an improper intrusion on Clayton's policy prerogatives, and that the political process provides the only proper remedy for dispossessed property owners. But the ballot box does not provide a remedy for owners whose properties have been improperly seized in violation of their statutory and constitutional rights.

Centene's expansive view of Clayton's municipal powers is not reality. Thankfully, it is not the law of the State of Missouri.

The reality is that Clayton's determination of blight suffers from numerous fatal deficiencies. The most glaring is the lack of a finding of social liability as required under § 353.020. Clayton's own expert, PGAV, admitted unequivocally on multiple occasions that the properties within the Redevelopment Area are not a social liability. Hamstrung by this expert admission, Centene has furiously tried to overcome PGAV's testimony through numerous post-hoc creations and explanations. In 84 pages of hyperbole and misleading statements in its substitute brief, Centene attacks Appellants for focusing on

the absence of social liability and for questioning the presence of blight on some of the most expensive real estate in the St. Louis region. This criticism and exaggerated rhetoric does not stop with Appellants – Centene also ridicules the Missouri Court of Appeals for having the temerity to require Clayton to comply with state law. Despite these misguided attacks, the fact remains that there was no evidence of social liability within the Redevelopment Area as required by §353.020.

Even ignoring the admitted lack of social liability, Clayton’s determination of blight is fatally flawed for other reasons as well. Appellants’ properties are not necessary to cure the alleged blight, and the Redevelopment Area is certainly not an economic liability. The property has the highest per-square-foot value in the entire St. Louis metropolitan area and it increased in value the same or more than other Clayton commercial properties. In fact, the Redevelopment Area that Clayton asserts is blighted is in the center of a city that Clayton claims “has it all!” in its own promotional materials and is at the “hub” of the entire St. Louis area.<sup>1</sup> See Appendix A, Tab A.

Finally, in keeping with the position of Clayton in its Amicus Brief, Centene argues that this Court should not have to wait until properties become deteriorated to declare them blighted. Why wait, Centene and Clayton say, until an area is blighted when a city can grab any resident’s property if those in power think it could be put to a better use that will fatten the city’s coffers?

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<sup>1</sup> Clayton’s blighting study lists more than half a dozen recent major construction projects near the Redevelopment Area. (Pl. Ex. 12, PEX 612.)

Appellants ask this Court to recognize the obvious – that Clayton’s desire to replace office uses with retail do not equate to blight under Missouri law. The mere promise of an alternative use of prime properties does not mean those properties are blighted. It is indeed the rare case where overturning a finding of blight is justified. But rarely has a municipality’s abuse of the power of eminent domain been so apparent, and so complete, as in this case.

### ARGUMENT

#### **I. Section 353.020(2) sets forth specific requirements that must be met for a legislative finding of blight.**

The statutory language of § 353.020(2) is clear. In order for there to be a legislative determination of blight an area **must**: (1) by reason of age, obsolescence, inadequate or outmoded design or physical deterioration, **have become** an (2) economic and (3) a social liability, and such conditions must be (4) conducive to ill health, transmission of disease, crime or an inability to pay reasonable taxes. Centene seeks to nullify this definition of blight. The sum and substance of Centene’s argument is that the local legislative body has unfettered discretion to impose its own definition of “blight” under Chapter 353, and that this Court is powerless to contradict such a finding: “[The] 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.” (Resp. Brf., p. 37.) Centene cites no case law to support this interpretation. Instead, it cites *Berman v. Parker*, 348 U.S. 26, 34 (1954) and *Atkinson v. Planned Indus.*

*Expansion Auth.*, 517 S.W.2d 36 (Mo. banc 1975), neither of which gives a legislative body free reign to blight any property within its environs.

**A. SOCIAL LIABILITY**

**1. Respondent’s proposed standard for social liability must be rejected.**

Crucially, Centene’s own expert testified that the Redevelopment Area is not a social liability. In the face of such conclusive testimony, Centene devotes much of its brief using sleight of hand to establish that it is. First, Centene concocts a definition of “social liability” by piecing together the definitions of “social” and “liability” found in the dictionary. Under this strained construction of the meaning of social liability, § 353.020(2) would be satisfied if anything “works as a disadvantage” with respect to a “social gathering” or forming “relationships with ones fellows.” A residence hall not associated with a fraternity or sorority would constitute a social liability under this view.

Centene lambastes the Missouri Court of Appeals for its reliance on this Court’s decision in *Tax Increment Financing Com’n of Kansas City v. J.E. Dunn Const. Co., Inc.*, 781 S.W.2d 70, 78 (Mo. banc 1965) in construing the phrase “social liability.” However, under the principles of statutory construction set forth in *United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 911-12 (Mo. banc 2006), the same case relied on by Centene, the Missouri Court of Appeals was correct in considering the problem that the statute was enacted to remedy and in reviewing the historical context in which determinations of blight and redevelopment emerged in order to construe the meaning of “social liability.” As this Court noted in *Dunn*, the legislature enacted redevelopment statutes giving municipalities the power to redevelop slums and

blighted areas that constituted “a serious and growing menace injurious to the public health, safety, morals and welfare. . . . and which served as . . . . a breeding ground for juvenile delinquency, infant mortality, crime and disease.” *Id.* at 78. Based on its review of the historical context in which determinations of blight and redevelopment emerged, the Court of Appeals properly concluded that the definition of social liability “focuses upon the health, safety, and welfare of the public.”

More probative and even more unsettling is Centene’s view, and that of Clayton, that § 353.020(2) does not require that the property currently constitute a social liability and the fear that it may one day become one is enough. The Court of Appeals expressly rejected this Chicken Little argument: “The evidence cited by Centene focuses upon only the prospective benefits of redevelopment, and not the current state of the properties themselves. . . . We conclude that Clayton’s ultimate goals for the area cannot serve as probative evidence of social liability in light of the lack of evidence concerning the public health, safety, and welfare in the record before us.” (Slip op. p. 9.) Moreover, Centene’s argument is contrary to the express language of the statute, which uses the language “**have become** economic and social liabilities.”

**2. Respondent’s own expert and the Blighting Study authored by his firm establish that the Redevelopment Area is not a social liability.**

In more sleight of hand, Centene asks this Court to consider the testimony of its expert when favorable, but discount it when it is unfavorable. Centene relies on the testimony of Brancaglione with respect to the alleged physical conditions in the

Redevelopment Area, but seeks to distance itself when the issue involves social liability. Centene claims that Appellants ask the Court to ignore the totality of the testimony of Brancaglione. To the contrary, Appellants believe it is important for this Court to understand how Brancaglione's testimony compares to Clayton's finding of "social liability."

As noted by Centene, Brancaglione testified by deposition for three days. Nowhere during the course of those three days did he testify that the failure to include a finding of social liability in the PGAV report was inadvertent. Centene attacks Brancaglione's testimony, stating that he gave "speculative deposition" testimony as to why there was no reference to social liability in the conclusion of the report.

This mischaracterizes Brancaglione's testimony. He testified that the lack of reference to social liability was intentional:

"Q. PGAV did not render any conclusions about the area becoming a social liability in this conclusion, did they?

A. No.

Q. Was there a reason for that?

A. Yeah. We went there yesterday. The factors that are – existent here don't constitute, in our mind, a social liability in the way we understand that to be applicable to these situations." (Def. Ex. C-2, p. 1.)

When asked whether there was anything in the PGAV report that shows that a social liability exists, he said: "We don't talk about it in precisely those terms, no." (PEX 1327.)

Finally, when questioned about his review of the Blighting Study before it was published to Clayton, Brancaglioine testified:

“Q. Did you agree with her (Carol Waggoner) that PGAV did not have an opinion at the time this report was drafted that the area satisfied the criteria as a social liability under Chapter 353?

\* \* \* \*

A. Yes.” (Def. Ex. C-2, p. 2.)

Centene further attempts to discredit Brancaglioine by attempting to portray him as Ms. Wagner’s understudy in the preparation of the Blighting Study. The picture Centene attempts to paint is simply not accurate. Brancaglioine not only testified as the corporate representative of PGAV, he reviewed the conclusions in the Blighting Study before they were published to the Board of Aldermen, and made no changes as a result of his review. (PEX 5, 1273, 1274, 1275.) After this, he was produced by Centene as an expert to testify about whether the property in the Redevelopment Area was blighted. (Ex. 53, PEX 1294.) Brancaglioine is Vice President of Urban Consulting for PGAV. He has either drafted or reviewed all seventeen Chapter 353 studies prepared by PGAV over the prior five years before trial – all but this one included a finding of social liability. (Tr. 681.)

**3. Clayton relied solely on the Blighting Study, which makes no finding of social liability, in determining that the Redevelopment Area is blighted.**

The record is clear that Clayton relied exclusively on PGAV’s flawed, unsupported findings in support of its blighting determination. As noted in Appellants’ opening brief, Schoedel specifically advised the Board with reference to whether there can be blight in Clayton’s central business district that its expert reports “stand on their own.” (Pl. Ex. 6, p. 3.)

Moreover, Ordinance 5911 cites only one item in support of its conclusion of blight – the PGAV study. (Plaintiff’s Ex. 21.) In support of its claim that the Board relied on more than just the Blighting Study in making its determination of blight, Centene cites the testimony of Schoedel. (Resp. Brf. p. 53.) However, Centene fails to point out that Schoedel was forced to admit on cross-examination that he had previously testified in his deposition that Clayton’s only information supporting a finding of blight was the Blighting Study. (Tr. 641-42.)

In addition to downplaying the importance of the Blighting Study in Clayton’s determination of blight, Centene also claims that Appellants’ contention that the Blighting Study “did not contain a finding of social liability is . . . inaccurate and unavailing.” (Resp. Brf. p. 52.) In other words, Centene claims that there is such a finding of social liability in the Blighting Study – a patently untrue claim. Even Centene admits that there is no mention of social liability in the Blighting Study: “the lack of an express reference to social liability in the PGAV report....” (Resp. Brf. p. 53); “the record does not clearly establish why the PGAV study does not refer to social liability.” (Resp. Brf. p. 54.)

Centene also claims that the Blighting Study “identified a number of conditions supporting a finding of social liability. . . .” (Resp. Brf. p. 52.) But Centene does not point to one condition in the Blighting Study that supports a finding of social liability. Instead, Centene claims that PGAV’s failure to include any finding of social liability in its Blighting Study does not matter because it is the Board that is vested with the authority to make a blight determination. (Resp. Br., p. 53.) Centene does not identify any evidence before the Board – other than the PGAV Blighting Study – that the

Redevelopment Area constituted a social liability. (Tr. 641.) Instead, Centene states, “Ordinance 5911 contains an express legislative determination of social liability. . . .” (Resp. Br., p. 54; Pl. Ex. 21.) In other words, Centene argues that simply because the Board parroted the statutory language in its ordinance, including the term “social liability”, that there **is** social liability, despite the lack of evidence and the testimony of its expert that there was none.

**4. There is not substantial evidence – or any evidence – that the Redevelopment Area is a social liability.**

Centene has asserted that such amorphous factors as lack of vibrancy, parking, street life, vitality, “pedestrian-friendliness” and retail, as well as alleged economic liabilities such as an inability to contribute adequate taxes and lack of jobs is sufficient to establish social liability. Surely if such factors were sufficient to establish social liability, Centene would be able to cite case law to support such a position or an expert to so testify. Centene was unable to find either. The only authority for Centene’s definition of social liability is the imagination of the author of its brief.

Centene also claims that lack of jobs in the Redevelopment Area constitutes a social liability. Even if this were sufficient, there is no evidence that there is a lack of jobs. Centene offered no evidence regarding how many jobs there are in the Redevelopment Area, which includes the 71,690 square foot Library Limited building that is fully occupied as office space by Centene. In reality, Centene is arguing that it is a social liability if there could be more jobs in a particular area, not that the existing

number is substandard. This is true of almost any area and is not a basis for a finding of social liability.

Centene also suggests that the Redevelopment Area is a social liability based on vacancies in the Redevelopment Area. Centene's argument ignores that the Library Limited Property sold twice within one year. (Def. Ex. I-2; Tr. 531-536.) Additionally, a tenant of Appellant Mint Properties, Maharam Fabric, has wanted to rent additional space, but has been deterred from doing so by the specter of condemnation. (Tr. 486.) Other prospective tenants have been dissuaded from occupying space because of the threats associated with this project. (Tr. 490.)

Centene cites Schoedel's testimony of the potential dangers (vandalism, fire, and crime) associated with vacant buildings. (Tr. 631-633) However, the evidence at trial did not support a finding that any of these perceived dangers are present in the Redevelopment Area, nor is there any evidence in the record that these were ever considered by the Board. (Tr. 631-644; Def. Exs. X-2, Y-2.) As noted in Appellants' Substitute Brief, police and fire reports in the area indicated there were negligible calls over the five year period prior to the issuance of the RFP. (Tr. 643-648; Def. Exs. X2 and Y2.)

Centene argues that a lack of retail in the Redevelopment Area constitutes a social liability. To the contrary, use of property for retail development – as opposed to some other use such as office space, a church, a school or a park – is simply a matter of what use the property will be put as opposed to an indication of blight. Centene states that the Master Plan emphasizes the importance of “a pedestrian-friendly atmosphere with retail

components along Forsyth.” The portions of the Master Plan that Centene cites as emphasizing retail do not refer to Appellants’ properties, or for that matter, the Redevelopment Area. (Plaintiff’s Ex. 2, p. 8-9.) The Master Plan’s statements about retail development actually refer to the Retail/Mixed Use Core, which is west of the Redevelopment Area along Forsyth Boulevard and Central Avenue. (Plaintiff’s Ex. 2, p. 9.)

Centene also neglects to mention that Clayton’s own special zoning sought to **preserve** the same area that Centene now criticizes as suffering from a lack of redevelopment. Clayton’s director of planning said that this district, known as an Overlay Zoning District:

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

**5. Both newly enacted § 523.261 and prior case law support reversal of the trial court’s judgment because there is no evidence of social liability.**

There is absolutely no evidence to support that the Redevelopment Area is a social liability. Not only does this lack of evidence fail to meet the substantial evidence standard set forth in § 523.261, but it also fails to meet the prior common law arbitrary and capricious standard. Centene argues that both *Maryland Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284 (Mo.App. 1979) and *City Center Redevelopment Corp. v. Foxland, Inc.*, 180 S.W.3d 13 (Mo.App. 2005) are not applicable in the present case because this case has nothing to do with a failure of the ordinance to have a detailed

statement of financing (*Maryland Plaza*) or the condemnation of property that has already been rehabilitated (*City Center*). The holdings in these cases are not limited to their specific facts if they stand for the well-established principal that statutes conferring the power of eminent domain must be strictly construed and enforced, and when not complied with, a court cannot authorize the exercise of the power. *See, e.g., City Center Redevelopment Corp. v. Foxland, Inc.*, 180 S.W.3d 13, 16 (Mo. App. E.D. 2005); *Maryland Plaza Redevelopment Corporation v. Greenberg*, 594 S.W.2d 284, 292 (Mo. App. E.D. 1979). When a condemning authority fails to comply strictly with all of the statutory prerequisites to its exercise of eminent domain, a petition to condemn property must be dismissed. *Id.*

This is just such a case. Section 353.020(2) sets forth certain requirements that must be present in order for there to be a finding of blight. Centene has not and cannot establish that the Redevelopment Area meets the statutory prerequisites found in § 353.020(2).

**B. PHYSICAL CONDITION OF THE PROPERTIES**

Centene argues that the evidence supports a finding of age, obsolescence, inadequate and outmoded design, or physical deterioration, and that the mere presence of any of those factors is enough to mandate this Court's affirmance of the trial court. This argument misreads the language of § 353.020(2), and is plainly contradicted by the record. Under the statute, a blighted area is an area that has become – present perfect tense – an economic and social liability by reason of age, obsolescence, inadequate or outmoded design or physical deterioration. In other words, the area to be declared

blighted must have become an economic and social liability, and the area's existing conditions must have resulted from the enumerated factors - age, obsolescence, inadequate or outmoded design or physical deterioration. The mere presence of a single factor, without the overarching conditions of both economic and social liability, is insufficient. For example, age alone does not make a property blighted in the absence of both economic and social liability.

Centene's treatment of the record regarding the condition of the properties themselves is equally groundless. Centene attempts to make its case with the continual recital of conditions present in any collection of real estate – new or old – in the obvious hope that repetition over 84 pages will persuade the reader that the area is actually blighted. Centene's argument that the Redevelopment Area has had longstanding problems, stagnation, and the like ring hollow when the area was not even mentioned in a 2004 memorandum from Clayton's planning director that discussed eight areas in Clayton most in need of redevelopment. *See* Appendix, Tab B.

Centene mentions the 2002 closure of Borders, the last retail tenant of the Library Limited site, but glosses over the fact that its own expert noted that Borders' departure was simply part of a 30-year market shift in which retail relocated to more suburban sites and was replaced by office uses. (Plaintiff's Ex. 12, p. 3.) Centene also fails to mention that after Borders' closure in the first half of 2002, the Library Limited Property was under contract for a major hotel and office project within months.

Centene also selectively discusses parking, one of three different excuses that Centene has proffered for why it is necessary to acquire Appellants' properties. Centene

asserts that parking concerns within the Redevelopment Area had not been resolved. However, Centene's corporate designee testified that Centene began discussions to acquire Clayton's municipal parking garage because the garage, in the heart of downtown Clayton, was being underutilized. (Tr. 266-267.) Indeed, the Master Plan upon which Centene places so much reliance also indicates concern that too much parking could create a "sterile" atmosphere and lead to blight. (Plaintiff's Ex. 2, p. 24.) Although it noted the importance of managing visitors' perceptions of convenience and the need to have adequate parking, the Clayton Master planned deemed the system of downtown parking effective. (Plaintiff's Ex. 2, p. 24.)

Similarly, Centene relies exclusively on the flawed PGAV blighting study as support for its arguments that vacancies and supposed physical deterioration of properties within the Redevelopment Area merit a finding of blight. With respect to vacancies, this ignores that the Library Limited sold twice within one year. The Kohner Properties' building at 7730 Forsyth was fully occupied at the time condemnation proceedings began. The Sheehan property at 7716/7718 Forsyth is occupied with tenants such as realtor Edward L. Bakewell, Inc. and Dolan Realty Advisors, LLC, a real estate brokerage firm who collectively have had a commercial presence in Clayton for over a century. Centene's citation of the Mint Properties building at 7732/7734 Forsyth as a property with vacant space fails to point out that the building's main tenant Maharam Fabric spent more than \$300,000 to renovate its showroom and wanted to rent additional

space, but was deterred from doing so by the threat of condemnation. The real condition of these properties is hardly the caricature of vacancy and decay that Centene argues.<sup>2</sup>

**C. ECONOMIC LIABILITY AND INABILITY TO PAY REASONABLE TAXES**

The finding of PGAV and Clayton regarding economic liability and the inability of the Redevelopment Area to pay reasonable property taxes was based upon an analysis of a comparison of assessed values in the Redevelopment Area to those in the remainder of the block. (Pl. Ex. 12, pp. 15-21.) Centene fails to mention that PGAV testified that a comparison of assessed values in the Redevelopment Area to all commercial properties in Clayton would be dispositive of the properties' ability to pay reasonable taxes. (Def. Ex. B-2, p. 9.) PGAV could not, and therefore Clayton could not, conclude that the Redevelopment Area had an inability to pay reasonable taxes since the Redevelopment Area kept up with the remainder of Clayton. The record establishes that the difference in the increase in the value of the Redevelopment Area versus the rest of the commercial property in Clayton is .9 percent over a five year period, an infinitesimal difference. (Def. Ex. P, attachments 3, 6.)

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<sup>2</sup> Centene's reliance on the vacant Library Limited building does not recognize that it owned the property for over a year before the blighting ordinance was enacted. Centene completed a million dollar renovation of that building, which is now fully occupied, prior to the passage of the ordinance.

Moreover, Centene relies exclusively on the Assessor's data in arguing an inability to pay reasonable property taxes, even though PGAV acknowledged a number of errors in that data:

“Q. Right. But you're making a conclusion that the properties in the Redevelopment Area do not have the ability to pay reasonable taxes based on the assessor's data that's flawed, is it not?

A. It may be flawed, but it's still the basis on which you calculate the taxes.”  
(Pl. Ex. 53, PEX 1301.)

Centene's argument that the land value of the Redevelopment Area as set forth in the Assessor's records supports the conclusion that the Redevelopment Area had an inability to pay reasonable taxes completely mischaracterizes the testimony. PGAV testified that it had no explanation for why the land value for the balance of the block bordered by Forsyth, Hanley, Carondelet and Bemiston is valued at a higher price than the Redevelopment Area. One fact is certain: had the Library Limited Property been assessed at true value, the land value for the Redevelopment Area would have far exceeded all other blocks in Clayton.

Centene argues that the assessed value of the land in the Redevelopment Area lagged behind other blocks in the CBD based upon Ward's report. Again, Centene ignores the fact that the Assessor did not utilize either the sale price to Summit or the sale price to Centene in determining the assessed value for the Library Limited Property. The highest value per square foot of land shown in Mr. Ward's report was \$115.94 per square foot. The price that Centene paid for the Library Limited Property was \$ 169.67 per

square foot. As testified to by PGAV, Centene paid \$10.1 million dollars for the land (not the building and the land) constituting the Library Limited Property. (Ex. 53, PEX 1318.) Because Centene’s purchase price was based only upon the land, rather than trailing the land value for other blocks in the Central Business District, the value of the land for the Redevelopment Area far exceeded the land value for the other blocks in the Central Business District.

Centene claims that there was evidence before the Court that Centene did not pay fair market value for the Library Limited Property. Centene further goes on to argue that the evidence was that Centene paid a premium to acquire the property. No such testimony exists. Brancaglione stated:

Q. “But, again, you just told me that you are not going to opine that Centene paid a premium.

A. Because I don’t know that in fact they did . . .” (Pl. Ex. 53, PEX 1318.)

Centene does not provide a cite to any testimony to indicate that in fact Centene paid a premium. The fact that Centene paid the price it paid for a piece of property adjacent to its existing headquarters as part of any “opportunistic” purchase is indicative of fair market value. Missouri courts have long recognized the definition of fair market value as the price paid by an able and willing buyer under no compulsion to buy and a willing seller under no compulsion to sell. *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 900 (Mo. banc 1990). There was no testimony as to a compulsion on behalf of Summit or Centene in the transaction where Centene purchased the Library Limited Property. As such, the purchase price was indicative of fair market value.

Finally, the fact the Border's bookstore closed had nothing to do with the condition of the property. While no one testified from personal knowledge why the bookstore closed, the reason was certainly not related to the condition of the property. In fact, PGAV testified the building was suited for a Border's bookstore. (Pl. Ex. 53, Vol. 3, p. 5.) As noted previously, market forces mandated the shift from freestanding stores to regional malls. To argue that a drop in sales tax is the result of a high volume retailer leaving the area is disingenuous.

The purpose of Chapter 353 is to cure blight. As previously stated, a finding of blight requires that the condition of the properties cause an economic and social liability, as well as an inability to pay reasonable taxes. To argue that the condition of the Library Limited Property created an economic liability is simply preposterous. The condition of the Library Limited Property was suitable for a Border's bookstore, suitable to house numerous Centene employees, suitable for Centene to spend over \$1 million dollars in updates and maintenance, and after spending all of that money, suitable for Centene to demolish the building and construct over 500,000 square feet of office/retail space on land that it had paid the highest price per acre for in the St. Louis Metropolitan Area. This hardly seems like the scenario the legislature envisioned when it enacted Chapter 353 to cure urban blight.

#### **D. NECESSITY**

Centene mischaracterizes Appellants' argument regarding necessity by failing to address the limitation set forth in § 353.020(1), which restricts when non-blighted properties may be included in a redevelopment area. That section provides that non-

blighted buildings, improvements or properties may be included only when they are “necessary for the effective clearance, replanning, reconstruction or rehabilitation of the area.” § 353.020(1).

Instead of addressing the issue of whether Appellants’ non-blighted properties are necessary “for the effective clearance, replanning, reconstruction or rehabilitation” of the allegedly blighted Library Limited Property, Centene argues – in the face of clearly contradictory testimony from PGAV – that **all** of the properties are blighted. This proposition, which flies in the face of any layman’s observation of the properties, again suggests that Clayton’s determination is impervious to common sense, logic, or the scrutiny of any court. Centene once again points to no evidence establishing that Appellants’ specific properties are blighted, but instead simply states that PGAV’s Blighting Study concluded, and the Board found, that the “area” was blighted within the meaning of § 353.020. Thus, if the Board or PGAV says it is blighted, then it must be.

Again, Centene’s position is flatly contradicted by the Blighting Study upon which Clayton relied in passing its ordinance. PGAV expressly stated that “[t]he Area does include buildings and improvements which are not themselves blighted. . . .” PGAV testified:

“Q. My question was: which of the properties satisfy the definition of blight contained in Chapter 353.020 Paragraph (2), in your opinion?

\* \* \* \*

A. The principal properties and the ones, as I think I said before, clearly have the most major conditions were 7720, 7700, 21 South Hanley,

and then the ones that, and I'll have to refer to it again just to make sure that I'm giving you the right – 7736.” (Def. Ex. B-2, p. 7.)

\* \* \* \*

“Q. ... if we exclude the Library, Ltd. properties and just look at the five remaining properties, are those five properties taken by themselves, blighted as a whole?

A. I don't know because I didn't look at them that way.” (Def. Ex. B-2, p. 9.)

Centene also argues that plans to develop only the Library Limited Property are not relevant to the issue of necessity. But, Missouri courts have held that non-blighted parcels are “necessary” only if they “are necessary to provide a tract of sufficient size or accessibility to attract redevelopers.” *Tierney v. Planned Indus. Expansion Authority of Kansas City*, 742 S.W.2d 146, 151 (Mo. banc 1987) (citing *Allright Missouri, Inc. v. Civic Plaza Redevelopment Corporation*, 538 S.W.2d 320 (Mo. banc 1976);). That both Summit and Centene intended to proceed with projects on only the Library Limited Property establishes that this property is of sufficient size or accessibility to attract redevelopers without the inclusion of Appellants' properties.

Centene then tries to describe its “decision” to include the Forsyth Properties (Appellants' properties plus the two additional properties that have already been condemned) as an “evolving process.” The evidence at the hearing, however, was that this “decision” to include the Forsyth Properties, as well as this supposed “evolving process,” did not occur until after April 22, 2005 – the date of the issuance of the RFP.

Centene's Reh testified that it was his job to analyze the needs of Centene with respect to property acquisition and that he had determined prior to the RFP that the Library Limited Property, by itself, was enough property to meet Centene's development needs. (Tr. 271-72.) Reh testified that prior to the RFP, the only development plan Centene was considering was a multi-story building or buildings with approximately 500,000 square feet of space and 50,000 square feet of retail space on the Library Limited Property. (Tr. 273-276.) He also testified that he never discussed acquiring any other properties for Centene's project with Clayton prior to the RFP. (Tr. 272-73.) Thus, it is clear from the testimony that Centene's plans "evolved" only after the RFP was issued. It was perfectly willing to proceed with developing the Library Limited Property, without Appellants' properties, until it was forced to change its plans by the issuance of the RFP.

Centene describes the pre-RFP discussions as preliminary in nature and not involving experts such as outside real estate, construction, design, or financing consultants. (Resp. Sub. Brf. 72.) This assertion by Centene is soundly refuted by the testimony of Reh during which he stated that he had Clayco prepare images of a 500,000 square foot dual office tower building in March of 2005. (Tr. 276; Pl. Ex. 30, p. 1723.) Clayco prepared a financial feasibility analysis pre-RFP that showed that the dual office tower project located entirely on the Library Limited Property was financially viable. (Tr. 281-82.) Contrary to the assertion of Centene, none of the consultants hired by Centene advised it that it was necessary to acquire the properties in question in order to do the proposed redevelopment of the Library Limited Property. (Tr. 283.)

City Manager Schoedel's testimony similarly established that Centene expanded its project not because it needed the Forsyth Properties to construct its project on the Library Limited Property, but instead because the City required it to do so. Schoedel testified:

“Q: Did Centene ever tell you why they included these properties in their response to the RFP?

A: Through our conversations Centene knew that we were expecting them to propose a larger project than they had initially talked about.  
(Tr. 131.)

\* \* \* \*

Q: The question was, Mr. Schoedel, was I would like for you to tell us today why you believe that it is necessary to condemn these properties in order for Centene Plaza Redevelopment Corporation to fulfill its project?

A: Because I believe it's critical to make a project which the City would like to see in that area.

Q: All right. So your answer again for the second time is you're telling me that Centene has to have it because the city wants it?

A: Yes, sir.” (Tr. 137.)

Centene's argument that the Clayton Master Plan somehow justifies the taking of Appellants' properties is not supported by the very document on which it relies. The Master Plan is a general statement of development goals with respect to several business

districts. (Pl. Ex. 2, p. 5.) Contrary to Centene’s assertions, it is merely hortatory and does not mandate any particular development strategy. Additionally, the portions of the Master Plan that Centene cites as emphasizing retail do not refer to Appellants’ properties, or for that matter, to the Redevelopment Area. (Pl. Ex. 2, p. 8-9.) The Master Plan’s statements about retail development actually refer to the Retail/Mixed Use Core, which is west of the Redevelopment Area along Forsyth Boulevard and Central Avenue. (Pl. Ex. 2, p. 9.) Appellants’ properties lie in the area the Master Plan denominates the Forsyth Corridor, an area that the plan’s authors note has a “variety of site development patterns.” (Pl. Ex. 2, p. 13.) That variety “does not distract from the desired character, but is rather cosmopolitan and appropriate.” (Pl. Ex. 2, p. 13.)

More important, the zoning adopted by the City six years after the Master Plan contradicts Centene’s argument. Appellants’ properties are part of an area Clayton designated for preservation. Clayton’s Director of Planning and Development Services said that this district, known as an Overlay Zoning District:

“seeks to preserve the pedestrian-friendly nature of this mostly one and two-story section of the CBD. The overlay district does allow a PUD if the project is appropriate to the goal of **preservation of the existing area.**”

(Def. Ex. B) (emphasis added)

Appellants’ uses along Forsyth Boulevard are in compliance with Clayton’s CBD Core Overlay Zoning District, which limits the height of structures to four stories. (Tr. 351-353.) Centene’s planned six-story parking garage will hardly “preserve the existing area.”

Appellants' expert, Richard Ward, testified that Clayton's CBD Core Overlay Zoning District is intended to protect the pedestrian-friendly environment of the low-rise portions of downtown Clayton, including Appellants' properties. (Tr. 349-351; Def. Ex. Q.) The properties along Forsyth Boulevard, including Appellants' properties, are pedestrian-friendly. (Tr. 355.) Thus, Clayton's purported objective here – to establish more retail and a pedestrian-friendly environment – is already satisfied.<sup>3</sup>

## II. STANDARD OF REVIEW

In its Substitute Brief, Respondent makes reference in a footnote to Appellants' concession "that the General Assembly rejected the idea of imposing de novo review" (Resp. Br. 34.) This "concession" is in reference to the Task Force's recommendation that the role of the judiciary be expanded so as to allow for the substitution of its opinion for that of the legislative body which had originally made the finding that the requisite proof of "blight" had been presented. (Task Force Recommendation #16.) The rejection of this concept by the General Assembly in no manner detracts from the principle recognized in *Hoffman v. City of Town and Country*, 831 S.W. 2d 223, 225 (Mo.App. E.D. 1992) that appellate courts reviewing the trial court's decision "make our own independent determination of whether the legislative body's decision was fairly debatable." This is a principle that was recognized by this Court in *Binger v. City of*

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<sup>3</sup> See, e.g., *City Center Redevelopment Corp. v. Foxland, Inc.*, 180 S.W.3d 13 (Mo. App. E.D. 2005) where the court affirmed denial of a condemnation where the alleged public purpose had already been fulfilled.

*Independence*, 588 S.W. 2d 481, 486 (Mo. 1979), wherein the *Murphy v. Carron* standard that traditionally applies to judge-trying cases was found to be inapplicable when the trial court's review of the propriety of an administrative or legislative decision was at issue. In such an instance, the appellate court reviews the record and makes its own determination of the propriety of that administrative or legislative decision. Within the specific context of a legislative finding of blight, the appellate court's de novo determination of the propriety of that decision was recognized in *JG St. Louis West Limited Liability Co. v. City of Des Peres*, 41 S.W. 3d 513, 517 (Mo. App. E.D. 2001).

As for the scope of that judicial review, it has historically been confined to a determination of whether the legislative body had acted arbitrarily or unreasonably or was induced to act by fraud, collusion or bad faith. *Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W. 2d 11, 15 (Mo. 1974); *City of Bridgeton v. Missouri-American Water Co.*, \_\_\_ S.W.3d \_\_\_, 2007 WL 1121807, \*5 (Mo. banc 2007). That is until the passage of H.B. 1944.

**A. The Trial Court Was Required to Apply the Eminent Domain Statute that Existed at the Time of Trial, Mandating Use of the Substantial Evidence Test**

There is no dispute that at the time of trial, the 2006 Eminent Domain Law was in effect and directed the trial court to apply the substantial evidence standard, as well as the “arbitrary or capricious or induced by fraud, collusion, or bad faith” standards. § 523.261. The statute provides that “a court of competent jurisdiction” is to make “a determination as to whether those standards have been met” in reviewing the legislative determination that an area is blighted. § 523.261.

Centene’s argument that the standard set forth in § 523.261 is one to be applied by the legislative body in enacting blighting legislation is inconsistent with the language of the statute and case law. The directives in § 523.261 do not tell Clayton what to do. The City’s role in the condemnation process is found in § 353.020(2), which sets forth the definition of blight. The 2006 amendments did not change Clayton’s role. Perhaps Centene would have a point if that section changed and imposed an additional requirement (e.g., has been vacant for 10 years). But it did not. Section 523.261 simply tells judges what to do, that is, review the legislative determination.<sup>4</sup>

Centene is advocating an unprecedented rule that comes down to this: When a stricter standard of judicial review is adopted, the stricter standard cannot apply to legislative enactments that preceded the adoption of the stricter standard of review. No court in a published opinion has ever adopted such a rule. In contrast, courts have repeatedly invalidated legislative enactments by applying stricter standards of review than existed when the legislation was adopted, including in some of the most important civil rights cases. *Skinner v. State of Oklahoma*, 316 U.S. 535, 541 (1942) (“strict scrutiny” test adopted for first time in an equal protection challenge to invalidate law mandating sterilization of “habitual” criminals); *Griswold v. Connecticut*, 381 U.S. 479, 481-85 (1965)(applying strict scrutiny for first time to privacy rights to invalidate ban on

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<sup>4</sup> Centene cites various versions of the HB1944. They all have similar language in making the application of the substantial evidence test a judicial, not city, function.

contraceptives); *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967)(extending strict scrutiny for first time to a right-to-marry to invalidate ban on interracial marriages).

Missouri courts have held that procedural laws do not trigger the “retroactive operation” clause of the constitution. *Jones ex rel. Williams v. Missouri Dept. of Social Services*, 966 S.W.2d 324, 329 (Mo. App. E.D. 1998). Centene admits, as it must, that procedural laws do not apply to the part of a proceeding completed prior to the effective date. (Resp. Br. 24.) But Centene misses the point that the substantial evidence test was not applied until trial, months after enactment of Section 523.261. One of Centene’s own authorities specifically describes Section 523.261 as “procedural provisions.” Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 Mo. L. Rev. 721, 738 (2006).

Furthermore, in response to the seven cases cited in our opening brief holding that the standard of review is procedural (App. Br. 21), Centene merely discounts those cases because they involved choice-of-law rulings. (Resp. Br. 33.) Centene does not attempt to explain why a standard of review would be procedural in choice-of-law cases but not in this case. We have found no cases holding that the standard of review is not procedural in **any** type of case.

Centene relies on *State ex rel. Atmos Energy Corp. v. Public Service Com’n*, 103 S.W.3d 753, 762 (Mo. banc 2003). But that case merely held that rules telling the Public Service Commission how to enact its regulations did not invalidate previously-adopted regulations. Again, because Section 523.261 does not change what Clayton was to do (found in Section 353.020(2), *Atmos* is irrelevant.

## **B. The Legislature Meant to Change the Law in Adopting the Substantial Evidence Test**

Centene argues that the addition of the phrase “substantial evidence” to the common law test (whether the findings were arbitrary or capricious, or induced by fraud, collusion or bad faith) did not change the law. (Resp. Br. 29-33.) In other words, Centene asks this Court to tell the legislature that it engaged in a futile act in adding that phrase to the existing test. This Court should decline Centene’s invitation to repudiate the legislature’s action.

As we stated many times in our opening brief, condemning these properties with no evidence to support the required findings mandates reversal under any test. This record goes beyond what Missouri’s appellate courts have ever seen before in condemning \$7.4 million an acre property in the middle of one of the state’s wealthiest communities.

It is true that there are not bright lines of demarcation between arbitrariness and substantial evidence. But courts do recognize a difference. Recently this court noted that the standard of review of the State Tax Commission is “whether the decision constituted an abuse of discretion, whether it was supported by competent and substantial evidence on the record as a whole, or whether it was arbitrary, capricious, or unreasonable.”

*Algonquin Golf Club v. State Tax Com’n*, \_\_\_ S.W.3d \_\_\_, 2007 WL 817394, at \*3 (Mo. App. E.D. 3/20/2007). But in rejecting the Commission’s classification of certain portions of private golf courses as commercial property, this Court held only that the classification was “not supported by competent and substantial evidence.” *Id.* at \*7.

The addition of the substantial evidence standard clearly calls for something beyond what existed before. Here, only absolute deference would compel the conclusion that the heart of Clayton is blighted. The legislature meant there to be change in the eminent domain review standards. This Court should adopt a heightened level of scrutiny.

### **CONCLUSION**

Centene's pleas to this Court to turn a blind eye to the defects in this misguided condemnation effort should not be answered. The facts and law mandate that the Order of Condemnation be reversed and that the underlying ordinances be declared void.

Respectfully submitted,

CARMODY MacDONALD P.C.

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Gerard T. Carmody, #24769  
Kevin M. Cushing, #27930  
Teresa Dale Pupillo, #42975  
120 South Central Avenue, Suite 1800  
St. Louis, Missouri 63105  
(314) 854-8600  
(314) 854-8660 (fax)  
[gtc@carmodymacdonald.com](mailto:gtc@carmodymacdonald.com)  
[kmc@carmodymacdonald.com](mailto:kmc@carmodymacdonald.com)  
[tdp@carmodymacdonald.com](mailto:tdp@carmodymacdonald.com)

Attorneys for Appellants

**RULE 84.06(c) CERTIFICATION AND CERFTICATE OF SERVICE**

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2000 and contains no more than 7,619 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure (less than the 7,750 limit in the rules). The font is Times New Roman, proportional spacing, 13-point type. A CD-ROM (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

I hereby certify that one true and correct copy of the foregoing and a CD-ROM containing the same was mailed, postage prepaid, this 18th day of May, 2007, addressed to the following:

Thomas B. Weaver  
Timothy J. Tryniecki  
Jovita M. Foster  
Armstrong Teasdale  
One Metropolitan Square, Suite 2600  
St. Louis, MO 63102-2740

Attorneys for Plaintiff/Respondent

CARMODY MacDONALD P.C.

---

Gerard T. Carmody, #24769  
Kevin M. Cushing, #27930  
Teresa Dale Pupillo, #42975  
120 South Central Avenue, Suite 1800  
St. Louis, Missouri 63105  
(314) 854-8600  
(314) 854-8660 (fax)  
[gtc@carmodymacdonald.com](mailto:gtc@carmodymacdonald.com)  
[kmc@carmodymacdonald.com](mailto:kmc@carmodymacdonald.com)  
[tdp@carmodymacdonald.com](mailto:tdp@carmodymacdonald.com)

Attorneys for Appellants

**APPENDIX**

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