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**IN THE SUPREME COURT OF MISSOURI**

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**APPEAL NO. SC92470**

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**ST. LOUIS COUNTY, MISSOURI,**
**Appellant,**

**v.**

**RIVER BEND ESTATES HOMEOWNERS ASSOCIATION *et al.*,**
**Respondents.**

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**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY**
**DIVISION 36**
**HON. ELLEN H. RIBAUDO**

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# Reply Brief of Appellant St. Louis County, Missouri

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**PATRICIA REDINGTON #33143**
**COUNTY COUNSELOR**

**CARL W. BECKER #37585**
**STEPHANIE L. HILL #56726**
**ASSISTANT COUNTY COUNSELORS**
**41 South Central Ave., 9th floor**
**St. Louis, MO 63105**
**(314) 615-7042 (telephone)**
**(314) 615-3732 (facsimile)**
**cbecker@stlouisco.com**
**slhill@stlouisco.com**
**Attorneys for St. Louis County, Missouri**

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## ARGUMENT

### I. Failure to Record

#### A. County exercised due diligence to reconstruct the record.

Under Mo.R.Civ.P. 81.12(f), "[i]f anything material is omitted from the record on appeal, the parties, by stipulation, or the appellate court, on a proper suggestion or of its own initiative, shall direct that the omission or misstatement be corrected." Substantial portions of the record, including all of the arguments and rulings on objections heard at the bench and 146 inaudible references of varying lengths, are missing from the transcript. County used due diligence to correct the shortcomings in the record and submitted a draft stipulation to Novels. County also filed a Motion to Remand in an effort to obtain a full record for appeal.

Novels' citation to *State v. Borden*, 605 S.W.2d 88 (Mo. 1980) for the proposition that County failed to satisfy the requirement to attempt to correct the record is wrong. But County met the *Borden* requirements. *Borden* does not require the parties to reach an agreement, only to "attempt " doing so. *Id.* Novels' failure to respond to County's proposed stipulation does not vitiate the fact of County's attempt.

Apart from their blanket dismissal of the impact of the unrecorded arguments and inaudible portions, Novels have made no response regarding the proposed stipulation.[1]

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[1] Novels have inserted an irrelevant and unsupported allegation that County misled them in some way in order to obtain an extension in which to file its brief. County disputes

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Their contention that County did not exercise due diligence is without merit.

**B. Absence of a complete transcript is material and prejudicial.**

The record on appeal is not confined to testimony, but includes arguments and rulings on objections. *See* Mo.R.Civ.P. 81.12(a). Novels incorrectly argue, without citation, that the missing bench arguments involving objections do not matter. However, the unrecorded, omitted portions of the transcript specifically relate to the issues of this appeal. Post-objection recollection, while helpful for partial reconstruction of missing elements of a transcript, does not adequately reflect the arguments raised during the objections. The reasons for the trial court's ruling on objections, any limitations on the rulings, and directions with respect to succeeding evidence are all totally absent from the record. When reviewing the record on appeal, neither the parties nor this Court should be required to speculate about these crucial elements.

Novels are dismissive of the 146 inaudible portions, claiming that "only five (5) are found in the actual testimony of witnesses and that only a few are found in portions of the transcript that are during proceedings relevant to the issues on appeal." *Novels' Brief, pp. 15-16.* However, approximately eleven inaudibles occur during argument of the pre-trial Motions in Limine, which were taken under submission and then argued when the testimony was presented. *See e.g., Tr. 6:24; 9:10; 15:5-7; 15:17; 15:25; 18:10; 19:11; 22:9; 27:12-13; 28:19; 35:1.* . Approximately twelve inaudibles occur in the context of

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this claim but further notes that any communications about an extension of time do not change the fact that County did submit a proposed stipulation to the Novels.

a particularly important issue raised in the appeal: the owner's statement of value. *Tr. 269:15; 269:17; 271:5; 271:8; 277:1; 277:4; 278:8-9; 278:14; 278:19; 280:1; 280:12.* Inaudibles are also present in argument of objections during the testimony by County's appraiser. *Tr. 308:6; 341:21; 342:7; 349:18; ; 391:9; 391:24-25; 393:21.* The inaudibles, coupled with the unrecorded argument and rulings, require this Court to speculate about the validity of these arguments and hinder County's ability to address the issues on appeal.

Novels mistakenly conclude that the lack of dispute as to the court rulings equates to a lack of prejudice. The unrecorded arguments prejudice the County's ability to appeal because the court's rulings comprise only one part of the record and the issues raised and argued limited subsequent witness testimony.

Novels also minimize the impact of inaudible portions of their closing argument. But improper closing arguments are often crucial in determining error. Without a complete record of the closing argument, County cannot effectively demonstrate the extent to which Novels utilized improper inflammatory and prejudicial language. *See Tr. 478:21; 478:24; 479:5.* Contrary to Novels' assertion that County did not provide "any single instance where the inaudible materially prejudices its right to appeal," *Novels' Brief p.10,* County specifically pointed to an inaudible portion of the transcript in closing which "preclude[d] County from ascertaining the full extent to which Novels incited passion and prejudice in this particular instance. *County's Brief p. 35 n. 5.*

Novels' reliance on *Skillicorn v. State*, 22 S.W.3d 678 (Mo. banc 2000) is misplaced. In *Skillicorn*, the record was incomplete because the defendant's mental



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health records were not presented and offered into evidence. But an incomplete record resulting from counsel's failure to offer documents into evidence is significantly different from a court's failure to record arguments pertaining to objections, without the knowledge or consent of the parties. Here, the parties participated in a four-day trial. It is simply not possible to document how much information was omitted during a four-day trial when the recorder was not in operation, or to ascertain the effect of omitted information on the jury.

Clearly the 146 "inaudibles," taken with the failure of the trial court to record the arguments and ruling on objections, did prejudice County. Judgment should be reversed and the case retried.

## II. Heritage Value References

### A. County's Brief complied with requirements of Rule 84.04(d).

In Point II of its opening Brief, County argued error in the trial court's receipt of evidence that did not pertain to fair market value of the property: the court admitted evidence of Novels' attachment to and unwillingness to sell their property, yet excluded evidence that the jury verdict would be increased to account for the property's heritage value. The jury was thus inflamed by Novels' "emotionally charged testimony and argument" and did not know that "heritage value" would be added on to the jury's verdict. *County's Brief p. 37.*

Contrary to Novels' contention, County's point is neither "confusing" nor "multifarious." Novels' state that "County's position seems to be that the court did *not* commit error in its ruling by including evidence of the history of the property until it

*excluded* evidence of heritage value," *Novels' Brief p. 19*. In fact, County was quite clear in arguing that "fair market value does not include, and in fact specifically prohibits, emotional statements about the sentimental value specific to a particular owner or about his unwillingness to sell." *County's Brief p. 32*. The fact that the trial court then exacerbated its error by refusing to let the jury know about the heritage value add-on highlights the prejudice to County, and was properly included in a single point on appeal.

Further, it is this Court's policy "to decide a case on its merits rather than on technical deficiencies in the brief." *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 338 (Mo. banc 1998). County's argument is clearly set forth and in no way impedes review or requires the Court to act as an advocate for County; it complies with Mo.R.Civ.P. 84.04(d) and should be reviewed on the merits.

**B. Trial court committed plain error in rulings.**

In a second effort to preclude substantive review of County's claim of prejudicial evidentiary error, Novels argue that County failed to preserve this issue by timely objection. County did object to Novels' effort to incite the jury against County, pointing out that the trial was supposed to be "about just compensation, not insult or any emotion." *Tr. 486-87*. The trial court, however, quickly overruled that objection. Other objectionable statements were actually contained in counsel's own questions or arguments, so that by the time an objection could have been made the damage was done and could not have been reasonably mitigated by any instruction the court could have given. *See, i.e., Tr. 338* ("When you talk about a willing seller, he or she doesn't have a



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gun to her head."); *502* ("They've held on to a property for 100 years. It's taken against their will.").

To the extent County did not adequately preserve its right to appeal, the trial court's evidentiary errors should be reviewed as plain error. "The question of whether to consider a matter as plain error is discretionary with an appellate court." *State v. Frazier*, 927 S.W.2d 378, 379 (Mo. App. 1996). In exercising that discretion, "`the appellate court looks to determine whether there facially appears substantial grounds for believing that the trial court committed error that is evident, obvious and clear, which resulted in manifest injustice or a miscarriage of justice.'" *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 809 (Mo. banc 2011) (citation omitted) (reviewing and reversing as plain error the termination of parental rights without required investigation).

The trial court's admission of evidence and argument which had the apparent intent, and actual result, of inciting passion and prejudice against the condemning authority was obvious and clear error, and the oversized verdict for Novels evidenced a miscarriage of justice. What occurred at trial is closely analogous to what happened in *Green v. Ralston Purina Company*, 376 S.W.2d 119 (Mo. banc 1964), where the plaintiff sought to incite the jury against the "big bad corporation," just as Novels sought to incite the jury against County for "putting a gun to their head" to take Novels' property. The *Green* court condemned the same kind of tactics employed herein by Novels:

> The richman-poor-man argument, in which counsel consciously and deliberately array the size, wealth or power of a corporation on the one hand against the position of an individual on the other . . . could have no other effect than to

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> prejudice the corporation in the eyes of the jury and deprive it of its right to a fair and impartial trial. . . . Such statements are 'dangerous and harmful indulgences, potent in exciting sympathy or prejudice, and should be discouraged, especially when apparently used for that purpose'. . . This type of jury appeal is not permitted. *It is the duty of the trial judge to stop such an argument at its inception*; to instruct the jury to disregard it, and to reprimand counsel. A mistrial should be declared where it appears impossible for the jury to deliberate dispassionately on the merits of a cause or defense as a result of the action of counsel in charging the atmosphere of the trial with prejudice.

*Id.* at 127 (emphasis added/citations omitted).

Novels should not have been permitted to put such "dangerous" and "potent" statements before the jury, via questions and argument for which objections could neither be anticipated nor effectively rebutted. Refusal by this Court to review Novels' blatant pandering would encourage attorneys to incite juries by asking questions with no legitimate purpose, thereby leaving opponents with the equally undesirable alternatives of objecting and calling more attention to the offensive remarks or else waiving the right to seek review. The lethal tactics employed by Novels and left unchecked by the trial court should be reviewed as plain error.

### C. Trial court erred in evidentiary rulings.

As noted above, the admission of passionate statements unrelated to market value constituted plain error. Novels argue that these statements, which they mischaracterize as "history" of the property, were relevant in determining fair market value. *Novels' Brief,*

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*p. 20*. Novels assert that courts "`cannot infer bias, passion or prejudice from a verdict within the range of testimony and the party raising that issue must show some incident or occurrence which created such bias, passion or prejudice.'" *Novels' Brief p. 23, citing M & A Elec. Power Co-op v. Tomlinson*, 608 S.W.2d 571, 573 (Mo. App. 1980).

Novels' citation is not apt. Here, the verdict was *not* strictly within the range of testimony, *see Point VI infra*, and County *has* provided the Court with numerous examples of incidents and occurrences which created "bias, passion or prejudice." *See County's Brief, pp. 32-36*. For the Novels to argue that repeated references to having "a gun to their head" were innocuous and not a suggestion "that the eminent domain powers had been use[d] in a coercive manner," *Novels' Brief p.22*, is specious. Their continual insertion of non-market value remarks about their love for their property and loathing to part with it was prejudicial. Coupled with the trial court's simultaneous refusal to inform the jury that such factors would be separately compensated by the heritage value addition, the erroneous admission of this evidence was even more devastating and resulted in a double recovery for emotional damages (which County contends were not compensable at all, *see Points VII-IX, infra*). Because the jury was inflamed against County and unaware that Novels would indeed be compensated for their personal attachment to the property, its verdict was the result of passion and prejudice and should be reversed.

## III. Owner's Testimony of Value

### A. Court did not exclude owner's testimony as "settlement negotiation."

In responding to County's brief, Novels have mischaracterized the trial court's ruling on the admissibility of owner Derek Novel's previously stated opinion of value.

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Novels inaccurately argue that the court based its exclusion of Mr. Novel's opinion on a finding that the opinion was "a continuation of settlement negotiations." *Novels' Brief p. 30.* Instead, the trial court suggested that Mr. Novel's opinion of value *might* have been based upon the same value for which he had previously indicated he would settle. The court then speculated that Mr. Novel might not have actually "believed" that $496,000 was the true value of the property, *Tr. 274*, and excluded his opinion of value based on the possibility that his subjective belief did not match his expressed statement. Thus, the court's ruling cannot be sustained as an (appropriate) exclusion of testimony about settlement negotiations. *Tr. 271-280.* Instead, the ruling that is being appealed is the court's determination that the opinion was subject to exclusion because it might not have been a "true" expression of Mr. Novel's opinion:

> Based on the fact that there has been no statement on the record with regard to his *belief* of the fair market value and the court's inability to ascertain whether or not that number of 496 was genuinely his *true belief* as to what the value of the property was at the time of the commissioner's hearing or the product of what he believes the -- and the negotiations as to what he was going to settle for at that time. Therefore, I'm not going to allow the explanation, and I will note that continuing objection and it will be preserved.

*Tr. 278:22 – 279:7* (emphasis added).

**B. Exclusion of Mr. Novel's opinion of value was prejudicial error.**

The fact that the discussed settlement amount and the opinion of value were identical should not have been a factor in determining the opinion's admissibility for

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impeachment. Inadmissibility of a settlement offer does not render inadmissible for impeachment purposes an opinion of value which happens to equal that amount. "[I]t is permissible to use evidence that is relevant and material for impeachment purposes, even if the same evidence would be inadmissible for another purpose." *City of Maryland Heights v. Heitz*, 358 S.W.3d 98, 112 (Mo. App. 2011) . *See also* **Houfburg v. Kansas City Stock Yards Co. of Maine**, 283 S.W.2d 539, 548–49 (Mo. 1955) (Rule against admitting evidence of insurance payments did not apply when such evidence was necessary "in order that the jury may properly evaluate the testimony of a witness").

The Condemnation Commissioners specifically asked Mr. Novel for his opinion of value, and he responded with the amount of $496,000. *Tr. 432*. The only purpose of the Commissioners' hearing having been to determine what damages were owed to Novels, *see* Section 523.040 R.S.Mo., it defies logic to suggest that Mr. Novel would have testified, against his own interests, to anything less than the full value of the damages he claimed to have sustained as a result of the taking.

Further, case law does not support Novels' argument, *see Respondents' Brief pp. 30-31*, that impeachment testimony is admissible "only" after personal testimony by the party being impeached. In *Land Clearance for Redevelopment Authority of the City of St. Louis v. Henderson*, 358 S.W.3d 145, 157 (Mo. App. 2011), the appellate court sustained the admission of impeachment testimony that consisted of "a summary statement of a presentation that LCRA's attorney had prepared for the commissioners' hearing." The court stated that the LCRA should not "be able to avoid previous statements made concerning the sole issue at trial, simply because it asserts its opinion as to value through

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third-party experts." *Id.* at 158.

Consistently therewith, Mr. Novel should not be able to avoid previous statements simply because he chose to assert his opinion at trial through a third-party expert; permitting him to do so would promote gamesmanship to the detriment of truth. At trial, Novels' opinion of value via their appraiser was $1,296,746. *Tr. 211:15-16.* Mr. Novel's refusal to acknowledge at trial that he had an opinion of value should not have prevented County from letting the jury know that, in fact, the owners had expressed a very different opinion of value prior to trial.

The prejudice to County from the exclusion of such dramatic impeachment is clear. An ordinarily prudent person would want to consider the owner's prior, and very different, opinion of value before awarding an amount two or three times higher, and "all evidence of value which an ordinarily prudent person would consider in reaching a conclusion regarding the fair market value of the condemned property is admissible." *Mo. Highway and Transp. Com'n v. Our Savior Lutheran Church*, 922 S.W.2d 816, 819-20 (Mo. App. 1996). Mr. Novel's opinion was admissible both as impeachment and as an admission against interest, and the trial court's refusal to allow the jury to hear Mr. Novel's opinion of value was an abuse of discretion which requires reversal of the judgment entered herein.[2]

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[2] Novels' brief did not even address County's argument that Mr. Novel's publicly stated opinion of value should also have come into evidence as an admission against interest, and County will not reiterate that argument . *See* County's Brief pp.43-44.

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## IV. Evidence concerning Terra Vista Comparable Sale.

In seeking preemptively to undermine the significance of a particular comparable sale relied on by County's appraiser ("the Terra Vista comparable"), Novels' appraiser speculated that the seller had been unsophisticated and suggested that the seller had been outmatched by the buyer. When County tried to rebut this speculation with evidence of the seller's sophistication as illustrated by a subsequent sale, the trial court refused to permit County to elicit the sale price that would have underscored that sophistication .

Novels' argument that County was "only" precluded at trial from eliciting the purchase price for the second sale is correct. But it was the sale price that was relevant, to show the seller's sophistication and ability to command a very favorable purchase price. This was necessary to rebut the speculation by Novels' appraiser that the Terra Vista comparable was not relevant because the parties were not evenly matched. And contrary to Novels' argument, their appraiser was speculating when he suggested the buyer knew more than the seller did as to the Terra Vista comparable:

MR. BECKER: And you said that certain information leaked out to a developer for Terra Vista, I believe? Is that what you said?

MR. DEMBA: Yes.

MR. BECKER: And what did you mean by that?

A. *I think* that Levinson, having been a developer and a participant in the real estate market, had some involvement in real estate in the Maryland Heights area, knew about the Howard Bend study, was aware of the changes, the letters of map revision and how it affected the area outside of the Howard Bend area.

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*Tr. 234:23 –235:8 (emphasis added).*

Considering these and other derogatory/ speculative comments by Mr. Demba, the admission of rebuttal evidence regarding the seller was crucial to County's case. "'A party may introduce evidence to rebut that of his or her adversary, and for this purpose any competent evidence to explain, repel, counteract, or disprove the adversary's proof is admissible.' " *Heitman v. Heartland Regional Medical Center*, 251 S.W.3d 372, 377 (Mo. App. 2008) (citation omitted). Because County was prohibited from introducing relevant rebuttal testimony, the judgment should be reversed.

## V. City Experts' Testimony.

### A. Proposed evidence of City Experts was appropriate.

The Trial Court erred by prohibiting City Experts from giving specific opinions relating to development of the Subject Property. Novels' justification for the Trial Court's ruling is that such evidence was outside the scope of City Experts' permissible testimony as "non-retained experts." Novels' justification is without support. Novels erroneously maintain that because County disclosed City Experts as "non-retained experts" pursuant to Rule 56.01, that Novels had not been put on "notice" that County would call these experts for opinions relating to development of the Subject Property. *Novels' Brief*, p. 47. Novels doggedly insist upon this position even though Novels had extensive opportunity to discover the subject matter of City Experts' testimony, including extensive depositions.

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County met its disclosure requirements under Rule 56.01. In the course of discovery, the County identified two witnesses employed by the City of Chesterfield, Missouri ("City"): Aimee Nassif, the City Planning and Development Director and Jeff Paskiewicz, a civil engineer in the City Public Works Department ("City Experts"). County disclosed this information responsive to Novels' request for "the expert's name, address and field of expertise." Novels' Brief, App. A-21 . The label as "non-retained" applies to the rules governing discovery, but did not preclude the Novels' from deposing City Experts prior to the trial nor does it limit the scope of the testimony City Experts could provide based upon their knowledge, experience and expertise, particularly for purposes of rebuttal. Novels provide no case law in support of their proposition that the designation as retained or non-retained limits the scope of an expert's testimony during trial.

Novels represented to the Trial Court that in deposition, City Experts were not familiar with the Subject Property prior to being contacted by County. But the time at which they became familiar is irrelevant; the point is that Novels were able through discovery to ascertain that both City Experts had extensive knowledge and experience with the Subject Property. Contrary to the characterization in Novels' Brief at p. 46, City Experts described at length during deposition that they possessed knowledge of and experience with Subject Property and the surrounding development. *See Appendix A19-*

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*A23;A46-A53 and A120-A126*[3].After discovery, Novels had full knowledge that County would offer evidence through City Experts that related to development issues with the Subject Property. The only issue in a condemnation case is the amount of damages, and County evidenced its intent to procure City Experts' testimony to reduce the amount of damages. Novels' assertion that County called these witnesses to testify about general issues relating to the City, but not issues relating to development of the Subject Property, has no basis.

**B. County provided a sufficient foundation for City Experts' testimony.**

The Trial Court erred in excluding City Experts' testimony relating to development of the Subject Property because the County provided the Trial Court with a sufficient foundation that consisted of numerous descriptions of the proposed testimony. In contrast to the Novels' assertion that the County relied on general statements about the excluded evidence, the County specifically argued that City Experts would testify as to the development challenges and limitations for Subject Property. These issues were first discussed in Novels' Motions in Limine. *See Defendant's Motions in Limine, L.F. 134-136; Tr. 398:2-22; 399; 443.* The Trial Court also heard Novels' objections and County's counter arguments when County called City Experts to the stand; however, those objections and arguments were not recorded. *See Tr. 399;443.*

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[3] The unrecorded sidebar arguments described in Point I also included discussion of the City Experts' knowledge of Subject Property.

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The Novels indicate that the description of the excluded evidence is too general, yet they cite seventeen examples that outline the information sought from the City Experts. *Novels' Brief, pp 41-43*. These examples demonstrate that the County did in fact describe the specific subject matter of the City Experts' testimony and the relevance of the excluded evidence. Therefore, County did lay the proper foundation for testimony relating to the Subject Property.

**C. The County was not required to make an offer of proof.**

As stated above, the Trial Court erred in excluding the testimony of the City Experts with respect to development of the Subject Property. Although the County did not make an offer of proof when Novels' objection to the evidence was sustained, no offer of proof was required. While the general rule requires an offer of proof, an exception allows for review of excluded evidence by the appellate court absent such an offer. The exception is articulated in *Eltiste v. Ford Motor Company*, 167 S.W.3d 742, 749 (Mo.App. 2005). Evidence will be admissible without an offer of proof if all three prongs of the following test are satisfied: "'[f]irst, it requires a complete understanding, based on the record, of the excluded testimony. Second, the objection must be to a category of evidence rather than to specific testimony. Third, the record must reveal the evidence would have helped its proponent.'" *Id.* (quoting *Frank v. Environmental Sanitation Management*, 687 S.W.2d 876, 883-884 (Mo. banc 1985)).

In the case at hand, the requirements for the exception have been met. First, Novels had a complete understanding of the evidence the County wished to produce because Novels had deposed City Experts. The Trial Court was also fully informed with

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respect to the excluded evidence because in the side bar argument on Novels' objection to City Experts' testimony, County articulated that City Experts had the knowledge and expertise to testify to the requirements for and challenges to development of Subject Property in order to rebut testimony previously given by Novels' witness Ernie Demba. *Tr. 398:2; 399; 443*[4] The Trial Court had previously heard Mr. Demba's testimony in which he had stated at length that the City of Chesterfield would impose virtually no limitations on the development of Subject Property. *Tr. 173:15-20; 191:10-11*. The County's proposed evidence, which was thoroughly explained to the Trial Court, was in direct rebuttal to Mr. Demba's testimony. Consequently, both parties and the Trial Court had a complete understanding of County's proposed evidence from City Experts.

Secondly, Novels' objection was to the category of evidence: that is the application of the City's Planning and Zoning requirements, and the challenges associated with development of the Subject Property, especially topographical challenges including Flood Plain and Flood Way. *Tr. 35-38; 398:2; 399; 443.* Ms. Nassif would have testified to the existing zoning on Subject Property; that Mr. Demba's proposed development for valuation would not comply with the existing R-2 zoning; and that about density calculations and the process to obtain a zoning change (something Mr. Demba essentially stated was a given because of the existing developments neighboring Subject

[4] As further briefed in Point I, the unrecorded portions of the trial included arguments upon Novels' objections to the testimony of City Experts.

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Property). *See Tr. 222:19-223:24.* Mr. Paskiewicz would have testified about the impact of Flood Plain and Flood Way on the development process.

Third, and finally, the admission of City Experts' evidence would have greatly aided and benefitted the County. The testimony of City Experts would have directly rebutted the testimony of Novels' expert, Mr. Demba, who had testified at length that a "villa development" was the most feasible development for the Subject Property, and that there were few if any challenges a developer would encounter with the City and with the topography in such development. *Tr. 174:6-19; 177:7-178:6; 187:22-188:12; 198:13-199:1.* Based upon these suppositions, Mr. Demba testified that the fair market value of the Subject Property was the extremely high value of $1,296,746.00. *Tr. 211:15-16.* The benefit to the County's in having City Experts testify is obvious. City Experts would have explained the limitations, risks and requirements that Mr. Demba failed to address in his valuation of Subject Property. By doing so, City Experts' testimony would have directly rebutted the unsupported assertions made by Mr. Demba, and consequently substantially eroded not only his credibility, but also the inflated market value he had placed on the Subject Property. By excluding City Experts' testimony, the Trial Court deprived County of the benefit of relevant rebuttal testimony as to fair market value of the Subject Property.

The case at hand is strikingly similar to the factual and procedural situations in *Eltiste v. Ford Motor Company*, *supra*, where the Eastern District Court of Appeals specifically found that the "plaintiffs' failure to make an offer of proof did not result in a failure to preserve the claim of error." 167 S.W.3d at 750. In *Eltiste*, the trial court also

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excluded expert evidence. The Court of Appeals held that the first prong of the *Frank* test was fulfilled because defendants had taken the deposition of the expert and that plaintiff had provided sufficient information in the argument against a motion in limine to show a complete understanding of the proposed testimony. *Id.* As stated above, this is the same trial scenario as the case at hand.

As to the second prong, the *Eltiste* court found that the excluded testimony all related to interpretation of certain documents. *Id.* In the case at hand, the excluded testimony all related to the City's limitations, risks and requirements relating to development of the Subject Property. In both cases, the evidence excluded was a category of evidence.

Finally, with respect to the third prong, the *Eltiste* court noted that it was "fairly apparent" that if the plaintiffs' experts could have interpreted the documents, it would have helped the plaintiffs. *Id.* As noted above, it is obvious that the evidence excluded by the trial court in the case at hand would have greatly benefitted the County.

Based on its analysis, the *Eltiste* court ruled that no offer of proof was necessary. This Court should rule likewise. *See also State ex rel. State Highway Com. v. Northeast Bldg. Co.,* 421 S.W.2d 297, 300 (Mo. 1967) and *Marchosky v. St. Luke's Episcopal-Presbyterian* Hospitals**,** 363 S.W.3d 121 (Mo.App. 2012)(holding that all three conditions were met and offer of proof was, therefore, unnecessary).

## VI. Excessive Verdict.

In defending the jury verdict which exceeded the highest amount to which any witness testified, Novels correctly point out that the award was closer to $3,000 higher

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than $31,000 higher. County apologizes to the Court and opposing counsel for the transcription error which caused this discrepancy.

Nonetheless, the fact remains that the amount awarded did exceed the amount supported by the evidence. Thus, the verdict was not supported by substantial evidence. *See State ex rel. State Highway Commission v. Hamel*, 404 S.W.2d 736, 739 (Mo. 1966) This is particularly significant to support County's argument that the jury was swayed by passion and prejudice, *see Point II*,*supra*, but also provides independent ground for reversing the judgment.

## VII. Heritage Value statute is unconstitutional because it impermissibly alters the very meaning of just compensation.

### A. County did not waive its right to challenge constitutionality.[5]

The Novels contend that County did not raise the unconstitutionality of the heritage value statute sufficiently early to preserve the challenge. This is incorrect. There was no required pleading in which this issue could have been raised, and County's objection to the addition of heritage value to the jury verdict was appropriately raised when the issue first arose: namely, after the jury's verdict was returned but before the trial court added heritage value to the amount awarded by the jury. *L.F. 153-54*.

The Novels contend that County should have raised this issue when the trial court added heritage value onto the Commissioners' award. County, however, is not obligated

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[5] The Novels argued waiver as to all three constitutional points, thus this section applies to *Points VIII* and *IX* as well.

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to make every available constitutional challenge in order to preserve those challenges it does wish to maintain. The fact that County did not choose to challenge the portion of Section 523.061 R.S.Mo. which calls for the addition of heritage value to the Commissioners' award - an interim and non-binding ruling much like the ruling on a motion in limine - did not affect its ability to challenge the statute to the extent the statute calls for post-trial additur to a jury's determination of just compensation. Anything County could have raised at that earlier point would have been rendered moot by the filing of exceptions, and indeed, that is exactly what happened when the Novels filed their exceptions to the report of the commissioners.[6]

Section 523.061 R.S.Mo. provides two separate avenues for the imposition of the heritage value. The first avenue is after the filing of the commissioners' report, at which point the circuit judge is instructed by the statute "to determine whether heritage value is payable" and to increase the commissioners' award accordingly. Alternatively, "If a jury trial of exceptions occurs … the circuit judge … shall determine whether heritage value is payable and shall increase the jury verdict…." Section 523.061 R.S.Mo. Because Novels opted for a jury trial on their exceptions, they effectively required the circuit court

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[6] Novels argue that County waived its right to challenge any portion of the heritage value statute by paying the enhanced Commissioners award into court without filing exceptions. *Respondents' Brief p.58.* But County's willingness to *settle* a case by payment of an amount higher than its original offer does not prevent it from challenging the authority for *requiring* it to pay an amount in excess of the jury's verdict.

to set aside its determination of whether the heritage value applied, and to reach the decision on the basis of the evidence produced at trial.

Moreover, Novels' suggestion that County first raised any question about the constitutionality of the Heritage Value statute after trial is incorrect. During the direct examination of Ernie Demba, County made an objection and the parties approached the bench. *Tr. 170-171.* County objected to testimony referencing the history of the property and argued that application of heritage value pursuant to Section 523.061 R.S.Mo. violated the Article I, Section 6, and Article VI, Sections 23 and 25 of the Missouri Constitution. During cross examination of Defendant Derek Novel, County again argued its objection to application of Heritage Value. *Tr. 269.* As noted in Point I, these arguments, along with the other objections, were not recorded by the court and therefore are not contained in the trial transcript. *See Point I and County's Motion to Remand for New Trial.*

More important, however, is that County specifically made its constitutional objections to the heritage value statute when the issue was first squarely before the court, that is, after the jury had rendered its verdict but before the judge entered judgment thereon. County is therefore very differently situated from the appellant in the case cited by Novels, *Land Clearance for Redevelopment Authority of Kansas City, Missouri v. Kansas University Endowment Ass'n*, 805 S.W.2d 173 (Mo. banc 1991). In that case, the Court deemed untimely a constitutional challenge that was first raised post-judgment. Here, County's challenge was made pre-judgment and in time for the trial court to consider County's argument and to act prospectively and correctly in rendering its



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judgment. The *Land Clearance* case is inapposite.

Novels also cited to *Land Clearance for Redevelopment Authority of City of St. Louis v. Henderson*, 358 S.W.3d 145 (Mo. App. 2011), for the proposition that County has not preserved its constitutional appeal. *Henderson*, however, actually supports County's position. Although Henderson addressed the specificity of a constitutional challenge rather than its timeliness, it is instructive for the reminder that even without a proper challenge courts "may nevertheless review unpreserved claims of error affecting substantial rights. . . ." *Id.* at 157. The other cases cited by Novels are likewise unhelpful to their position. *See City of St. Louis v. Butler Co.*, 219 S.W.2d 372, 376 (Mo. 1949), cited at p. 56 (Constitutional challenged not preserved when relevant constitutional provision first identified on appeal); *State v. Knifong*, 53 S.W.3d 188, 192 (Mo. App. 2001), cited at p. 56 (Appellant had presented fully articulated claim of unconstitutionality for the first time in motion for new trial). Novels have cited no case, nor could they, to support the argument that a specific constitutional challenge, raised at the first available opportunity and resolved by the trial court, was not timely made and properly before an appellate court.

**B. General Assembly cannot redefine "just compensation."**

Novels point to examples wherein legislative bodies have undertaken to provide an extra measure of compensation to landowners whose property was taken by eminent domain. But the heritage value statute fails the test of constitutionality in that the General Assembly did not undertake to award a new measure of compensation but instead to create a new definition of "just compensation." This, the General Assembly cannot do



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within the Constitution. This Court has defined the term "just compensation" as it is used in the Constitution, *City of St. Louis v. Union Quarry & Const. Co.*, 394 S.W.2d 300, 305 (Mo. 1965), and the General Assembly may not redefine constitutional rights as illuminated by this Court. "Regardless of legislative intent, it should be obvious that a statute cannot supersede a constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993).

Each of the statutes proffered by Novels as examples of how a legislature added to the amount to be received by a condemnee involve the legislature essentially saying the just compensation is not enough, and the condemnee should receive more. None of the statutes exemplify an alteration to the literal meaning of just compensation. Of particular relevance to this issue is the Novel's view of pre-judgment interest in a condemnation case. Citing *Akers v. City of Oak Grove*, 246 S.W.3d 916 (Mo. 2008), Novels point to the Supreme Court's understanding that pre-judgment interest is a component of just compensation. This conclusion makes County's point: the Supreme Court observed, *id.* at 922, that pre-judgment interest stems directly from the Constitution, and "reflects the legislature's judgment of what is constitutionally required to achieve just compensation for a direct taking." Because pre-judgment interest stems directly from the Constitution, the General Assembly was within its bounds to enact a statute setting its amount in condemnation cases. In contrast, with the enactment of the heritage value statute, the General Assembly presumed to grant a right to heritage value as though it too stems directly from the Constitution, when it plainly does not. The distinction between pre-judgment interest and heritage value is that pre-judgment interest equates to lost value of

money from the time of the taking – it is the fair market value over time – whereas heritage value is an artificial add on, having no objectively verifiable connection to fair market value. While the General Assembly may possess the power to give such add ons to condemnees, it may not amend the meaning of the Constitution as declared by the Supreme Court.

**VIII. No public purpose for heritage value compensation.**

In response to Point VIII, Novels argue that unless the General Assembly's implicit determination that payment of a heritage value serves a public purpose is arbitrary and unreasonable, the heritage value statute does not violate the Constitution. For this proposition Novels rely on *State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority*, 518 S.W.2d 68 (Mo. 1975). *Farmers' Electric* involved a statue which permitted use of public funds to benefit private entities which would finance pollution control facilities. The Supreme Court characterized the public purpose of this use of the public treasury as both "apparent" and "obvious," *Id.* at 74 and 75, and accordingly not arbitrary and unreasonable.

The same cannot be said of the heritage value statute. Requiring payment of a heritage value is arbitrary and unreasonable because it does not benefit the condemning authority or general public in any way – the sole beneficiary is the qualifying landowner, and the condemning authority would acquire the same property regardless of whether the landowner receives an additional benefit beyond just compensation. There is no legitimate reason for a condemning authority to pay additional funds to a landowner who happens to have the land taken held in the family for fifty years, as opposed to having



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held it for forty-nine years and eleven months -- or for only one year.

Novels argue that because condemnation necessarily requires a public purpose, payment of heritage value is "automatically tied to a public purpose." *Novels' Brief p. 66.* This nexus to a public purpose, however, is too attenuated to support Novels' position. Yes, the acquisition of property has a public purpose; no, that public purpose does not justify the payment of money to property owners in excess of both market value and of any costs that property owners may occurred in the condemnation process (such as relocation costs).

Novels acknowledge the personal rather than public nature of their loss when they argue that heritage property "creates a special situation … and requires compensation." *Novels' Brief p. 67.* Novels do not explain, however, why this "special situation" merits compensation, any more than a property owner would receive extra compensation because of having been married on the property, or because of having any other one of innumerable personal and peculiar reasons to be attached to the property. The payment of heritage value to satisfy a personal attachment does not serve a public purpose and therefore violates Missouri Constitution Article III, Section 38(a) and Article VI, Sections 23 and 25.

## IX. Jury Determination of Heritage Value.

Novels' argument is that when the County declined to offer an instruction for the jury to award the heritage value, the County waived the ability to raise the issue on appeal. They cite as authority Rule 70.03, but this rule does not require a party

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dissatisfied with a proposed objection to offer a different one. Rather, Rule 70.03 only obligates the making of an objection to those given, and County made the appropriate objection.

Further, in the face of Section 523.061 R.S.Mo. which requires for the trial judge to determine and ascertain the heritage value, it would have been pointless for County to offer an instruction which contravened the requirements of the statute. At that stage of the trial, Novels as well as the trial judge were well aware of County's objections to the unconstitutionality of the statute. Had County offered such an instruction, it would have undercut County's argument that the heritage value is not part of the just compensation to which the Novels are entitled, and the Novels would now be arguing that the offering of such an instruction waived County's right to challenge the statute.

## CONCLUSION

For the reasons set forth in County's Brief, judgment should be reversed and the case remanded for new trial (Points VII-IX). Alternatively, the judgment should be reversed and remanded and the trial court instructed to enter judgment without addition of any "heritage value" (Points VII-IX).

**PATRICIA REDINGTON**
**COUNTY COUNSELOR**

By: /s/ Patricia Redington
Patricia Redington #33143
/s/ Carl W. Becker
Carl W. Becker #37585
/s/ Stephanie L. Hill
Stephanie L. Hill #56726
41 South Central Ave., 9th Floor
Clayton, Missouri 63105

(314) 615-7042
(314) 615-3732 (fax)
predington@stlouisco.com
cbecker@stlouisco.com
slhill@stlouisco.com
*Attorneys for St. Louis County, Missouri*

## CERTIFICATE OF COMPLIANCE AND SERVICE

I 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 2007 and contains 7544 words in total. The font is Times New Roman, proportional spacing, 13-point type.

I certify that a copy of this brief was served electronically this 2nd day of November, 2012, on Robert Denlow, Esq. and Paul G. Henry, Esq., attorneys for Respondents.

/s/ Carl W. Becker
Carl W. Becker



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