SC88647

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IN THE MISSOURI SUPREME COURT

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CITY OF ARNOLD

Plaintiff-Appellant

v.

HOMER R. TOURKAKIS, et al.

Defendants-Respondents

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ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
Honorable M. Edward Williams, Judge

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# BRIEF OF MISSOURI MUNICIPAL LEAGUE (MML), CITY OF PECULIAR, CITY OF KENNETT, CITY OF PORTAGEVILLE, CITY OF ROLLA, CITY OF GLADSTONE, CITY OF GRANDVIEW, CITY OF CASSVILLE, CITY OF LAPLATA, CITY OF OWENSVILLE, VILLAGE OF BEL-RIDGE, CITY OF POPLAR BLUFF, CITY OF SPRINGFIELD, CITY OF CHESTERFIELD, CITY OF ASHLAND, CITY OF SEDALIA, CITY OF MARYVILLE AND CITY OF WEST PLAINS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT, CITY OF ARNOLD

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## INTEREST OF THE MISSOURI MUNICIPAL LEAGUE AND PARTICIPATING MUNICIPALITIES

All parties to this appeal have given permission to the filing of suggestions by *Amici Curiae* as required by Supreme Court Rule 84.05 (f). The Missouri Municipal League (MML) is an association of 651 municipalities in the State of Missouri whose membership includes third and fourth-class cities, villages, charter cities and counties. The MML provides for cooperation in formulating and promoting municipal policy at all levels of government to enhance the welfare and common interests of municipalities and their citizens.

The MML and seventeen municipalities who have joined in the MML *amici curiae* brief (8 third-class cities and 7 fourth-class cities, a village and a charter city) hereinafter referred to as MML believe that the decision by Judge Williams declaring that statutes in Chapter 99 RSMo are inconsistent with Article VI, § 21 of the Missouri Constitution of 1945 and are therefore unconstitutional, has far reaching implications on all levels of local government, not just third-class cities. Therefore, while the MML fully supports the Points Relied On by the Appellant, City of Arnold, the MML has a much broader interest. The MML respectfully submits the additional discussion and argument.

The City of Arnold, a third class city, proceeding pursuant to a redevelopment plan, attempted to acquire blighted land under the Real Property and Tax Increment Allocation Act, §§ 99.800 through 99.865 RSMo. (TIF Law). Defendant's filed a Motion to Dismiss (LF 0029-0030) which was granted by Judge Williams. (LF 0039-

0042). Judge Williams reasons on pages two and three (2-3) of his Order and Judgment sustaining the Motion to Dismiss that Article VI, § 21 of the Missouri Constitution authorizes the enactment of laws or ordinances for reclamation of blighted areas and the taking of private property for such purposes through the power of eminent domain **only** by cities and counties that have charters. He further reasons that the delegates who wrote the Missouri Constitution of 1945 intended only charter cities and charter counties to have this power. Judge Williams concludes that since the City of Arnold is not a charter city, it lacks authority to take the property of the defendants under Chapter 99, notwithstanding enabling legislation by the General Assembly. He further concludes that to the extent that Chapter 99 is inconsistent with Article VI, § 21 of the Constitution of 1945, it is unconstitutional.

This decision not only impacts third-class cities, but many other local governmental entities such as fourth-class cities, villages, unincorporated towns and non-charter counties that are defined as a municipality under § 99.805 RSMo. Villages, unincorporated towns and non-charter counties have been granted authority by the General Assembly under the TIF Law to acquire land by eminent domain for a redevelopment project, §99.820.1(3) RSMo., and would also be impacted by this decision.

The potential impact of this decision becomes apparent when you read the 2006 Annual Report on Tax Increment Financing Projects in Missouri (Report) prepared by the Missouri Department of Economic Development that describes some

263 TIF projects and is available online.[1] The Report lists on pages one and two (1-2) some 194 projects with a Blight designation, 54 with a Conservation Area designation, 12 projects for Economic Development, and three projects that were a combination of the above designations. The Report shows 54,107 new jobs have been created since inception and 27,950 have been retained. In addition, the total for Payments in Lieu of Taxes as defined in §99.805(10) RSMo. and Economic Activity Taxes in §99.805.4 RSMo. under the TIF Law were $669,602,056 since inception of the program. The Report further shows that many third and fourth-class cities, villages and non-charter counties[2] have used the TIF Law for TIF projects, and while details in the report do not show what land was acquired by eminent domain the Report on page two (2) shows an expenditure for land acquisition in the amount of $236,035,000. The Secretary of State's Official Manuel[3] shows there are

[1] The Missouri Department of Economic Development is required to keep this Report pursuant to §99.865.4 RSMo, due to the size of this document, it is not included in the appendix but may be found online at http://www.missouridevelopment.org/upload/tifannualreport032907.pdf

[2] The Report lists TIF Financing projects by city or county and is available online as noted in footnote 1.

[3] The Official Manual shows municipalities by classification, due to the size of this document it is not included in the appendix but is available online at http://www.sos.mo.gov/BlueBook/2005-2006/0791-0874.pdf (see pages 851-874).

approximately 260 villages, 500 fourth-class cities and 57 third-class cities in Missouri which would be affected by this decision.

Obviously many of the projects listed in the Report involve charter cities, but many also involve other types of local government entities such as third and fourth-class cities, villages and non-charter counties. An example of the magnitude of the decision in this case becomes apparent when you look at the information involving the Branson Landing project. The Branson Landing project shown in the Report was a $450,000,000 project undertaken by the City of Branson, a fourth-class city, and is expected to generate $154,689,841 in TIF reimbursable costs. Included in that figure are costs of $39,019,548 for the acquisition of blighted property and relocation payments. The Report shows that the Branson Landing project has already created 1,875 new jobs out of an expected total of 2,500 new jobs. Obviously third and fourth-class cities, villages and non-charter counties will be impacted by this decision if they can no longer use the TIF Law as authorized by the General Assembly.

This decision also impacts the Land Clearance for Redevelopment Authority (Authority) acting pursuant to §§ 99.300 et seq. RSMo. The Authority works closely with municipalities in helping to clear blight under § 99.430 RSMo. Section 99.460 RSMo authorizes an Authority to acquire land that is blighted, substandard or insanitiary for a land clearance redevelopment project and to exercise the power of eminent domain for the project. Land acquired may be sold or otherwise disposed of for commercial, industrial or other development in accordance with the plan. § 99.320(10) RSMo. Obviously, an Authority as defined in § 99.320(2) RSMo would

clearly fall within the reasoning of this decision and could not blight land and acquire the property by eminent domain as part of a redevelopment project since, based on Judge Williams' reasoning, there is no constitutional grant authorizing this action.

Urban Redevelopment Corporations operating under Chapter 353, RSMo would also fall under the reasoning of Judge Williams. The Planned Industrial Expansion Authority Law §§ 100.300 et seq. RSMo and the powers granted to the Industrial Authority to acquire land by eminent domain for industrial development as defined in § 100.310(9) RSMo for the purposes set out in § 100.420. RSMo. would also be lost under the rationale of the Circuit Court's decision. It is clear that the implications of Judge Williams' decision go well beyond its immediate impact on Appellant, the City of Arnold. His decision would require this court to overrule a long line of cases upholding these laws which are similar in scope and objective to the TIF Law being questioned in this case.

## SUGGESTIONS BY AMICI CURIAE

The decision of the Circuit Court is contrary to the precedents of this Court in interpreting Article VI, § 21 of the Missouri Constitution. While these precedents clearly hold against the rationale followed by Judge Williams, it is useful to step back and look at the basic framework of the Missouri Constitution as related to the authority of the General Assembly before discussing these precedents.

### 1. The Missouri Constitution Reserves All Powers to the General Assembly Not Otherwise Limited.

The Missouri Constitution reserves all powers to the General Assembly not otherwise specifically limited. State ex inf. Dalton ex rel. Holekamp v. Holekamp Lumber Co., 340 S.W. 678 (Sup. 1961). The power of the General Assembly to make laws is plenary within its sphere of responsibility. State Auditor v. Joint Committee on Legislative Research, 956 S.W.2d 228, 230-231 (Mo. 1997). Because the legislative power of the state's General Assembly is plenary, any constitutional limitation must be strictly construed in favor of the power of the General Assembly. Board of Educ. Of City of St. Louis v. City of St. Louis, 879 S.W.2d 530, 532 (Mo. 1994). It is apparent from the Order and Judgment in this case that Judge Williams thought he had to find a grant of authority in the Missouri Constitution in order for the General Assembly to adopt legislation authorizing a third-class city the power to blight land and acquire property for redevelopment purposes in accordance with a

redevelopment plan. Judge Williams' analysis was fundamentally flawed. He did not have to find a grant of power for the City of Arnold because the General Assembly may enact any law not expressly or inferentially prohibited by the state or federal constitutions. Ex Parte Roberts, 166 Mo. 207, 65 S.W. 726, 728 (1902).

From the above principle, a series of constitutional rules of construction follow that further guide our analysis. Limitations must be expressed in the constitution or clearly implied from its provisions. Hickey v. Board of Ed. of City of St. Louis, 363 Mo. 1039, 1045-1045, 256 S.W.2d 775, 778 (Mo. 1953). Limitations on the power of the General Assembly to enact laws are strictly construed in favor of the power of the General Assembly to pass laws. A constitutional command to do one thing is not a denial of its power to do other things. McGrew v. Missouri Pac. Ry. Co., 230 Mo. 496, 132 S.W. 1076, 1087 (1911). Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly. Brown v. Morris, 365 Mo. 946, 290 S.W.2d 160, 166 (1956). Deference due the General Assembly requires that doubt be resolved against nullifying its action if it is possible to do so by any reasonable construction of that action or by any reasonable construction of the Constitution. Liberty Oil Co. v. Director of Revenue, 813 S.W.2d 296, 297 (Mo. 1991). Obviously Judge Williams did not apply the above analysis since he incorrectly assumed that the Missouri Constitution had to grant the power to a third-class city.

Application of these rules to Article VI, § 21 shows that there is no limitation, direct or implied, that limits the power of the General Assembly to deal with the basic

problem of urban decay. Language should be given its plain meaning when there is no ambiguity. Independence-Nat. Educ. Ass'n v. Independence School Dist., 223 S.W.3d 131, 136-137 (Mo. 2007)

Limitations on the power to blight and acquire property to redevelop in accordance with a redevelopment plan should be strictly construed because the power flows directly from the police power. Berman v. Parker, 75 S.Ct. 98, 102, 348 U.S. 26 (1954). Removal of urban decay (blight), in all of its forms is a component of the police power that promotes the order, safety, health, morals, and the general welfare of the people. State ex rel. Rouveyrol v. Donnelly, 365 Mo. 686, 693, 285 S.W.2d 669, 674 (Mo. 1956). For this reason limitations against the exercise of the police power should be strictly construed.

**2. The Words "Enact Laws" Refers to the General Assembly.**

Not only did Judge Williams' decision fail in its application of basic constitutional principles but it ignored precedent established in State on Inf. of Dalton v. Land Clearance for Redevelopment Authority, et al., 364 Mo. 974, 270 S.W.2d 44 (1954) that held the Land Clearance for Redevelopment Authority of Kansas City, a municipal corporation under §99.320 RSMo. could blight land and acquire it in accordance with a redevelopment plan. As already noted, the Land Clearance for Redevelopment Authority would be subject to the reasoning of Judge Williams. Interpreting the first clause in Article VI, § 21 the Court held: "On the other hand, Article VI, § 21, in express terms, unqualifiedly authorizes the legislature and cities

and counties operating under constitutional charters to enact legislation providing for the taking of blighted and insanitary areas by eminent domain." Supra.

In addition, the Circuit Court failed to consider Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 635 (Mo. 1965) in which this court again considered the language in Article VI, § 21 and concluded that the General Assembly could enact legislation which allowed blight to be eliminated by acquisition of land in accordance with a plan by a private redevelopment corporations pursuant to Chapter 353.

> Such constitutional authority as is needed for full and complete elimination of this cancerous attack upon our municipalities was provided by the 1945 Constitution of Missouri, V.A.M.S. Article VI, § 21, thereof provides: 'Laws may be enacted [by the General Assembly], **and any city * * * operating under a constitutional charter may enact ordinances**, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest.' (Emphasis supplied.) Supra at 640.

In upholding the Planned Industrial Expansion Act in Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36, 42 (Mo. 1975) the court

notes that the Act §§ 100.300 et seq. is nearly identical with respect to blighting and acquisition of land as was upheld in State, on Inf., of Dalton v. Land Clearance for Redevelopment Authority et al., supra. Clearly, based on precedent, the General Assembly had the power to enact this legislation under Article VI, § 21.

**3. Rules of Construction Require a Different Interpretation.**

Not only did Judge Williams ignore this Court's precedents in interpreting Article VI, § 21 but he also failed to apply fundamental rules of construction in his interpretation.

> **§ 21. Reclamation of blighted, substandard or insanitary areas**
>
> Laws may be enacted, and any city or county operating under a constitutional charter may enact ordinances, providing for the clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas, and for recreational and other facilities incidental or appurtenant thereto, and for taking or permitting the taking, by eminent domain, of property for such purposes, and when so taken the fee simple title to the property shall vest in the owner, who may sell or otherwise dispose of the property subject to such restrictions as may be deemed in the public interest
>
> V.A.M.S. Const. Art. VI, § 21

As noted earlier, Judge Williams' decision ignores the first phrase in Article VI, § 21 that states "Laws may be enacted…." This phrase stands out in stark contrast to the language which follows providing "…and any city or county operating under a

constitutional charter may enact ordinances,…." It is clear that the drafters of the 1945 constitution made a distinction between laws and ordinances. Cities enact ordinances and the General Assembly enacts laws Article III, § 21, and while they both have the force of law in this context, meaning must be given to the first clause otherwise the first clause has no meaning. Every word or phrase must be given meaning**.** J.S. DeWeese Co. v. Hughes-Treitler Mfg. Corp**.**, 881 S.W.2d 638 (Mo. App. E.D. 1994). Clearly the drafters of the 1945 constitution were referring to laws made by the General Assembly.

This analysis is bolstered by the 1945 Constitutional Debates. The Debates show a proposed new section to the constitution and a draft of the proposed language. Missouri Constitutional Debates, 1945, Volume 9, page 2702. The adopted section shows that the first clause was shortened from the original draft. The submitted draft stated "The General Assembly shall have the power to provide by law…" which was changed in the final version that was adopted to read, "Laws may be enacted…." This change seems to be a short, more polished version of the language in the initial draft with no change in its substance. While it is true that larger cities were much more interested in this amendment, the Debates show that other cities like Springfield and perhaps St. Joseph were also interested. Missouri Constitutional Debates, 1945, Volume 9, page 2702. The City of Springfield did not become a charter city until 1954 and St. Joseph did not become a charter city until 1981.

## CONCLUSION

The Missouri Municipal and the sixteen cities and one village who have joined in the MML *Amici Curiae* brief respectfully urge this Court to reverse the decision of the Circuit Court for the reasons stated herein.

Respectfully Submitted,

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## CERTIFICATION

I hereby certify that this brief contains 3,519 words and therefore complies with the type-volume limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This document was created in Word 2000 and uses Times New Roman 13-point font. The enclosed diskette contains the full text of this brief and has been scanned for viruses and is hereby certified to be virus free.

_____

Howard C. Wright, Jr.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief in paper format and on virus free diskette was provided by depositing same, postage-prepaid with the United States Postal Service this ____ day of September, 2007, to:

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