IN THE SUPREME COURT OF MISSOURI

NO. SC88647

CITY OF ARNOLD,
Plaintiff-Appellant,
v.
HOMER TOURKAKIS, ET AL.,
Respondents,

and

AMERENUE, ET AL.,
Defendants.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
The Honorable M. Edward Williams

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE AND THE OFFICE OF THE OMBUDSMAN FOR PROPERTY RIGHTS IN SUPPORT OF RESPONDENTS

INSTITUTE FOR JUSTICE
ROBERT W. GALL, DC Bar #482476*
WILLIAM H. MELLOR, DC Bar #462072*
SCOTT BULLOCK, DC Bar #442379*
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: 703-682-9320
Facsimile: 703-682-9321
E-Mail: bgall@ij.org
wmellor@ij.org
sbullock@ij.org

Application for Admission Pro Hac Vice pending

Attorneys for *Amicus Curiae* Institute for Justice

SCHULTZ & LITTLE L.L.P.
RONALD J. EISENBERG,
Mo. Bar #48674
640 Cepi Drive, Suite A
Chesterfield, MO 63005
Telephone: 636-537-4645
Facsimile: 636-537-2599
E-Mail: reisenberg@sl-lawyers.com

Paul Anthony Martin, MO Bar #57386
Ombudsman for Property Rights
The State of Missouri
111 North 7th Street, Ste. 934
St. Louis, MO 63101
Telephone: (314) 340-4877
Facsimile: (314) 340-4878
E-mail: propertyczar@mo.gov
Attorney for *Amicus Curiae* Office of the Ombudsman for Property Rights

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STATEMENT OF INTEREST

This brief is presented by both the Institute for Justice and the Office of the Missouri Ombudsman for Property Rights. All parties have consented to the Institute for Justice filing a brief in this matter pursuant to Supreme Court Rule 84.05(f), and all parties except the City of Arnold have consented to the Office of the Ombudsman for Property Rights filing a brief in this matter. Because of the City's objection, the Institute and the Ombudsman are filing a joint motion pursuant to Rule 84.05(f)(3) asking this Court to allow the filing of this brief.

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. The Institute is committed to the principle that "[i]ndividual freedom finds tangible expression in property rights" and that such rights are imperiled by arbitrary use of the power of eminent domain for the benefit of private interests. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993).

Among other constitutional issues, the Institute for Justice litigates property rights cases throughout the country in both state and federal courts. For the past decade, the Institute has regularly represented property owners fighting condemnation of their homes or businesses for the benefit of private parties. The Institute represented homeowners from New London, Connecticut, in the controversial case of *Kelo v. City of New London*, 545 U.S. 469 (2005). It was also lead counsel for home and business owners in *City of Norwood v. Horney*,

853 N.E.2d 1115 (Ohio 2006), in which a unanimous Ohio Supreme Court interpreted the Ohio Constitution to forbid takings for private development. The Institute has also filed *amicus curiae* briefs in important eminent domain cases throughout the country, including in the highest courts of Connecticut, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, and Oklahoma, the United States Courts of Appeals for the Fifth and Ninth Circuits, and the U.S. Supreme Court.

The Office of the Missouri Ombudsman for Property Rights was established as part of the Missouri eminent domain reform law passed on May 5, 2006, and signed into law by Governor Matt Blunt.

On June 23, 2005, Governor Blunt appointed a task force to study eminent domain issues in the wake of *Kelo*. The Governor charged the task force with conducting a thorough review of federal and state eminent domain laws to protect Missouri home, farm and business owners from falling victim to government tax grabs. Specifically, Governor Blunt ordered the task force to make recommendations when the proposed public use of the property being acquired by eminent domain is not directly owned or primarily used by the general public. This task force recommended the establishment of the Office of the Ombudsman for Property Rights.

The Missouri Ombudsman for Property Rights is tasked with documenting issues regarding the use of eminent domain across Missouri as well as assisting

citizens by providing guidance to individuals seeking information regarding the condemnation process in Missouri.

INTRODUCTION AND SUMMARY

The City of Arnold, a non-charter city, seeks to use eminent domain to take Homer and Julie Tourkakis's property so that a private developer can build a shopping center. The City claims that the Real Property Tax Increment Allocation Redevelopment Act ("the TIF Act"), Mo. Rev. Stat. §§ 99.800 *et seq*. (2007), allows it to condemn property in a so-called "blighted" area; however, as the trial court correctly ruled, the TIF Act conveys no eminent domain powers to non-charter cities. The trial court's ruling is supported by the fact that, across the country, courts strictly construe purported grants of eminent domain authority against condemnors. Furthermore, if Arnold were to prevail in this case, the specter of condemnations for private use in the name of "blight" removal would, without clear legislative sanction, expand to cover all non-charter cities in Missouri. Accordingly, the decision of the trial court should be affirmed.

STATEMENT OF FACTS

Homer Tourkakis is a long-time small business owner in Arnold.[1] Homer has run his dental office, where his wife Julie works as an assistant, for almost twenty years. In 2005, the City of Arnold, which is a non-charter city, agreed with

[1] This recitation of facts is drawn from the trial court's decision and the briefs filed by the Tourkakises in the trial court.

THF Realty ("THF") that THF would build a large shopping center where the Tourkakis' property now stands. The City labeled the Tourkakis' well-maintained property and the surrounding area "blighted" under the TIF Act. Then, claiming that the TIF Act allowed it to use eminent domain, Arnold filed a condemnation action against the Tourkakises so that it could take their property and transfer it to THF. The Tourkakises did not want to lose their property to eminent domain, so they fought the condemnation. The trial court held that the TIF Act does not grant non-charter cities like Arnold the ability to use eminent domain for "blight" removal, and thus dismissed the condemnation action. This appeal by Arnold followed.

POINT RELIED ON

The opinion of the trial court should be affirmed because, as courts across the country have uniformly recognized, purported grants of eminent domain authority should be strictly construed against condemnors, and a strict construction of the TIF Act does not allow a finding that the Legislature authorized non-charter cities to use eminent domain for "blight" removal under the Act.

Mo. Rev. Stat. § 99.820.1(3) (2007)

Article VI, Section 21 of the Missouri Constitution

Centene Plaza Redevelopment Corp. v. Mint Properties, 225 S.W.3d 431 (Mo. banc 2007)

State ex rel. Missouri Water Co. v. Hodge, 878 S.W.2d 819 (Mo. banc 1994)

ARGUMENT

The opinion of the trial court should be affirmed because, as courts across the country have uniformly recognized, purported grants of eminent domain authority should be strictly construed against condemnors, and a strict construction of the TIF Act does not allow a finding that the Legislature authorized non-charter cities to use eminent domain for "blight" removal under the Act.

A. Courts Across the Country Strictly Construe Statutes That Condemnors Claim Grant Them the Authority to Use Eminent Domain.

In Missouri and across the country, when a government entity such as a city or redevelopment authority asserts that a statute is a legislative grant of power authorizing it to use eminent domain, courts always strictly construe the language of the statute against that entity. *See, e.g., Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431, 434-35 (Mo. banc 2007) (strictly construing definition of "blighted" area in [Mo. Rev. Stat. § 353.020] to include a "social liability" that takes into account the health safety, and welfare of the public rather than economic benefits of future development); *State ex rel. Missouri Water Co. v. Hodge*, 878 S.W.2d 819, 821 (Mo. banc 1994) ("Statutes delegating this right [of eminent domain] are strictly construed."); Nichols on Eminent Domain § 3.03[6][b] (3rd ed. 2006) (collecting cases from across the country in which grants of eminent domain authority have been strictly construed against condemnors); *see also* the cases cited *infra* on pages 6-9.

Courts in other states routinely apply this rule of construction to statutory language in order to block condemnations in situations where cities or redevelopment authorities have claimed eminent domain authority beyond what has been clearly granted to them by that language. *See, e.g., Gallenthin Realty Development, Inc. v. Borough of Paulsboro*, 924 A.2d 447, 464-65 (N.J. 2007) (refusing to construe definition of "in need of redevelopment" in statute so broadly as to allow condemnation of economically unproductive property); *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 339 (Md. 2007) (refusing to allow quick-take condemnation because city failed to demonstrate that it was "necessary" for it to have "immediate possession" and "immediate … title" as required by statute); *Norfolk Redevelopment and Housing Authority v. C and C Real Estate, Inc.*, 630 S.E.2d 505, 512-13 (Va. 2006) (redevelopment authority could not use eminent domain for blight because its redevelopment plan "contain[ed] authorization for acts beyond those delegated" by statute); *Arvada Urban Renewal Authority v. Columbine Professional Plaza Ass'n*, 85 P.3d 1066, 1072-73 (Colo. 2004) (holding that redevelopment authority did not have statutory authority to condemn property for blight removal because there was not, as required by statute, a new determination that the property was blighted); *Aposporos v. Urban Redevelopment Commission*, 790 A.2d 1167, 1175-77 (Conn. 2002) (holding that redevelopment agency could not use eminent domain because it had not conducted hearing required by statute); *Municipality of Anchorage v. Suzuki*, 41 P.3d 147, 154 (Alaska 2002) (holding that city did not meet statutory

prerequisite to exercise of eminent domain authority granted under statute); *Wilmington Parking Authority v. Land with Improvements*, 521 A.2d 227, 232-34 (Del. 1987) (holding that parking authority's attempted use of eminent domain was beyond what was conferred to it by statute).

When applying the rule of strict construction, courts often find that cities or redevelopment agencies are relying on statutes that, because they do not provide a clear grant of eminent domain authority, confer no such authority of any kind. *See, e.g., City of Midwest City v. House of Realty, Inc.*, 100 P.3d 678, 690 (Okla. 2004) (holding that city could not use eminent domain for blight removal because the statute upon which it relied did not expressly give it that authority); *GTE Northwest, Inc. v. Public Utility Commission of Oregon*, 900 P.2d 495, 500-01 (Or. 1995) (holding that public utility commission (PUC) could not use eminent domain because "no section of [Or. Rev. Stat. § 759.580] contains an express grant of authority to the PUC to act in eminent domain generally or in regard to LEC's property"); *Board of County Comm'rs of the County of Arapahoe v. Intermountain Rural Electric Association*, 655 P.2d 831, 833-34 (Colo. 1982) (holding that county could not use eminent domain to acquire office space for district attorney because statute did not clearly authorize that use); *City of Little Rock v. Raines*, 411 S.W.2d 486, 491-93 (Ark. 1967) (holding that city could not use eminent domain to take property for an industrial park because neither constitutional provisions nor statutes could be interpreted as granting power to it); *Cowlitz County v. Martin*, 165 P.3d 51, 56 (Wash. Ct. App. 2007) (barring

county's use of eminent domain for the improvement of salmonid fish runs because statute relied upon by county did not grant eminent domain authority to county); *Eighth & Walnut Corp. v. Public Library of Cincinnati*, 385 N.E.2d 1324, 1326-27 (Ohio Ct. App. 1977) (rejecting argument by public library that it could condemn property under certain statutes because those statutes did not authorize use of condemnation power).

Courts strictly construe purported grants of eminent domain authority against condemnors because they recognize that eminent domain is a harsh power whose exercise is in derogation of citizens' property rights and that applying the rule of strict construction prevents government overreaching. *See, e.g., Board of County Comm'rs of Muskogee County. v. Lowery*, 136 P.3d 639, 647 (Okla. 2006) ("We adhere to the strict construction of eminent domain statutes in keeping with our precedent, mindful of the critical importance of the protection of individual private property rights as recognized by the framers of both the U.S. Constitution and the Oklahoma Constitution."); *Burlington Northern and Santa Fe Ry. Co. v. Chaulk*, 631 N.W.2d 131, 245 (Neb. 2001) ("The power of eminent domain must be exercised in strict accordance with its essential elements in order to protect the constitutional right of the citizen to own and possess property against an unlawful perversion of such right.") (internal quotation marks omitted); *Baycol, Inc. v. Downtown Dev. Authority of City of Ft. Lauderdale*, 315 So.2d 451, 455 (Fla. 1975) ("The power of eminent domain is one of the most harsh proceedings known to law. Consequently, when the sovereign delegates this power to a

political unity or agency, a strict construction must be given against the agency asserting the power."); *Orsett/Columbia L.P. v. Superior Court ex rel. Maricopa County*, 83 P.3d 608, 611 (Ariz. Ct. App. 2004) ("[A] policy of strict construction protects private property rights from overreaching by the government.").

Furthermore, the rule of strict construction has an important constitutional dimension: Courts are concerned when political subunits claim eminent domain authority outside of a clearly stated grant of power by a state legislature based on that legislature's finding of a public use. When subunits condemn property outside such a grant, it is less likely that property is actually being taken for a true public use. *See, e.g., Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445, 449-67 (7th Cir. 2002) (local planning commission's use of eminent domain without a determination of public use by state legislature violated Fifth Amendment); *Arvada*, 85 P.3d at 1073; (holding that redevelopment authority lacked statutory authorization to use eminent domain and stating that a lack of a statutorily recognized public purpose for use of eminent domain raises specter of private property being taken for private use). Applying the rule of strict construction lessens that danger by ensuring that only political subunits with clear grants of eminent domain authority can condemn.

B. Strictly Construed, the TIF Act Does Not Grant to Non-Charter Cities the Ability to Use Eminent Domain for "Blight" Removal.

In this case, strict construction of the TIF Act precludes a finding that it gives Arnold and other non-charter cities the power of eminent domain for blight removal. The relevant provision of the statute provides that municipalities may do the following:

> Pursuant to a redevelopment plan, *subject to any constitutional limitations*, acquire by purchase, donation, lease or, as part of a redevelopment project, eminent domain, own, convey, lease, mortgage, or dispose of, land and other property, real or personal, or rights or interests therein, and grant or acquire licenses, easements and options with respect thereto, all in the manner and at such price the municipality or the commission determines is reasonably necessary to achieve the objectives of the redevelopment plan.

Mo. Rev. Stat. § 99.820.1(3) (2007) (emphasis added).

The phrase "subject to any constitutional limitations" signals that the Legislature has not attempted to grant eminent domain authority to non-charter cities, which do not possess inherent authority to use eminent domain for blight removal. For the reasons articulated by the trial court and Homer and Julie

Tourkakis, Article VI, Section 21, of the Missouri Constitution should not be interpreted as allowing the Legislature to grant eminent domain authority for blight removal to non-charter cities. However, even if Article VI, Section 21, of the Missouri Constitution did allow the Legislature to grant to non-charter cities the ability to use eminent domain for blight removal, nothing in that provision could be read as stating that the Legislature *must* grant that authority to non-charter cities. Without such a grant, the constitutional baseline for non-charter cities, in the absence of a clear law providing eminent domain authority for non-charter cities, is a lack of that authority.

Strictly construed, the phrase "subject to any constitutional limitations" is an explicit acknowledgement of that baseline; it recognizes that non-charter cities will not be able to use eminent domain pursuant to the TIF Act. This court should decline Arnold's and its amici's invitation to render the phrase meaningless by reading it out of the statute. *See, e.g., Centene Plaza Redevelopment Corp.*, 225 S.W.3d at 435 (refusing to render the term "social liability" in [Mo. Rev. Stat. § 353.020] meaningless by equating it with "economic liability); *Mayor and City Council of Baltimore City*, 916 A.2d at 347-48 (Md. 2007) (refusing to read out of statute language requiring that City demonstrate that it is "necessary" for it to have "immediate possession" and "immediate … title"); *Norfolk Redevelopment and Housing Authority*, 630 S.E.2d at 512 (refusing to read out statutory language requiring that properties subject to condemnation must be "infeasible of rehabilitation" and to substitute redevelopment authority's plan's use of "appear

infeasible of rehabilitation"). Reading "subject to any constitutional limitations" out of the statute would allow non-charter cities to use eminent domain under the TIF Act for "blight removal" without a clear declaration from the Legislature that, for them, such a use is proper – i.e., does not constitute a private use.

Notably, "subject to any constitutional limitations" does not appear in any of the urban renewal statutes that Arnold and its amici claim would be imperiled by a ruling for Tourkakis: the Land Clearance for Redevelopment Authority Law, Mo. Rev. Stat. §§ 99.300 *et seq.* (2007), The Planned Industrial Expansion Law, Mo. Rev. Stat. §§ 100.300 *et seq.* (2007), and The Urban Redevelopment Corporations Law, Mo. Rev. Stat. §§ 353.010 *et seq.* (2007). Other state supreme courts in similar situations, as part of a strict construction analysis, have found significant the differences between a purported statutory grant of eminent domain authority and other eminent domain statutes, especially when the latter are very similar to one another and the former is an outlier. *See, e.g., City of Midwest City*, 100 P.3d at 689 ("The absence of a grant of authority to condemn property in the Local Development Act is consistent with that Act's absence of protections for landowners [which are found in Oklahoma's other urban renewal laws]."); *Board of County Comm'rs of the County of Arapahoe*, 655 P.2d at 833-34 (presence of express grants of eminent domain authority for other purposes in other statutes indicated that legislature did not intend to grant eminent domain authority for the purpose of acquiring office space in a statute that lacked such a grant). Thus, contrary to the assertion of Arnold and its amici, a strict construction of the

language of the TIF Act here would not have any negative implications for those statutes. Nor would it prevent non-charter cities from using the TIF Act to finance redevelopment projects and acquire properties without using eminent domain. And, of course, charter cities such as Kansas City and St. Louis will certainly be able to continue to use eminent domain to address "blight," a concept whose genesis is rooted in big cities rather than rural or small-town areas.[2]

Furthermore, if the Legislature had intended for non-charter cities to be able to use eminent domain for "blight" removal, then it surely would have, *as it did in the three urban renewal acts mentioned in the prior paragraph*, specified the procedures by which entities that have not received a grant of eminent domain

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[2] *See, e.g., Annbar Associates v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 639 (Mo. banc 1966) (describing eradication of slums and blight as "urban renewal" for "great cities" that have grown up as a result of the transition from the agricultural age to the industrial age); Wendell E. Pritchett, The Public Menace of "Blight": Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 16 (2003) (describing origination of the use of the term "blight" by the Chicago school of sociology to describe urban areas: "Cities were like living organisms, the Chicago school argued, and, therefore, urban change occurred in natural patterns. Blight arose around the central business district, in areas that were formerly residential. As cities expanded, these areas became mixed use districts, with industry and commerce.").

authority from another source – i.e., non-charter cities – could exercise that authority.[3] The absence of a grant of authority to non-charter cities in the TIF Act is consistent with the Act's absence of a specification of eminent domain procedures that non-charter cities should follow.

[3] *See* Mo. Rev. Stat. § 99.460.1 (Land Clearance for Redevelopment Law) ("An authority may exercise the power of eminent domain in the manner and *under the procedure provided for corporations in chapter 523, RSMo, and acts amendatory thereof or supplementary thereto*.") (emphasis added); Mo. Rev. Stat. § 100.420.1 (The Planned Industrial Expansion Law) ("Any authority may exercise the power of eminent domain in the manner and *under the procedure provided for corporations in chapter 523, RSMo, and acts amendatory thereof or supplementary thereto*.") (emphasis added); Mo. Rev. Stat. § 353.130.3 (The Urban Redevelopment Corporations Law) ("An urban redevelopment corporation operating pursuant to a redevelopment agreement with a municipality for a particular redevelopment area, which agreement was executed prior to or on December 31, 2006, may exercise the power of eminent domain in such redevelopment area *in the manner provided for corporations in chapter 523, RSMo; or it may exercise the power of eminent domain in the manner provided by any other applicable statutory provision for the exercise of the power of eminent domain*.") (emphasis added).

C. A Decision in Favor of Arnold Would, Without Legislative Sanction, Expand the Potential For the Abuse of Eminent Domain For Private Use in Missouri.

As noted above, the suggestion by Arnold and its amici that a ruling for Tourkakis would have broad implications that would imperil the existence of Missouri's urban renewal statutes is clearly wrong. However, a decision in favor of the City of Arnold would have broad implications that would adversely impact home and business owners throughout the state who live in non-charter cities. If this Court accepts the invitation of Arnold and its amici to read into the TIF Act a grant of eminent domain authority to non-chartered cities, other non-chartered cities will suddenly – and without explicit authorization by the Legislature – have the green light to use eminent domain for "blight" removal under the TIF Act. Unfortunately, many Missouri cities have a long history of abusing eminent domain by labeling perfectly fine properties blighted so that they can be transferred to private developers who promise to generate more tax dollars. *See, e.g.*, Dana Berliner, Public Power, Private Gain (Institute for Justice, 2003), *available at* http://www.castlecoalition.org/publications/report/index.html, at 117-123; Dana Berliner, Opening the Floodgates: Eminent Domain Abuse in a Post-Kelo World (Institute for Justice, 2006), *available at* http://www.castlecoalition.org/publications/floodgates/index.html. Indeed, since the U.S. Supreme Court's infamous decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), which held that private economic development is a "public use"

under the Fifth Amendment to the U.S. Constitution, there have been in Missouri over six hundred instances of filed, authorized, or threatened condemnations for the benefit of private developers. *See* Opening the Floodgates, at 57-65. The definition of "blighted area" in the TIF Act is so broad that it can encompass almost any neighborhood in the state.[4] Fortunately for residents of non-charter cities, however, the Legislature has not, for the reasons explained above,

[4] Mo. Rev. Stat. § 99.805(1) (2007) defines "blighted area" as:

> [A]n area which, by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.

Notably, unlike in Mo. Rev. Stat. § 353.020 (2007), which was at issue in *Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431 (Mo. banc 2007), a blighted area need not constitute both an economic and social liability under the TIF Act.

attempted to extend the reach of "blight" condemnations to non-charter cities through the TIF Act.

But now Arnold is pushing the legal envelope in order to gain blight-condemnation powers – not through the Legislature, but through this litigation. Another non-charter city, Sugar Creek, a small town located between Kansas City and Independence, is following closely in Arnold's footsteps. Under the guise of seeking to remove "blight," Sugar Creek is preparing to condemn a working-class neighborhood so that a private developer can build a big-box retail complex there. *See* David Martin, *Grocery Sacked*, THE PITCH, May 10, 2007, *available at* http://www.pitch.com/2007-05-10/news/grocery-sacked/full (last visited Nov. 25, 2007); Hugh Welsh, *Attorney Takes Up Cause*, INDEPENDENCE EXAMINER, October 3, 2007, *available at* http://examiner.net/stories/100307/new_204924858.shtml (last visited Nov. 25, 2007). If Arnold prevails in this case, nothing will stop Sugar Creek from moving forward with its plans to enrich its tax base at the expense of its long-term residents.

These residents include Penelope Marth, whose grandfather built several homes in Sugar Creek. She lives in one of the homes, the same one in which her mother was raised. Up the street from Penelope live two widows. Josie Webster, who struggles with health problems, has lived in her home for over twenty years. Eleanor Miller raised five children in her immaculately-maintained ranch home that she has lived in for forty-eight years. Jerry McGinnis, a dump truck driver

who enjoys restoring classic American cars in his large attached garage, lives nearby.

All of these people are proud of their homes and take good care of them but, according to Sugar Creek, they live in a "blighted" area. Much of the evidence of "blight" involves conditions over which residents have no control, such as cracked sidewalks and potholes. *See* Blight Study: *Sugarland at Sugar Creek in* Sugarland Center Tax Increment Financing Plan: Sugar Creek, Missouri (King Hershey, PC 2007), at 9 and 15. Other "blight" factors include off-street parking in front of homes and the fact that, through no fault of property owners, the zoning of their property has changed. *See id*. at 9 and 18. The finding of blight appears to have been a foregone conclusion, especially since the project developer entered into a lease with a grocery store to occupy part of the development before the Tax Increment Financing Plan and blight study were published. *See* Sugarland Center Tax Increment Financing Plan: Sugar Creek, Missouri (King Hershey, PC 2007), at 2.

Like Arnold, Sugar Creek is attempting to rely on the TIF Act as a basis for eminent domain authority for "blight" removal even though the Act does not grant that authority to it. Fortunately, a strict construction of the TIF Act forbids such a result. A decision to the contrary will open the floodgates to more abuse of eminent domain for private use in a state that, unfortunately, has seen more than its fair share.

CONCLUSION

The rule of strict construction of purported grants of eminent domain authority requires that the decision of the trial court be affirmed. The Legislature did not confer eminent domain authority on non-charter cities in the TIF Act. Not only would a ruling for Arnold read the words "subject to any constitutional limitations" out of the TIF Act, it would also expose the residents of all non-charter cities in Missouri to the abuse of eminent domain for private development under the guise of "blight" removal.

Respectfully submitted,

Ronald J. Eisenberg, MO Bar #48674
Schultz & Little, L.L.P.
640 Cepi Drive, Suite A
Chesterfield, MO 63005
Telephone: 636-537-4645
Facsimile: 636-537-2599
E-Mail: reisenberg@sl-lawyers.com

INSTITUTE FOR JUSTICE
ROBERT W. GALL, DC Bar #482476*

WILLIAM H. MELLOR, DC Bar #462072*
SCOTT BULLOCK, DC Bar #442379*
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Telephone: 703-682-9320
Facsimile: 703-682-9321
E-Mail: bgall@ij.org
wmellor@ij.org
sbullock@ij.org
*_Application for Admission Pro Hac Vice pending_
Attorneys for _Amicus Curiae_ Institute for Justice

Paul Anthony Martin, MO Bar #57386
Ombudsman for Property Rights
The State of Missouri
111 North 7th Street, Ste. 934
St. Louis, MO 63101
Telephone: 314-340-4877
Facsimile: 314-340-4878
E-mail: propertyczar@mo.gov

Attorney for _Amicus Curiae_ Office of the Ombudsman for Property Rights

RULE 84.06(c) AND CERTIFICATE OF SERVICE

I hereby certify that this brief complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief contains no more than 4,428 words, excluding the cover, certificate of service, certification required by Rule 84.06(c), and signature block, and was prepared using Microsoft Word. The font is Times New Roman of 13-point type and proportional spacing. A CD-ROM, scanned for viruses and virus free, containing the full text of this brief has been created for the Court and each counsel of record for service accompanying the physical brief.

I hereby certify that a true and correct copy of the foregoing *Amicus Curiae* Brief of the Institute for Justice and the Office of the Ombudsman for Property Rights in Support of Respondents, along with a CD-ROM containing the same was mailed, postage prepaid, to the following counsel of record on the ___day of November, 2007:

Gerard T. Carmody
Kelley F. Farrell
Kameron W. Murphy
Carmody MacDonald P.C
120 South Central Avenue, Suite 1800
St. Louis, Missouri 63105
Attorneys for Appellant

Robert K. Sweeney
P.O. Box 20
503 Main Street
Hillsboro, MO 63050
Attorney for Appellant

Joann T. Sandifer
Husch & Eppenberger, LLC
190 Carondelet Plaza, Suite 600
St. Louis, Missouri 63105
Attorney for Appellant

Tracy Hunsaker Gilroy
The Gilroy Law Firm
231 S. Bemiston Avenue, Suite 800
St. Louis, MO 63105
Attorney for Respondents,
Homer R. and Julie Tourkakis

Michael A. Wolff
Seigel & Wolff P.C.
7911 Forsyth Blvd., Suite 300
St. Louis, MO 63105
Attorney for Respondents,
Homer R. and Julie Tourkakis

James S. Burling
Timothy Sandefur
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Attorneys for Respondents,
Homer R. and Julie Tourkakis

Michael F. Barnes
Ameren Ue
One Ameren Plaza
1901 Chouteau Avenue
M/C 1310
St. Louis, MO 63103
Attorney for Respondent,
Ameren Ue

Jovita M. Foster
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102
Attorney for Respondent,
UMB Bank of St. Louis

John F. Medler, Jr.
Southwestern Bell Telephone, L.P.
One AT&T Center, Room 3558
St. Louis, MO 63101
Attorney for Respondent,
Southwestern Bell Telephone, L.P.

Kenneth C. Jones
Missouri American Water Company
727 Craig Road
St. Louis, MO 63141
Attorney for Respondent,
Missouri-American Water Company

Marc B. Fried
Dennis J. Kehm, Jr.
Office of the County Counselor;
County of Jefferson, Missouri
P.O. Box 100
Hillsboro, MO 63050
Attorneys for Respondent,
Beth Mahn

Mr. William C. Dodson
P.O. Box 966
Imperial, MO 63052
Attorney for Respondent,
Unknown

Robert D. Vieth
Trustee
7805 Cassia Court
St. Louis, MO 63123

David P. Abernathy
Laclede Gas Company
720 Olive Street, Room 1402
St. Louis, MO 63101

Howard C. Wright, Jr.
Special Counsel
840 Boonville
Springfield, MO 65802
Attorney for *Amicus Curiae* MML
and Participating Cities

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Ronald J. Eisenberg