No. SC88647

IN THE SUPREME COURT OF MISSOURI

CITY OF ARNOLD, MISSOURI,
Appellant,

v.

HOMER R. TOURKAKIS and
JULIE TOURKAKIS,
Respondents,

On Petition from the Circuit Court of
Jefferson County, Missouri, Division Three
Case No.: 06JE-CC00142

ANSWER BRIEF OF RESPONDENTS HOMER AND JULIE TOURKAKIS

JAMES S. BURLING, CSB No. 113013
Pro Hac Vice
TIMOTHY SANDEFUR, CSB No. 224436
Pro Hac Vice
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: jsb@pacificlegal.org
E-Mail: tms@pacificlegal.org

MICHAEL A. WOLFF, No. 38207
Seigel & Wolff P.C.
7911 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105-3860
Telephone: (314) 726-0009
Facsimile: (314) 726-5809
E-Mail: maw@seigelwolff.com

TRACY HUNSAKER GILROY, No. 32289
The Gilroy Law Firm
231 South Bemiston Avenue, Suite 800
St. Louis, Missouri 63105
Telephone: (314) 965-3536
Facsimile: (314) 965-3560

Counsel for Respondents Homer R. Tourkakis, et al.

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INTRODUCTION AND STATEMENT OF FACTS

Since 1988, Homer Tourkakis has operated a dental office at 1506 Big Bill Road in the City of Arnold (hereafter the City), where he employs five office workers and assistants, including his wife, Appellant Julie Tourkakis. Legal File (LF) 0015-16. The dental office is a small building overlooking Interstate 55. LF 0011-12, 0039.

In 2005, the City of Arnold, a third-class, non-charter city in Jefferson County, adopted ordinances allegedly under the authority of the Tax Increment Financing Act (Mo. Ann. Stat. § 99.800, *et seq.*) (hereafter the TIF Act). These ordinances adopted an agreement with a real estate developer called THF Realty, to build Arnold Commons, a.k.a. the Arnold Triangle, a 325,000-square-foot shopping center that will include a Lowe's hardware store, an Office Depot office supply store, and other retailers, and which will boast "excellent highway visibility." *See* THF Realty, Arnold Commons, *available at* http://www.thfrealty.com/properties/docs/ArnoldCVR.pdf (last visited Nov. 27, 2007).[1] The City declared the area "blighted," and, adopted resolutions asserting the power to use eminent domain to

[1] A copy of this document is included in the Respondents' Supplemental Legal File. Respondents hereby request that this Court take judicial notice of the contents of this document. *Bowman v. Kansas City*, 233 S.W.2d 26, 30 (Mo. 1950) (in eminent domain case, court may take judicial notice of proposed use of land). *See also Borden Co. v. Thomason*, 353 S.W.2d 735, 766-67 (Mo. 1962) (court may take judicial notice of economic facts underlying legislative decision).

condemn the Tourkakis' property for redevelopment. At all times relevant to this case, the City was acting pursuant to powers it claimed derived from the TIF Act.[2]

On June 16, 2006, the City filed a petition in eminent domain against Dr. Tourkakis and his wife. LF 0009-19. The Tourkakises filed their answer on September 28, 2006, and objected that, among other things, the condemnation was not legally authorized because the condemnation would violate the due process and equal protection clauses of the Missouri Constitution, LF 0026, because the area was not blighted[3], LF 0023, and because the taking of property for transfer to a private party for redevelopment purposes is not a "public use"

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[2] In a sentence of its opening brief, the City claims that it brought the condemnation action pursuant not only to the TIF Act but also to Chapters 77 and 88 of Vernon's Annotated Missouri Statutes. Appellant's Opening Brief (hereafter AOB) at 5. But, the City did not further plead, prove, or follow any of the condemnation procedures prescribed in either Chapters 77 or 88, which chapters specifically enable third-class cities to condemn property for city public works projects, not for redevelopment projects. The City's reference to such statutes serves to reveal (1) the City's recognition of the absence of condemnation enabling language and condemnation procedures in the TIF Act; and (2) the City's recognition that it needed more authority than is granted by the TIF Act in order to operate as a condemnor. Nevertheless, Chapters 77 and 88 are public works statutes, and do not empower a non-charter city to condemn for redevelopment projects.

[3] There has never been any *judicial* determination as to whether or not the Tourkakis property is blighted.

as required by the Missouri Constitution, LF 0025. The Tourkakises raised their constitutional and other objections in a timely manner, and moved for dismissal, arguing *inter alia*, that the City, not being a charter city, lacked authority to use eminent domain for redevelopment, and that any statute purporting to grant that power to the City would violate Article VI, section 21, of the Missouri Constitution. LF 0030.

After briefing and oral argument, the Circuit Court ruled in favor of the Tourkakises. LF 0045-47. It found that the Tourkakises' constitutional arguments "need not" be addressed. LF 0047. While the court questioned "whether the legislature *could* have conferred the power of eminent domain" on third-class cities, it found that there was "no such intent" on the part of the Legislature, given the TIF Act's reference to "constitutional limitations" would have been rendered "meaningless" if the Act were interpreted as expanding condemnation powers beyond those specified in Article VI, section 21, of the Missouri Constitution. *Id.* Based on this limiting construction, the court ordered dismissal, and this appeal followed.

JURISDICTIONAL STATEMENT

Respondents do not dispute the jurisdiction of this Court, but offer the following observation for purposes of greater accuracy, pursuant to Missouri Rule of Civil Procedure 84.04(f).

The City asserts that this case falls within this Court's exclusive jurisdiction under Article V, section 3, of the Missouri Constitution because the circuit court declared the TIF Act unconstitutional to the extent that it conflicted with Article VI, section 21, of the Constitution. In actuality, the Circuit Court held as a matter of statutory construction that the

TIF Act did not confer authority on the City to exercise eminent domain for the elimination of blight. It went on to observe in dicta that if the Act *did* confer such authority, the Act would be unconstitutional under Article VI, section 21. Thus, as explained in section I of this brief, this case is primarily one of statutory interpretation. If, however, this Court were to reverse the decision below on the statutory construction question, it would be required to address the constitutionality of the TIF Act. Thus this case does "involv[e] the validity of . . . a statute," Article V, section 3, and falls within this Court's exclusive jurisdiction.

POINTS RELIED ON

A. The Circuit Court Correctly Held That the TIF Act Does Not Grant Third-Class Cities Statutory Authority to Engage in Condemnation for Redevelopment of Purportedly Blighted" or Slum Areas

Mo. Ann. Stat. § 99.800, *et seq.*;

City of Smithville v. St. Luke's Northland Hosp. Corp., 972 S.W.2d 416 (Mo. Ct. App. 1998);

Missouri Highway & Transp. Comm'n v. Eilers, 729 S.W.2d 471 (Mo. Ct. App. 1987);

State ex rel. Mower v. Superior Court for Pierce County, 260 P.2d 355 (Wash. 1953).

B. The Missouri Constitution Does Not Permit Non-Charter Cities to Use Eminent Domain for Redevelopment Without Specific Legislative Authorization, and the Court Should Avoid This Constitutional Question by Construing the TIF Act Narrowly

Mo. Const. art. VI, § 21;

Constitutional Convention of 1943-44 Verbatim Stenotype Debates (hereafter *Transcript of Debates*);

State, on Inf. of Dalton v. Land Clearance for Redevelopment Auth. of Kansas City, Mo., 270 S.W.2d 44 (Mo. 1954);

Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 635, 646 (Mo. 1965).

C. Public Policy Militates Against Expanding the TIF Act or Construing Article VI, Section 21, Broadly and Thereby Allowing Third-Class Cities to Use Eminent Domain for Redevelopment

State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos, 35 S.W.3d 457 (Mo. Ct. App. 2000);

Alexander v. Mitchell, 260 P.2d 261 (Cal. Ct. App. 1953);

Brunn v. Kansas City, 115 S.W. 446, 449 (Mo. 1908);

Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 635 (Mo. 1965).

SUMMARY OF ARGUMENT

There are two questions in this case: (1) Does the TIF Act (Mo. Ann. Stat. § 99.800, *et seq.*) grant the power of using eminent domain for redevelopment to non-charter cities such as Arnold and (2) if so, is the grant of such power constitutional? The City's brief addresses the second question, but the trial court's decision addressed the first question: it held that the TIF Act does not grant this power to non-charter cities. LF 0047. In fact, although the circuit court's statutory construction argument was bolstered by its finding that Article VI, section 21, of the Missouri Constitution was "intended to limit the awesome power of eminent domain in [redevelopment] cases to charter counties and cities," *id.*, the court found that the question of whether the TIF Act is constitutional "*need not be*

answered," *id.* (emphasis added), because the Act's language revealed "no . . . intent" to grant the condemnation power to the City of Arnold. *Id.* The Court explicitly "limit[ed] its discussion to what the law appears to authorize." LF 0042. Thus the decision below rested on the court's interpretation of the TIF Act and that Act's reference to "constitutional limitations." It did not rest primarily on the constitutionality of the taking, let alone on the improper motives the City alleges.[4] *This case is primarily one of statutory interpretation*. Only if the Court determines that the Act authorizes the City of Arnold to condemn property alleged to be blighted, should the Court reach the question of the Act's constitutionality.

In this brief, Respondents argue that the TIF Act does not authorize non-charter cities to enact ordinances employing eminent domain for blight elimination. In addition, Respondents argue that interpreting the Act broadly, as the City asks this Court to do, would unnecessarily raise serious constitutional questions due to the Missouri Constitution's limited grant of blight-elimination powers to charter cities.

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[4] The City's repeated aspersions against the trial court's integrity—such as its claim that Judge Williams was motivated by "intentional avoidance" of the law, Opening Brief at 16, or by his own political views, *id.* at 1, 25—have no support in the record. "[C]ounsel's attempt on appeal to criticize the trial judge [is] distasteful." *State v. Rose*, 86 S.W.3d 90, 107 (Mo. Ct. App. 2002). In fact, the circuit court considered this case carefully and thoroughly.

The TIF Act does not authorize the City of Arnold to condemn property for blight elimination because: (1) it contains no explicit grant sufficient to satisfy the requirement of strict construction; (2) the Act provides no mechanism for non-charter cities to engage in condemnation and does not refer to any such mechanism; (3) the Act incorporates "constitutional limitations," and therefore does not exercise the Legislature's constitutional power to enact laws for the elimination of slums and blighted areas; and (4) construing the TIF Act broadly would violate the rule of constitutional avoidance.

If the Legislature had intended the TIF Act to grant the asserted power to third-class cities like Arnold, it could have done so. It did not. This Court, therefore, should not construe such a power by implication. The TIF Act is primarily a financing statute that incorporated the pre-existing powers of Missouri charter cities to condemn blighted areas, and since third-class cities possessed no such power, the TIF Act could not have granted it.

STANDARD OF REVIEW

On appeal, this Court considers the legal issues regarding eminent domain *de novo*. *Randolph v. Missouri Highways & Transp. Comm'n*, 224 S.W.3d 615, 617 (Mo. Ct. App. 2007). A trial court's decision dismissing a case will be affirmed "if any grounds asserted for dismissal are valid." *Brummitt v. Springer*, 918 S.W.2d 909, 912 (Mo. Ct. App. 1996); *Cooper v. Corderman*, 809 S.W.2d 11, 13 (Mo. Ct. App. 1991).

Because this case involves the power of eminent domain and the powers of non-charter cities, the Court must apply a strict construction to the statutes at issue. In cases involving the power of eminent domain, Missouri courts "compel strict compliance with the [enabling] statutes and . . . prevent the taking of private property for a private or non-public

use." *State ex rel. State Highway Comm'n v. Curtis,* 222 S.W.2d 64, 68 (Mo. 1949). The power of eminent domain "should not be gathered from doubtful inferences, or from vague or ambiguous language, and every reasonable doubt should be resolved adversely to the existence of the right." *State ex rel. County of St. Charles v. Mehan,* 854 S.W.2d 531, 534 (Mo. Ct. App. 1993); *accord, City of Springfield ex rel. Bd. of Pub. Utilities of Springfield, Mo. v. Brechbuhler,* 895 S.W.2d 583, 584 (Mo. 1995) ("The power of eminent domain is one of the most intrusive powers of government . . . . Therefore in determining the power to condemn in a governmental body, statutes must be strictly construed.").

In addition, Missouri law strictly construes the alleged powers of third- or fourth-class cities. *State ex rel. Mitchell v. City of Sikeston,* 555 S.W.2d 281, 288 (Mo. 1977). "Municipalities are creatures of statute and only have the powers granted to them by the legislature. Courts generally follow a strict rule of construction when determining the powers of municipalities." *Burks v. City of Licking,* 980 S.W.2d 109, 111 (Mo. Ct. App. 1998) (citation omitted). The authority of third- or fourth-class cities cannot be inferred or broadly construed but must be explicit and direct. This is particularly true with regard to the power of eminent domain. *See State ex rel. Missouri Cities Water Co. v. Hodge,* 878 S.W.2d 819, 821 (Mo. 1994); *City of Smithville,* 972 S.W.2d at 424 (strictly construing eminent domain power of third- and fourth-class cities).

ARGUMENT

I

THE CIRCUIT COURT CORRECTLY HELD THAT THE TIF ACT DOES NOT GRANT THIRD-CLASS CITIES STATUTORY AUTHORITY TO ENGAGE IN CONDEMNATION FOR REDEVELOPMENT OF PURPORTEDLY "BLIGHTED" OR SLUM AREAS

The court below held that the TIF Act (Mo. Ann. Stat. § 99.800, *et seq.*) does not grant third-class cities the power to condemn property for redevelopment. It found that the Act "provides that the acquisition of property is 'subject to any constitutional limitations.' It cannot be assumed that the legislature intended that this language be meaningless." LF 0047. Since Article VI, section 21, of the Missouri Constitution grants the power of eminent domain directly to charter cities, the court did "question whether the legislature *could* have conferred the power of eminent domain" on non-charter cities, but it concluded that the question "need not be answered" because the Legislature expressed "no such intent" in the statute. LF 0047. As this language makes clear, the circuit court's determination was based on statutory construction of the TIF Act. It addressed the constitutional issues only to interpret the *statutory* phrase "subject to any constitutional limitations."

The circuit court was correct in concluding that the text of the TIF Act reveals "no . . . intent" to give third-class cities the power to condemn for redevelopment. *Id.* Contrary to the City's unsubstantiated assertion, AOB at 11, the City's condemnation of the Tourkakis property is *not* authorized by the TIF Act.

A. The TIF Act Contains No Clear and Express Grant of Eminent Domain Power to Third-Class Cities

The City of Arnold is a third-class city that has no inherent power of eminent domain, and therefore has "only such power in respect thereto which has been granted to [it] by the Constitution or the statutes." *Petrolene, Inc. v. City of Arnold*, 515 S.W.2d 551, 552 (Mo. 1974) (citation omitted), *overruled on other grounds, Alumax Foils, Inc. v. City of St. Louis*, 939 S.W.2d 907 (Mo. 1997).

In cases involving the eminent domain powers of third- and fourth-class cities, Missouri courts require very specific legislative authorization.[5] In *Mehan*, 854 S.W.2d 531, for example, the court of appeals annulled an attempt by the fourth-class city of St. Peters to condemn land outside of its city limits. *Id.* at 533. The court noted that the eminent domain power belongs to the state and that non-charter cities may not exercise that power except as specifically authorized by the Legislature. Nor should the power be inferred where it is not explicit or necessarily implied by statute. *Id.* at 534. Using the rule of strict construction, the court found that "there are no provisions affording a city the right of condemnation of

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[5] The power of third- and fourth-class cities to engage in *financing* of redevelopment projects pursuant to the TIF Act is not at issue here. The brief of *Amici* Missouri Municipal League, *et al.*, contends that "third and fourth-class cities, villages and non-charter counties will be impacted [*sic*] by this decision if they can no longer use the TIF Law as authorized by the General Assembly," *id.* at 9, but this vastly overstates the issue. This case involves only the condemnation power allegedly included in the TIF Act; it does not involve the extensive and complicated revenue and funding mechanisms provided in that Act.

property outside its boundaries." *Id.* at 536. A similar strict construction should apply here. Unless the power to use eminent domain for redevelopment is either explicitly granted to non-charter cities in the TIF Act, or is inescapably implied by the statutory language, that power cannot be read into the statute.

This analysis has been followed in several Missouri decisions involving questions similar to this case. In *Hodge*, 878 S.W.2d at 821, a third-class city sought to condemn a waterworks company and to maintain it as a municipally-owned waterworks. It claimed that authority under a state law that allowed third-class cities to condemn property to provide for water supplies. *Id.* (citing Mo. Ann. Stat. § 91.450). The statute provided that third-class cities could "acquire . . . maintain and operate, waterworks," but this Court, relying on the rule that laws authorizing eminent domain must be strictly construed, *id.*, found that the statute did not authorize such an "extraordinary exercise of the power of eminent domain." *Id.* at 825.

Also, in *City of Smithville*, 972 S.W.2d at 424, the court found that the fourth-class city of Smithville lacked authority to condemn a private hospital. It asserted authority under Vernon's Annotated Missouri Statutes section 79.380, which *did* authorize the use of eminent domain to take "lands" necessary for the establishment of hospitals. Smithville contended that this language implied the authority to take existing hospitals. *Id.* at 423. But, again relying on the requirement of strict construction, the court rejected this argument: "Smithville's proposed interpretation of the statute is strained and involves a liberal construction rather than an appropriate strict construction of the statutory language. This court finds that a proper construction of the statute reveals no specific and express statutory

authority for Smithville's proposed condemnation of an existing hospital." *Id.* at 424.

The interpretations employed in *Mehan*, *Hodge*, and *Smithville* are applicable here. Any alleged grant of eminent domain authority to third-class cities must appear clearly and unambiguously in the statute or must be necessarily implied by the statute. Neither is the case in the TIF Act.

The TIF Act contains no explicit grant. It authorizes cities to use eminent domain only "subject to any constitutional limitations," Mo. Ann. Stat. § 99.820(1)(3), which introduces an ambiguity, since those "constitutional limitations" are not specified. The reference to constitutional limitations implies that the Act was not intended to expand the eminent domain powers beyond the grant already existing in Article VI, section 21. That is, the Act merely confirmed the preexisting eminent domain powers of charter cities. It contains "no specific and express" expansion of eminent domain powers to non-charter cities; certainly its language is far less precise than the language that was found inadequate in *Mehan*, *Hodge*, and *Smithville*. Had the Legislature intended to expand the eminent domain powers to include third-class cities also, it could easily have said so by specifying in the Act's definition section that third-class cities were being given expanded eminent domain powers.

There is also no indication in the legislative history that the TIF Act was intended to expand the power of eminent domain to third- or fourth-class cities. The Research Analyst's report on the TIF Act does not refer to any such expansion of eminent domain powers. *See* 1982 Missouri House Perfection Calendar, 81st Gen. Assembly, 2nd Sess. at 37-39 (May 1982). Secondary sources regarding the TIF Act also do not refer to any expanded eminent

domain authority for third-class cities. *See, e.g.*, Fred W. Lindecke, *Senate Passes Bill to Aid Urban Renovation Projects*, St. Louis Post-Dispatch, Apr. 21, 1982; Christina G. Dudley, *Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast*, 54 UMKC L. Rev. 77, 96-98 (1985); Michael T. White, *Tax Increment Financing in Missouri*, 46 J. Mo. Bar 453 (1990). *See also* Josh Reinert, *Tax Increment Financing in Missouri: Is It Time for Blight and But-For to Go?*, St. Louis U. L.J. 1019, 1025 (2001).

There is simply no indication that the TIF Act granted greater eminent domain authority beyond that already specified in the Constitution. Nor is such authority necessarily implied by the text of the statute, given the fact that the TIF Act provides no procedural mechanism for condemnations. *See infra*, I.B.

B. The TIF Act Creates No Procedure for Third-Class Cities to Use Eminent Domain for Redevelopment

Although the TIF Act refers to the power of eminent domain, it provides no mechanism by which third-class cities may use that power. The TIF Act makes no reference to the general eminent domain law, Mo. Ann. Stat. ch. 523, *et seq.*, which lays out the procedure for condemnation by entities that are authorized to use that power, or to the state law that authorizes third-class cities to use eminent domain for specific purposes (not including redevelopment). Mo. Ann. Stat. § 88.497.

By contrast, the other three acts which the Legislature has adopted for eliminating blight—The Urban Redevelopment Corporations Law, Mo. Ann. Stat. § 353.010, *et seq.*; The Planned Industrial Expansion Law, Mo. Ann. Stat. § 100.300, *et seq.*, and the Land Clearance for Redevelopment Authority Law, Mo. Ann. Stat. § 99.300-99.660—all *do* refer to chapter 523. *See* Mo. Ann. Stat. § 353.130(3) ("An urban redevelopment corporation operating pursuant to a redevelopment agreement . . . may exercise the power of eminent domain . . . in the manner provided . . . in chapter 523."); § 100.420(1) ("An authority . . . . may exercise the power of eminent domain in the manner and under the procedure provided for corporations in chapter 523 . . . ."); § 99.460(1) ("An authority may exercise the power of eminent domain in the manner and under the procedure provided for corporations in chapter 523 . . . .").

Likewise, third-class cities are empowered to condemn property for streets, water courses, and similar uses by chapter 88 of the Missouri Statutes (Mo. Ann. Stat. § 88.497), which establishes a procedure for condemnation and valuation. *See* Mo. Ann. Stat. §§ 88.010-88.077. These acts all provide a mechanism to follow when using eminent domain, to go along with the express grant of that power.

But the TIF Act, by contrast, does not specify any procedure for third-class cities to follow, and includes no cross-references to chapters 523 or 88. It therefore provides no mechanism for the use of eminent domain by third-class cities, which is strong evidence that the Legislature did not intend to grant such a power to them.[6] Indeed, while the TIF Act lays

[6] The TIF Act, unlike other redevelopment statutes, contains no provision calling for a liberal (continued...)

out a very thorough and complicated process for the *financing* of redevelopment projects, it does not provide even a rudimentary mechanism for condemnation. This is again suggestive that the Legislature did not intend to expand the use of eminent domain when enacting that Act.

As the court of appeals noted in *In re Foreclosure of Liens for Delinquent Land Taxes by Action in rem v. Hous. Auth. of Kansas City, Mo.*, 150 S.W.3d 364, 370 (Mo. Ct. App. 2004), the absence of "a means of enforcing" an alleged power is good reason to believe that "the General Assembly never intended" to grant such power. *See also Thogmartin v. Nevada Sch. Dist.*, 176 S.W. 473, 474 (Mo. Ct. App. 1915) ("[A]s the Legislature has provided no effective remedy . . . whereby such judgment may be enforced, it may be taken as quite evident that the law-making power did not intend the statute to apply . . . ."); *Bechen v. Moody County Bd. of Comm'rs*, 703 N.W.2d 662, 667 (S.D. 2005).

> The legislature has not established a procedure to allow a decision made by a board of adjustment to be subject to referendum. We do not believe that this was an oversight, given the carefully crafted procedure established by the legislature . . . . Thus we must conclude that the legislature did not intend that the actions of boards of adjustment be subject to referendum.

Millay v. Cam, 928 P.2d 463, 466 (Wash. Ct. App. 1996), *rev'd on other grounds*, 955 P.2d

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[6] (...continued)
construction. As with all statutes involving eminent domain, it is subject to a strict construction. *City of St. Charles v. DeVault Mgmt.*, 959 S.W.2d 815, 824 (Mo. Ct. App. 1997).

791 (Wash. 1998) ("[The legislature] has not established a procedure for resolving disputes about the 'sum required . . . .' This omission indicates that the Legislature did not intend to provide any preredemption procedure for disputing the 'sum required.'"); *Miller v. Baldwin*, 32 P.3d 234, 239 (Or. Ct. App. 2001) (where legislature has not provided a procedure for exercising an alleged power, it is strong evidence that such power does not exist); *City of South Haven v. Van Buren County Bd. of Comm'rs*, 734 N.W.2d 533, 539 (Mich. 2007) (same).

The Washington Supreme Court addressed a situation similar to this one in *State ex rel. Mower*, 260 P.2d 355. There, the court was asked to determine whether a park district had the authority to condemn property for park purposes under a statute that conferred on park districts "'the right of eminent domain,'" and the power to "'purchase, acquire and condemn lands.'" *Id.* at 357. But the statute contained "no method of procedure . . . for the exercise of the power of eminent domain by park districts." *Id.* As is the case here, the statute in *Mower* contained "[n]o provision . . . for the filing of any petition, no description of the contents thereof . . . nor . . . any designation of the court in which the property owner shall appear." *Id.* Many other important elements of procedure were missing and the court found that "[t]hese omitted provisions are not merely matters of form; they are essential to due process before private property may be taken for public use." *Id.* The court contrasted this silence with the detailed procedures provided by other state statutes authorizing the use of eminent domain, and concluded that although the statute purported to grant the power to take property, there was "no method of procedure stated in [the statute] either directly or by implication or by reference to other acts having a similar purpose." *Id.* at 359. This failed

to satisfy the strict construction required of eminent domain powers. Thus no effective grant of eminent domain power had occurred. *Id.*

Likewise, because it specifies no condemnation procedures or mechanism, the TIF Act simply assumes that cities using TIF Act powers will employ those eminent domain powers that they are given by *other* eminent domain statutes. But non-charter cities have no authority outside the TIF Act to use eminent domain for redevelopment. Because the powers of third-class cities are strictly construed, no such power may be inferred in the TIF Act where it is lacking.

In *City of Carthage v. Carthage Light Co.*, 70 S.W. 936 (Mo. Ct. App. 1902), the court found that a statute authorizing non-charter cities to establish gasworks for the lighting of city streets did not permit them to establish electrical companies for that purpose. The legislation in that case gave "no [explicit condemnation] authority" to the city, *id.* at 937, and the law had provided no mechanism by which the alleged authority could be exercised: there were "no terms employed in the act which authorized the passage of an ordinance to erect an electric plant, or to occupy the streets and alleys with the poles and wires." *Id.* Moreover, it was obvious that the Legislature had not considered authorizing electrical facilities when it enacted the law—just as in this case the 1943-44 Constitutional Convention delegates did not intend to authorize non-charter cities to engage in condemnation for blight elimination. *Id.* The court recognized that its interpretation might be "considered too narrow," but it noted that "[t]he grant of legislative powers to municipalities is to be strictly construed, and, if there be a reasonable doubt of the existence of a power, it will be held not to have been granted." *Id.*

In *City of Raytown v. Danforth*, 560 S.W.2d 846 (Mo. 1977), this Court found that fourth-class cities were required to obtain licenses to operate ambulances, and were not immunized from that requirement by a state law which granted fourth class cities the power to operate ambulances. Adhering to the rule that the powers of third- and fourth-class cities are strictly construed, *id.* at 848 (citing *Anderson v. City of Olivette*, 518 S.W.2d 34, 39 (Mo. 1975)), the Court noted that the enabling act made "no provision for licensing, minimum equipment requirements, personnel qualifications, training requirements or related operational standards." *City of Raytown*, 560 S.W.2d at 848. Because the Legislature had not provided these means, the Court would not presume that fourth-class cities had the authority to act on such matters independently; instead, those cities were required to abide by other statutes establishing licensing procedures. Likewise in this case the TIF Act makes no provision for third-class cities to establish the amount of compensation, or to provide for relocation expenses, or to do the other acts required of a condemning agency.

Simply put, *City of Carthage* and *City of Raytown* make it clear that where the Legislature has provided no means by which an alleged power may be exercised by a non-charter city, the Court will not infer the existence of such a power. The TIF Act creates no means by which third-class cities may use eminent domain for redevelopment, and the Court may not infer such a power.

The TIF Act allows municipalities to issue obligation bonds and provide for other financial arrangements, and to adopt redevelopment plans to govern development in the city. It also authorizes the acquisition of property by purchase, lease, gift, or condemnation. But all of these powers are "subject to any constitutional limitations"—that is to say, they may

be exercised only where appropriate under other applicable laws. Thus to those cities which may already use eminent domain for redevelopment—charter cities—the TIF Act granted authority to continue doing so via tax increment financing. But to those cities which may not use eminent domain for redevelopment—third-class cities such as Arnold—the TIF Act gave no new authority to condemn. This is why the Act provides no procedure for condemnation or valuation. The TIF Act authorizes third-class cities to follow its taxation and revenue mechanisms, including payments in lieu of taxes, or the issuance of bonds. *See* Dudley, *supra*, at 80-83. But it does not create any new power of eminent domain for third-class cities.

C. The TIF Act Incorporates "Constitutional Limitations" and Thus Did Not Expand Eminent Domain Powers of Non-Charter Cities Beyond the Constitution's Grant of Authority

In addition to the fact that the TIF Act lacks explicit language expanding the power of eminent domain, and the fact that the Act provides no mechanism for non-charter cities to use when employing eminent domain, there is a third reason to conclude that the Legislature did not intend to authorize cities like Arnold to use eminent domain for blight elimination. That is, the Legislature incorporated into the Act "constitutional limitations," rather than exercising its possible constitutional authority to grant that power to non-charter cities.

Section 99.820(1)(3) of the TIF Act gives municipalities a wide variety of powers, including the authority to buy, sell, lease, mortgage, and condemn property, "subject to any constitutional limitations." This phrase indicates that the Legislature was conscious of the

fact that Article VI, section 21, of the Constitution expressly allows only charter cities to use the power of eminent domain for blight elimination, and that the Legislature chose not to go farther. *State ex rel. Broadway-Washington Associates, Ltd. v. Manners*, 186 S.W.3d 272, 275 (Mo. 2006) ("The General Assembly is presumed to legislate with knowledge of existing law.").

Article VI, section 21, creates a grant of power, limited to charter cities, to use eminent domain for redevelopment. It also may allow the Legislature, if it so chooses, to go beyond that limit by enacting laws to that effect. But the incorporation of "constitutional limitations" into the TIF Act reveals that the Legislature chose not to exercise the full extent of its authority to expand the eminent domain authority, but merely to maintain the grant already existing in the Constitution.[7] The TIF Act must therefore be read within the boundaries of Article VI, section 21, not construed broadly. "Even the most liberal of

[7] Indeed, the phrase "subject to any constitutional limitations" occurs nowhere else in all of Missouri's statutes, which is strong reason to believe that the Legislature chose its words with care. Legislatures routinely use phrases of this sort to indicate an intent to avoid potential constitutional conflicts or to limit the reach of their acts. *Cf. Appeal of HCA Parkland Med. Ctr.*, 719 A.2d 619, 621-22 (N.H. 1998) ("[T]he phrase 'subject to this chapter' . . . plainly evinces an intent by the legislature to limit the [applicability of the statute] . . . . [It is] limiting language."); *Mills v. Fletcher*, 229 S.W.3d 765, 768 (Tex. App. 2007) ("[T]he phrase '[i]n addition to any other *limitation* under law,' shows an intent by the Legislature to limit expenses simply 'incurred.' ").

constructions does not mean that statutory words and phrases are to be given meanings unjustified by legislative intent or that express limitations are to be ignored." *Davis v. United States*, 861 F.2d 558, 565 (9th Cir. 1988).

Interpreting the TIF Act as authorizing third-class, non-charter cities to engage in eminent domain for clearance of blight would render the phrase "subject to any constitutional limitations" surplusage, in violation of the requirement that laws be interpreted to give effect to all provisions, *State ex rel. Union Elec. Co. v. Pub. Svc. Comm'n of Missouri*, 765 S.W.2d 626, 628 (Mo. Ct. App. 1988) ("It will not be presumed that the legislature inserted idle verbiage or superfluous language in a statute."); *Wilson v. Traders Ins. Co.*, 98 S.W.3d 608, 618 (Mo. Ct. App. 2003) (same).

In short, the phrase "subject to any constitutional limitations" is synonymous with "where otherwise authorized." The TIF Act allows municipalities to employ eminent domain only where they are already allowed to do so by the Constitution or existing statutes.

D. The Doctrine of Constitutional Avoidance Counsels Against Interpreting the TIF Act Broadly

Courts avoid construing a statute in a way that will raise grave constitutional concerns. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. 1991). A statute ought to be "construed so as to render it constitutional, if this is possible. A court will avoid the decision of a constitutional question if the case can be fully determined without reaching it." *State ex rel. Union Elec. Co.*, 687 S.W.2d at 165.

A limited interpretation of the TIF Act—as not conferring eminent domain powers for purposes of blight elimination on third-class cities—is well supported for other reasons,

including the lack of specific and unambiguous language, the absence of a mechanism for condemnation, and the textual incorporation of "constitutional limitations" in the Act itself. If, however, the Court interprets the Act as granting such powers, the Court will then be required to address the constitutional question of whether Article VI, section 21, authorizes the Legislature to grant such powers to non-charter cities. This is a complicated question, because, as the court below noted, such an interpretation would render language in Article VI, section 21, surplusage: if the Constitution allows the Legislature to empower *all* cities to enact ordinances for using eminent domain in slums or blighted areas, the phrase "and any city or county operating under a constitutional charter may enact ordinances" would be unnecessary and redundant.

In *Eilers*, 729 S.W.2d 471, the court of appeal found that a statute authorizing the Highway and Transportation Commission to condemn land for highway purposes did not also authorize the Commission to enter onto land for purposes of conducting a soil survey. State law authorized the Commission to "'cause such examination and survey for its proposed [highway] as may be necessary to the selection of the most advantageous route,'" *id.* at 472, and the Commission claimed that the word "survey" permitted them to enter onto land prior to condemnation and conduct a "soil survey" (which evaluates the surface strength of land to determine whether it can support a highway). The court rejected this argument, holding that the word "survey" only meant "'an actual examination of the surface of the ground,'" *id.* at 473 (citation omitted), and not the more involved procedure of a soil survey. It came to this conclusion because purported grants of eminent domain power must be strictly construed, *id.*, and statutes "must be construed to avoid constitutional problems." *Id.* Were

the statute construed to authorize pre-condemnation soil surveys, the statute would have "violate[d] constitutional restrictions on the taking and damaging of private property without just compensation." *Id.* To avoid such constitutional issues, the court found that it was proper to read the statute narrowly as not granting the Commission the asserted power. *Id.*

Interpreting the TIF Act broadly would require this Court to determine that Article VI, section 21, which explicitly grants the condemnation power only to charter cities, and which was intended by the 1943-44 Constitutional Convention only to grant that power to charter cities, also allows the Legislature to expand that authority to non-charter cities. There is strong reason to doubt that the Constitution goes so far, however.

This Court should interpret the TIF Act strictly, and avoid the constitutional question of whether Article VI, section 21, permits the Legislature to grant blight-eradication condemnation powers to third-class cities. Such an interpretation would "not deny the necessity [or] prudence" of using eminent domain for such purposes, *id.* at 474, but would recognize that granting such expanded condemnation powers "is up to the legislature." *Id.*

II

THE MISSOURI CONSTITUTION DOES NOT PERMIT NON-CHARTER CITIES TO USE EMINENT DOMAIN FOR REDEVELOPMENT WITHOUT SPECIFIC LEGISLATIVE AUTHORIZATION, AND THE COURT SHOULD AVOID THIS CONSTITUTIONAL QUESTION BY CONSTRUING THE TIF ACT NARROWLY

A. The Missouri Constitution Prohibits Condemnation for Transfer to Private Parties Except in Specified Circumstances

The question of whether non-charter cities have constitutional authority to use eminent

domain for redevelopment purposes must begin with a review of the history of the Missouri Constitution. *Cf. State ex rel. Randolph County v. Walden*, 206 S.W.2d 979, 983-84 (Mo. 1947) (examining constitutional history when interpreting its terms); *Metal Form Corp. v. Leachman*, 599 S.W.2d 922, 926 (Mo. 1980) ("It is proper to consult [the 1943-44 Constitutional Convention] proceedings and debates in determining the purpose and meaning of constitutional provisions although such proceedings and debates do not have binding force on the courts."); *accord, Farmer v. Kinder*, 89 S.W.3d 447, 453-54 (Mo. 2002).

Echoing the Fifth Amendment to the United States Constitution, Article I, section 26 (which was present in the Constitution prior to 1875), provides that private property "shall not be taken or damaged for public use without just compensation." This implies that property may only be taken for public, and not for private, use. *Dickey v. Tennison*, 27 Mo. 373, 374 (1858).

However, rather than leaving this to implication, the 1875 Constitutional Convention added section 28, which emphasizes that "private property shall not be taken for private use with or without compensation." Section 28 is unique in the United States; no other state constitution contains two separate prohibitions against takings for private use. It was added in reaction to court decisions which authorized the taking of property for transfer to railroads and other powerful and politically influential corporations, which then used the property for private profit. *Humes v. Missouri Pac. Ry. Co.*, 82 Mo. 221, 226 (1884) (recognizing that section 28 was enacted due to the "adjudications by the courts of this State, as well as the current history of the times developing so many devices and schemes by individuals, legislatures and municipalities to obtain private property against the owner's consent for

purely private purposes."). As delegate Thomas Gantt explained at the 1875 convention, section 28's reiteration of the ban on private condemnations would prohibit actions by "the General Assembly if some one [*sic*] covets the vineyard of his neighbor[8] to declare that that vineyard may be taken and used as the vineyard of the trespasser and 'that it is hereby devoted to public use," 1 *Debates of the Missouri Constitutional Convention of 1875* 440 (1930). Early courts recognized that it barred takings which benefitted private parties. *Humes*, 82 Mo. at 226; *Colville v. Judy*, 73 Mo. 651, 654 (1881) ("[T]he wisdom of [the] framers is nowhere so conspicuously displayed as in the careful manner in which they have sedulously guarded private property and the rights incident thereto against ruthless invasion, and virtual confiscation under the thin disguise of legal process."); *In re Twenty-First St.*, 96 S.W. 201, 205-06 (Mo. 1906) (taking to give land to private railroad would violate the Public Use Clause).

The 1943-44 Constitutional Convention then added a third provision regarding eminent domain: Article VI, section 21, provides that "[l]aws 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 taking or permitting the taking, by eminent domain, of property for such purposes . . . ." This provision was added in response to increasing interest in slum-clearance projects during this period. *See generally* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent*

[8] This was a reference to 1 Kings 21.

Domain, 21 Yale L. & Pol'y Rev. 1, 22-37 (2003) (describing how the 1920s-1940s saw expansion of eminent domain for urban renewal). Specifically, this new provision was added at the request of the Convention's "Committee on Local Government (City of St. Louis, St. Louis County, and Jackson County),"[9] and particularly at the request of Kansas City officials, who sought expanded power for slum-clearance and public housing in large cities. *See Transcript of Debates* at 2090-91. Delegate Strayton explained that Article VI, section 21, would give "the City Council of Kansas City or St. Louis the authority to condemn by ordinance entire areas if they see fit, small areas or large areas, whatever are deemed necessary for the purpose of cleaning up that blighted area." *Id.* at 2091. The drafters of the 1945 Constitution evidently were concerned only with alleviating the blighted areas in large, charter cities, and they chose to grant constitutional authorization for redevelopment only to charter cities.

These three constitutional provisions were reconciled in *State ex rel. Dalton*, 270 S.W.2d 44, in which this Court held that the Constitution allows the use of eminent domain in cases where the property will be transferred to private parties only in the case of blighted, substandard, or insanitary areas. *Id.* at 51; *accord, Annbar Associates*, 397 S.W.2d

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[9] The Constitutional Convention had two committees on local government matters: one for counties under 100,000 population, called the "Committee on Local Government," and the other for large municipalities, called the "Committee on Local Government (St. Louis, St. Louis County, and Jackson County)." *Transcript of Debates* at 2171, 2175-76. Article VI, section 21, was drafted by the latter committee.

at 646. Otherwise, the power of eminent domain may not be used to transfer property to private use. Where two legal enactments refer to the same subject, the more specific provision will take precedence over the more general. *City of Kirkwood v. Allen*, 399 S.W.2d 30, 34 (Mo. 1966). Thus the power to take property for redevelopment in Article VI, section 21, is a specific and limited exception to the general rule established by Article I, sections 26 and 28: eminent domain may not be employed for private uses except in strict accordance with Article VI, section 21.[10]

B. The 1945 Constitutional Convention Only Intended to Allow the Legislature to Empower Charter Cities to Use Eminent Domain for Redevelopment

Because the power of eminent domain "is mighty," its use "must be in strict compliance with the strictures under which it is granted." *Md. Plaza Redevelopment Corp. v. Greenberg*, 594 S.W.2d 284, 292 (Mo. Ct. App. 1979); *accord, Harris v. L. P. & H. Constr. Co.*, 441 S.W.2d 377, 382 (Mo. Ct. App. 1969) ("Procedures for the condemnation of land are controlled by statute and must be strictly followed."). Thus the taking of property

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[10] Both *State ex rel. State Highway Comm'n v. Jones*, 205 S.W.2d 534 (Mo. 1947) and *Bd. of Regents v. Palmer*, 204 S.W.2d 291 (Mo. 1947), upon which the city relies, are irrelevant. Those cases interpreted sections 27 and 29 of Article I of the Missouri Constitution, neither of which is at issue in this case. This case involves Article I, section 26; Article I, section 28; and Article VI, section 21. *Jones* did declare that "slum clearance" is a "public purpose[] for which private property may be condemned," 205 S.W.2d at 535, but that point is not disputed here.

through eminent domain by an unauthorized party or in an unauthorized manner cannot be sustained.

The plain language of Article VI, section 21, holds that only charter cities may enact ordinances for the use of eminent domain to eliminate blighted areas. It declares that "[l]aws 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 . . . ." This section appears in the article devoted to charter cities, and the principle of *in pari materia* implies that this section should be interpreted consistently with its placement in Article VI. *Ketcham v. Blunt*, 847 S.W.2d 824, 827-28 (Mo. Ct. App. 1992) ("Provisions of the constitution that relate to the same subject matter . . . are intended to be read consistently and in harmony."). The natural reading of this provision is that only charter cities are permitted to enact ordinances providing for redevelopment, and that they may do so only in compliance with the "laws" that "may be enacted" by the Legislature.

To read this provision as intending that the Legislature should enact laws enabling *all* cities, including third-class, *non*-charter cities like Arnold, to use eminent domain for redevelopment, would be a more strained reading. Under that interpretation, the specification that charter cities may enact ordinances would be rendered surplusage, since the section should then have been written, "laws may be enacted providing for the clearance of blighted areas." The Court should avoid such an interpretation. *State Highways & Transp. Comm'n of Missouri v. Dir., Missouri Dep't of Revenue*, 672 S.W.2d 953, 955 (Mo. 1984). Instead, it should adopt the plain and ordinary meaning of Article VI, section 21. *J.S. v. Beaird*, 28

S.W.3d 875, 876 (Mo. 2000); *State ex rel. Dalton v. Dearing*, 263 S.W.2d 381, 385 (Mo. 1954) ("[E]very word employed in the constitution is to be expounded in its plain, obvious, and commonsense meaning.'" (citation omitted)). This is particularly true in the context of eminent domain, where provisions granting authority are strictly construed, with doubts resolved in favor of the property owner. *Hodge*, 878 S.W.2d at 820-21.

The debates surrounding the adoption of Article VI, section 21, support a restrictive reading of that section as affording power only to charter cities. The section was added at the behest of large cities which sought authority specifically for clearing dilapidated areas within those cities. *See Transcript of Debates* at 2090-91. The "Committee on Local Government (St. Louis, St. Louis County, and Jackson County)" appointed a sub-committee to draft a provision to allow for the slum clearance, a matter which, in the words of Delegate Strayton, "has received very great attention in Kansas City and St. Louis and Springfield, and perhaps in St. Joseph, because of its very great importance to those cities." *Id.* at 2090. Officials in Kansas City drafted the language of the provision and provided it to the 1943-44 Convention, which adopted it "in the form in which it came to us from the City Counselor's office in Kansas City." *Id.* Indeed, the debates reveal that the Convention consciously decided to limit the authority granted in Article VI, section 21, to the large cities which sought this authority. "It is not so serious with us as with many larger cities," Strayton explained, but "in all conscience it's serious enough . . . [a]nd the city administration and the Chamber of Commerce in Kansas City are asking that this provision be adopted as it is and give them the power and the authority to proceed to do those things which they think will restore that area." *Id.* When asked for further explanation, Strayton pointed out that "[i]t

means simply that we are giving the City Council of Kansas City or St. Louis the authority to condemn by ordinance entire areas if they see fit . . . [as] necessary for the purpose of cleaning up that blighted area." *Id.* at 2091. The Convention then adopted the section with no further debate. *Id.* Later, Delegate Stevens reiterated that Article VI, section 21, was

> put in the Constitution for the purpose of giving *a city or a county operating under a special charter* the power to condemn property in blighted areas and the power to give the right to private individuals to condemn property for blighted areas and to rehabilitate that property . . . . [It] deals with the condemnation of property for the purpose of disposing of those blighted areas *in large cities.*

Id. at 2181 (emphasis added).

As these discussions reveal, while Article VI, section 21, does not expressly forbid the Legislature from allowing non-charter cities to use eminent domain for redevelopment, such an interpretation would involve "a liberal construction rather than an appropriate strict construction" of a constitutional provision regarding eminent domain. *Smithville*, 972 S.W.2d at 424. A party claiming that legislation has empowered non-charter cities to use eminent domain for redevelopment must demonstrate that the legislation calls for such an expansion of power in unambiguous terms. That has not been done here.

Moreover, interpreting the section in that way would render constitutional language surplusage. Article VI, section 21's conscious limitation of power would then read in practical effect, "any city or county ~~operating under a constitutional charter~~ may enact ordinances, providing for . . . ." Courts should not presume that any constitutional language

is redundant. As the Court below put it,

> If it was intended that *all* cities and counties have authority to take property for this purpose by eminent domain, what do the words 'operating under a constitutional charter' mean? They can only mean that the delegates who wrote the Constitution of 1945 and the voters who approved it intended to limit the awesome power of eminent domain in such cases to charter cities and counties.

LF 0046-47. Article VI, section 21, should not be broadly construed to allow the Legislature to empower the City of Arnold or other non-charter cities to use eminent domain for the eradication of slums or blighted areas.

III

PUBLIC POLICY MILITATES AGAINST EXPANDING THE TIF ACT OR CONSTRUING ARTICLE VI, SECTION 21, BROADLY AND THEREBY ALLOWING THIRD-CLASS CITIES TO USE EMINENT DOMAIN FOR REDEVELOPMENT

A. Charter Cities Are More Able to Use Eminent Domain Responsibly and Consistently with Statewide Policy

Charter cities were created out of a desire to grant greater local autonomy to large cities whose "rapid expansion" required them to have "a maximum degree of freedom and discretion in both legislative and administrative matters." Henry J. Schmandt, *Municipal Home Rule in Missouri*, 1953 Wash. U. L.Q. 385, 385 (1953). But not all cities were granted such powers, and even those that were had only a limited autonomy, because the state must preserve its authority to regulate matters of statewide concern. *Kansas City v. J. I. Case*

Threshing Mach. Co., 87 S.W.2d 195, 202 (Mo. 1935). Moreover, the People of Missouri in their constitution, and the Legislature in its statutes, have made a conscious choice to restrict that autonomy only to large municipalities which are granted charters.

The city's belief that there is "no reason why these important powers should be restricted to constitutional charter cities," AOB at 24, is an argument for changing the categories of cities that the constitution and the Legislature have created. That argument is better addressed to the Legislature or to the framers of a constitutional amendment than to the judiciary. *Blaske*, 821 S.W.2d at 835 ("[A]rguments . . . that the statute is unwise or unfair . . . must be addressed to the legislature."); *State ex rel. Robb v. Poelker*, 515 S.W.2d 577, 583 (Mo. 1974) ("The legislative enactments of this state and the decisions of the courts construing the same determine the public policy of the state. In this situation the argument here made as to public policy should be addressed to the legislature." (citation omitted)).

Courts have long recognized that the powers of non-charter cities are not inherent but are derived from the Legislature. To allow all municipalities to act as autonomous bodies would lead to conflicting policies and overly complicated laws, and would undermine the Legislature's ability to address matters of statewide concern. *City of St. Louis v. Grimes*, 630 S.W.2d 82, 83-84 (Mo. 1982); *Tietjens v. City of St. Louis*, 222 S.W.2d 70, 73 (Mo. 1949). The TIF Act is a matter of statewide concern. *Klos*, 35 S.W.3d at 470; *see also Alexander*, 260 P.2d 261 (citywide referendum on eminent domain not permitted because eminent domain is matter of statewide concern). Granting third-class cities greater autonomy with regard to the TIF Act would disrupt the Legislature's capacity to plan for the state as a whole. Missouri has 800 non-charter cities, but only 36 charter cities. *2005-2006 Official*

Manual, State of Missouri 851 (K. S. Myer ed., 2005). Allowing such a large number of communities to engage in redevelopment plans without Legislative oversight would lead to just the kind of overlapping and potentially conflicting policies that have caused Missouri courts carefully to scrutinize the powers of non-charter cities. Courts have generally found certain matters to "be under ultimate state control as matters of statewide concern because . . . they needed uniformity of regulation," or are "beyond effective local handling," or because conflicting regulation "by municipalities would have an impeding effect upon state programs." George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 Stetson L. Rev. 845, 878-79 (1991).

Although there do not appear to be Missouri cases on point, the courts of California, Arizona, and other states have declared that the use of eminent domain must not be subjected to the potentially conflicting control of small, independently-acting municipalities.[11] In *Alexander*, 260 P.2d 261, the California Court of Appeal found that residents of the City of Palo Alto had no authority to enact an initiative abrogating the power of eminent domain. The court found that "the right of eminent domain is a matter of statewide concern and being such cannot be abrogated by the people of a municipality." 260 P.2d at 263. As with the City of Arnold, the City of Palo Alto had no inherent power of eminent domain, and could

[11] Missouri regards the eminent domain powers of *charter* cities to be matters of local instead of statewide concern, *State ex rel. St. Louis County v. Campbell*, 498 S.W.2d 833, 836-37 (Mo. Ct. App. 1973), but this is because they "enjoy[] . . . the[] right of home rule," *id.* at 836, which the City of Arnold does not.

exercise that power "only because authorized by the State Legislature." *Id.* at 263. Thus it was a matter of statewide concern that could not be limited by local legislation. Similarly, in *City of Mesa v. Smith Co. of Ariz., Inc.*, 816 P.2d 939 (Ariz. Ct. App. 1991), the Arizona Court of Appeals found that a municipality lacked power to condemn property to expand its cemetery. Unlike the City of Arnold, the City of Mesa is a charter city with home rule powers, *see id.* at 943, but charter cities in Arizona are not permitted to exercise their powers in ways that conflict with the Legislature's authority to set policy on matters of statewide concern. *Id.* Thus "[t]he exercise of the power of eminent domain is a matter of statewide concern, and any attempt to expand the power of eminent domain through municipal charter conflicts with the legislature's authority to determine the circumstances under which it chooses to delegate its power." *Id. Accord, City of Pryor Creek v. Pub. Serv. Co. of Okla.*, 536 P.2d 343, 345-46 (Okla. 1975) ("The fundamental power to exercise the right to acquire property by eminent domain lies dormant in the state until the Legislature by specific enactment designates the occasion, modes, and agencies by which it may be placed in operation . . . . The power of eminent domain is of state-wide interest and importance.").

The Legislature chose to grant charter cities greater autonomy with regard to condemnation for redevelopment. But it has not explicitly granted that authority to non-charter cities. To expand such power to all cities in Missouri would lead to potential conflicts and confusion with statewide policy. The Court should not construe the power of non-charter cities in such a way without a clear declaration by the Legislature.

B. Charter Cities Provide Greater Checks and Balances for the Protection of Property Owners Against Wrongful Uses of Eminent Domain

Charter cities are granted greater autonomy on the grounds that larger cities are not only best suited to handle issues of local concern, but are capable of providing for the protection of individual rights and of providing on their own for those checks and balances necessary to free, representative government. (Citizens of charter cities, for example, have the power of referendum, which citizens of non-charter cities do not. *Murray v. City of St. Louis*, 947 S.W.2d 74, 78 (Mo. Ct. App. 1997)). For smaller communities, the state Legislature provides such safeguards. *See Pearson v. City of Washington*, 439 S.W.2d 756, 761 (Mo. 1969) ("[T]he Legislature has established a form of government for cities of the third class . . . with certain checks and balances characteristic of a representative form of government."). Smaller communities tend to be plagued more by parochialism and the "mischiefs of faction," while in larger communities, competing interests tend to balance one another out. This is one reason James Madison argued that large republics were more capable of self-government than smaller communities. *See generally The Federalist No. 10* (James Madison) (Clinton Rossiter ed., 1961); George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule: Part II*, 24 Stetson L. Rev. 417, 486 (1995):

> In examining the impact municipal government can have on individual liberties, the dangers of majority abuse of government by factions, particularly by smaller units of government (as presented by James Madison with respect to federal/state relations) is of significant importance. The need to protect against possible abuse suggests that limits be placed upon local power.

The framers of the Missouri Constitution, in adopting a minium population requirement for

the availability of the charter form of government, chose to steer a middle ground by which local communities could exercise autonomy, but would not be so small as to lead to the problems of faction and parochialism. This choice reflects the considered balance on the part of the framers and ratifiers of the Constitution and of the people of Missouri in the years since. *Cf. Waisblum v. City of St. Joseph*, 928 S.W.2d 414, 417 (Mo. Ct. App. 1996) ("[T]he fact that the General Assembly, in all those years, never removed the population requirement denotes an intent by the legislature that it remain a part of the statute."). Indeed, Missouri courts have emphasized that one reason for the autonomy of charter cities in eminent domain cases is precisely that their size and complexity justifies entrusting them with expanded powers. *See, e.g.*, *Brunn*, 115 S.W. at 449 ("[T]he right of a city *of the size of Kansas City* in framing and adopting its charter, to provide a plan or code of procedure for exercising the right of eminent domain, is no longer an open question." (emphasis added)).

The use of eminent domain for redevelopment is unfortunately a matter that is highly susceptible of factional or parochial interference. *See Norwood v. Horney*, 853 N.E.2d 1115, 1140 (Ohio 2006) ("[D]ue to the mutuality of public and private interests in such cases, a danger exists that the state's decision to take may be influenced by the financial gains that would flow to it or to the private entity because of the taking."); *see also* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 Sup. Ct. Econ. Rev. 183, 201 (2007) ("[T]here are three major reasons why economic development takings are especially vulnerable to this threat: the nearly limitless applicability of the economic development rationale; severe limits on electoral accountability caused by low transparency; and time horizon problems."). Expanding the power of redevelopment

condemnations to third-class cities, to which the Legislature has chosen *not* to grant extensive autonomous powers, would increase the danger of abuse. Such power should not be expanded without an unequivocal declaration by the Legislature.

C. The Legislature Correctly Determined That "Blighted" Areas in Need of Redevelopment Occur in Large Urban Areas Rather Than Small, Non-Charter Cities

As the debates at the Constitutional Convention of 1943-44 reveal, and as Missouri Courts have long recognized, Article VI, section 21, was adopted so as to provide for "slum clearance." *State ex rel. State Highway Comm'n v. James*, 205 S.W.2d 534, 535 (Mo. 1947). During the early 20th century, political leaders increasingly sought power to eliminate slum neighborhoods through eminent domain. *See* Pritchett, *supra*, at 22-37; Eric R. Claeys, *Don't Waste a Teaching Moment: Kelo, Urban Renewal, and Blight*, 15 J. Affordable Hous. & Cmty. Dev. L. 14, 15 (2005) ("Blight or slum clearance was made popular during the 1920s and 1930s by progressive urban planners who sought to establish new idealistic programs for comprehensively planned urban development."). Slums were, of course, found in large urban areas, and it was for the eradication of those areas that the power to condemn for redevelopment was adopted. Over time, Missouri courts interpreted this more broadly, finding that condemnation could also be used to eliminate "economic underutilization," *Tierney v. Planned Indus. Expansion Auth. of Kansas City*, 742 S.W.2d 146, 151 (Mo. 1987), but even such cases were confined to "*urban* redevelopment," *id.* (emphasis added), on the grounds that "[c]entrally located urban land is scarce." *Id.* In *Annbar*, 397 S.W.2d at 646, this Court recognized that the "blight" that gave rise to Article VI, section 21, and the

redevelopment statutes are a phenomenon of large urban areas: "the growth like 'Topsy' of our great cities," the Court noted, had

> awakened [the state] to the realization that a result of that growth has been the creation of slums and blighted areas . . . [which are] a breeding ground for juvenile delinquency, infant mortality, crime and disease . . . . The people of the two great metropolitan areas of this state, Kansas City and St. Louis, have authorized their respective cities . . . [to] clear[] and redevelop[] . . . their blighted areas.

397 S.W.2d at 639. Thus neither the framers of the Missouri Constitution nor the courts have addressed the applicability of this power in *non*-charter areas, most of which are small, rural communities.

Missouri's redevelopment acts, including the TIF Act, were devised with large urban centers in mind. The TIF Act's definition section, for example, defines a "blighted area" as an area which has predominantly inadequate street layout, improper subdivision, and obsolete platting. Mo. Ann. Stat. § 99.805(1). It defines a "conservation area" as "an improved area" in which "fifty percent or more of the structures in the area have an age of thirty-five years or more" and which suffer from "abandonment" and "overcrowding." Mo. Ann. Stat. § 99.805(3). The Act's language therefore contemplates large urban centers, not small or rural communities. *See* Reinert, *supra*, at 1025 ("TIF districts are mainly concentrated in Missouri's metropolitan areas."). To expand the power of eradicating blighted conditions to small-scale, or predominately rural areas which were not contemplated by the framers of

the Missouri Constitution in enacting Article VI, section 21, would stretch that authority too far.

This summer, the New Jersey Supreme Court annulled the attempt by a city to use its blight-eradication laws to condemn property that was simply vacant and under-utilized. *Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447 (N.J. 2007). The court noted that the redevelopment statutes, like those at issue here, were devised with the intention of combating urban decay. *See id.* at 462 ("[L]awmakers recognized that where an undeveloped land area was burdened with defective, questionable or unusual conditions of title, unsuitable lot layouts, diverse ownership, and outmoded and undeveloped street patterns, serious difficulties stood in the way of . . . unified development."). For the city to use the law against land that is not an urban slum would contradict the constitutional intent of the people.

> Our Constitution restricts government redevelopment to "blighted areas." That limitation reflects the will of the People regarding the appropriate balance between municipal redevelopment and property owners' rights. The New Jersey Constitution does not permit government redevelopment of private property solely because the property is not used in an optimal manner.

Id. at 465. To allow smaller, non-charter communities to engage in redevelopment of areas that are not urban slums would be to expand the eminent domain power far beyond the intent of the framers. The Missouri Constitution recognizes that the "security" of the individual's right to "enjoy[] the gains of [his or her] own industry" is "the principal office of government." Mo. Const. art. I, § 2. This Court should maintain that security by barring the

condemnation of private property where it is not authorized by the constitution and laws of the State of Missouri.

CONCLUSION

The trial court correctly determined that the TIF Act does not grant third-class cities the power to use eminent domain for blight-elimination or redevelopment. The Act's language is too ambiguous and equivocal to satisfy the strict construction applied both to the powers of third-class cities and to statutes purporting to grant the power of eminent domain. Nor does the Act provide for a mechanism or procedure for such cities to condemn private property for redevelopment. Moreover, the TIF Act specifically incorporates "constitutional limitations," such as the specification in Article VI, section 21, that the power of condemning property for blight-elimination is confined to charter cities. Finally, Article VI, section 21, does not clearly allow the Legislature to grant such powers to third-class cities at all; construing it that way would render constitutional language surplusage. Thus the constitutional avoidance principle counsels against interpreting the TIF Act so broadly. Interpreting section 21 as allowing the Legislature to grant such powers to non-charter cities would render language in that section surplusage.

The decision of the circuit court should be *affirmed*.

DATED: November 28, 2007.

Respectfully submitted,

By _____
TIMOTHY SANDEFUR, *Pro Hac Vice*

JAMES S. BURLING, CSB No. 113013
TIMOTHY SANDEFUR, CSB No. 224436
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: jsb@pacificlegal.org
E-Mail: tms@pacificlegal.org

MICHAEL A. WOLFF, No. 38207
Seigel & Wolff P.C.
7911 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105-3860
Telephone: (314) 726-0009
Facsimile: (314) 726-5809
E-Mail: maw@seigelwolff.com

TRACY HUNSAKER GILROY, No. 32289
The Gilroy Law Firm
231 South Bemiston Avenue, Suite 800
St. Louis, Missouri 63105
Telephone: (314) 965-3536
Facsimile: (314) 965-3560

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 10,960 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Word Perfect.

I also further certify that the accompanying diskette filed with the Court has been scanned and was found to be virus free pursuant to Rule 84.06(g).

_____

TIMOTHY SANDEFUR, *Pro Hac Vice*

JAMES S. BURLING, CSB No. 113013
TIMOTHY SANDEFUR, CSB No. 224436
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: jsb@pacificlegal.org
E-Mail: tms@pacificlegal.org

MICHAEL A. WOLFF, No. 38207
Seigel & Wolff P.C.
7911 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105-3860
Telephone: (314) 726-0009
Facsimile: (314) 726-5809
E-Mail: maw@seigelwolff.com

TRACY HUNSAKER GILROY, No. 32289
The Gilroy Law Firm
231 South Bemiston Avenue, Suite 800
St. Louis, Missouri 63105
Telephone: (314) 965-3536
Facsimile: (314) 965-3560

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I hereby certify that two (2) true and correct copies of the foregoing document on paper and one (1) copy on diskette were served by first-class U.S. mail, postage prepaid this 28th day of November, 2007, to:

Gerald T. Carmody
Kelley F. Farrell
Carmody MacDonald P.C.
120 South Central Avenue, Suite 1800
St. Louis, MO 63105

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

Michael F. Barnes
AmerenUE
1901 Chouteau Avenue
M/C 1310
St. Louis, MO 63103

William C. Dodson
P.O. Box 966
Imperial, MO 63052

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

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

Marc B. Fried
Dennis J. Kehm, Jr.
Office of the County Counselor
County of Jefferson, Missouri
P.O. Box 100
Hillsboro, MO 63050

Kenneth C. Jones
Missouri American Water Co.
727 Craig Road
St. Louis, MO 63141

Jovita M. Foster
Armstrong Teasdale LLP
One Metropolitan Square, Suite 2600
St. Louis, MO 63102-2740

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

_____

TIMOTHY SANDEFUR, *Pro Hac Vice*

JAMES S. BURLING, CSB No. 113013
TIMOTHY SANDEFUR, CSB No. 224436
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-Mail: jsb@pacificlegal.org
E-Mail: tms@pacificlegal.org

MICHAEL A. WOLFF, No. 38207
Seigel & Wolff P.C.
7911 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105-3860
Telephone: (314) 726-0009
Facsimile: (314) 726-5809
E-Mail: maw@seigelwolff.com

TRACY HUNSAKER GILROY, No. 32289
The Gilroy Law Firm
231 South Bemiston Avenue, Suite 800
St. Louis, Missouri 63105
Telephone: (314) 965-3536
Facsimile: (314) 965-3560

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1. THF Realty, Arnold Commons,
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