

**IN THE MISSOURI SUPREME COURT**

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**CAUSE NO. SC91025**

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**BARBARA MANZARA AND KEITH MARQUARD**

**APPELLANTS,**

**v.**

**STATE OF MISSOURI AND INTERVENOR-NORTHSIDE**

**REGENERATION,LLC.**

**RESPONDENTS**

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**APPEAL FROM THE CIRCUIT COURT,  
NINETEENTH JUDICIAL CIRCUIT  
DIVISION NO. IV  
HONORABLE PATRICIA S. JOYCE**

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**BRIEF OF APPELLANT**

**(ORAL ARGUMENT REQUESTED)**

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## JURISDICTIONAL STATEMENT

Appellate jurisdiction is in this Court under Article V, Section 3, of the Missouri Constitution because this case challenges the validity and constitutionality of a Missouri Statute. Specifically, Appellants as Missouri taxpayers seek to declare unconstitutional §99.1205 R.S.Mo (Supp.2009).

### **STANDARD OF REVIEW**

When reviewing a court-tried case, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc 1976), states the appropriate standard of review. This Court will affirm the judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id at 32*. The standard of review for constitutional challenges is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc2008). A statute is presumed constitutional unless it clearly contravenes a constitutional provision. *Id*. Likewise, this court reviews the trial court's interpretation of the Missouri constitution *de novo*. *Id*. This Court has *de novo* review on other questions of law, including the meaning of statutes. *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 354 (Mo. banc 1995).

### **STATEMENT OF FACTS**

Appellants are Missouri taxpayers, citizens and real property owners who reside within a Missouri qualified census tract area, as designated by the United States Department of Housing and Urban Development under 26 U.S.C. Section 42, and within a distressed community as that term is defined in §135.530, R.S.Mo. ( LF 31,35)

Respondent is the State of Missouri and the Respondent –Intervenor is Northside Regeneration, a Missouri Limited Liability Company that has been selected by the City of St. Louis as a redeveloper to redevelop an area within a Missouri qualified census tract area, as designated by the United States Department of Housing and Urban Development under 26 U.S.C. Section 42, and within a distressed community as that term is defined in §135.530, RSMo.( LF 31).

The Distressed Land Assemblage Tax Credit Act(herein **referred to as DLATCA or §99.1205) as amended went into effect on** August 28,2009. Section 99.1205 provides that any applicant shall be entitled to a tax credit against the taxes imposed under chapters 143, 147,148, R.S.Mo, except for sections 143.191 to 143.265, R. S. Mo, in an amount equal to fifty percent of the acquisition costs, and one hundred percent of the interest costs incurred for a period of five years after the acquisition of an eligible parcel. Applicants entitled to receive such tax credits may transfer, sell, or assign the tax credits. A purchaser, transferee, or assignee of the tax credits authorized under this section may use acquired tax credits to offset up to one hundred percent of the tax liabilities otherwise imposed under chapters 143, 147, and 148, R. S. Mo, except for sections 143.191 to 143.265, R. S. Mo. The statute provides that “if the amount of such tax credit exceeds the total tax liability for the year in which the applicant is entitled to receive a tax credit, the amount that exceeds the state tax liability may be carried forward for credit against the taxes imposed under chapters 143, 147, and 148, R.S. Mo, for the succeeding six years, or until the full credit is used, whichever occurs first.” § 99.1205 (4).

The fiscal note for §99.1205 states that the annual cap on the Distressed Areas Land Assemblage Tax Credit is raised to twenty million dollars (\$20,000,000); this may reduce general and total state revenues by up to \$20M, since the program has no current redemptions, but may induce other economic activity. The total program cap is \$95 million. §99.1205(7)

Acquisition costs, interest costs and maintenance cost are defined respectively under § 99.1205.2 as (1)Acquisition Costs“ the purchase price for the eligible parcel, costs of environmental assessments, closing costs, real estate brokerage fees, reasonable demolition costs of vacant structures, and reasonable maintenance costs incurred to maintain an acquired eligible parcel for a period of five years after the acquisition of such eligible parcel; (9). Interest costs as interest, loan fees, and closing costs and (10)maintenance costs, costs of boarding up and securing vacant structures, costs of removing trash, and costs of cutting grass and weeds”

Acquisition costs, interest cost and maintenance cost are expenses and responsibilities that a private entity incur and assume when it purchases real property with loans and become a real estate owner.

The DALATCA(§99.1205) imposes the following preconditions on an applicant seeking issuance of the tax credits certificate: The applicant must be a redeveloper which is a person, firm, partnership, trust, limited liability company or corporation; an eligible area of at least 75 acres; at least 80% must be in within a distressed community as that term is defined in §135.530, R.S.Mo.(2009)) or a federal “Qualified Census Tract” (26 U.S.C. Section 42); the redeveloper must acquire at least 50 acres of the area; the average



parcels per acre must be four or more; and less than five percent of the acreage for acquisition by the redeveloper under the redevelopment plan shall consist of owner-occupied residences. The redeveloper must have incurred acquisition cost for at least 50 acres of eligible parcels, have been appointed the redeveloper of the area by a city or county; have entered into a redevelopment agreement, and have been approved for redevelopment incentives for the area.

On October 9, 2009 Appellants filed their Petition for Declaratory Judgment challenging the validity of §99.1205. On November 2, 2009 Appellants filed their Amended Petition for Declaratory Judgment challenging the validity of §99.1205 as (1) an unconstitutional grant of public money or property or a lending of public credit to a private person, association or corporation in violation of Article III, § 38(a) of the Missouri Constitution, and (2) an unconstitutional lending of public credit in aid or to a person ,association, municipal or other corporation, or the pledging of public credit for the payment of liabilities of an individual, association, municipal or other corporation in violation of Article III, § 39 (1) or (2) of the Missouri Constitution. On November 13, 2009 Respondent filed its Answer. On November 18, 2009 Appellants filed a verified application for a preliminary injunction which was set for hearing on November 23, 2009. (LF, 2)

Appellants attempted to obtain a ruling on the validity of §99.1205 before issuance of any tax credits issued pursuant to §99.1205. (id.).

On March 10, 2010 Appellants' action was heard in the lower court without a jury and on March 29, 2010 the trial court ruled that Appellants lacked standing to challenge

the validity of §99.1205 and upheld the constitutionality of said statute. On May 10, 2010 Appellant filed their Notice of Appeal. (LF. 3,50-52).

## **POINTS RELIED ON**

### **I.**

THE TRIAL COURT ERRED IN RULING THAT THE GRANTING OF TAX CREDIT UNDER §99.1205 IS NOT AN EXPENDITURE OF TAX REVENUE BECAUSE THIS COURT HAS HELD THAT THERE IS NO DIFFERENCE BETWEEN THE STATE GRANTING A TAX CREDIT AND FOREGOING THE COLLECTION OF THE TAX AND THE STATE MAKING AN OUT RIGHT PAYMENT FROM REVENUE ALREADY COLLECTED. THE ALLOWANCE OF SUCH A TAX CREDIT COSTITUTES A GRANT OF PUBLIC MONEY OR PROERTY WITHIN ARTICLE III, SECTION 38 (a) OF THE MISSOURI CONSTITUTION.

Mo. Const. (1945), Art. III, § 38(a)

*Curchin v. Missouri Ind. Development Bd.*, 722 S.W.2d 930 (Mo. banc 1987)

*Sommer v. City of St. Louis*, 631 S.W.2d 676 (Mo. App. E.D. 1982)

*Rosenberger v. Rector & Visitors*, 515 U.S. 819, 861n. 5 (1995)

### **II**

THE TRIAL COURT ERRED IN RULING THAT THE APPELLANTS DID NOT CHALLENGE THE TAX CREDIT ISSUED PURSUANT §99.1205 AS AN ILLEGAL EXPENDITURE OF TAX REVENUE BECAUSE WHEN APPELLANTS CHALLENGED THE STATUTE AS AN UNCONSTITUTIONAL GRANT OF

PUBLIC MONEY OR PROPERTY THEY EFFECTIVELY CHALLENGED THE TAX CREDITS UNDER §99.1205 AS AN ILLEGAL EXPENDITURES OF STATE REVENUE BECAUSE THE GRANTING OF SAID TAX CREDITS IS AN EXPENDITURE.

Mo. Const. (1945), Art. III, § 38(a)

*Curchin v. Missouri Ind. Development Bd.*, 722 S.W.2d 930 (Mo. banc 1987)

*Sommer v. City of St. Louis*, 631 S.W.2d 676 (Mo. App. E.D. 1982)

*Rosenberger v. Rector & Visitors*, 515 U.S. 819, 861n. 5 (1995)

### III.

THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS LACKED STANDING TO CHALLENGE §99.1205 BECAUSE APPELLANTS HAVE STANDING AS TAXPAYERS TO CHALLENGE ILLEGAL EXPENDITURES OF STATE REVENUE.

*Clark v. Crown Drug Co.*, 348 Mo. 91, 152 S.W.2d 145 (1941).

*Eastern Mo. Laborers Dist Council v. St. Louis County*, 781 S.W. 2d 43, 45-46 (Mo banc 1989)

*Harris v. Missouri Gaming Comm’n*, 869 S.W.2d 58,60(Mo banc 1994)

*Sommer v. City of St. Louis*, 631 S.W.2d 676 (Mo. App. E.D. 1982)

### IV.

THE TRIAL COURT ERRED IN UPHOLDING §99.1205 FROM CONSTITUTIONAL CHALLENGES BECAUSE IT PERMITS A (1) GRANT OF PUBLIC MONEY OR

PROPERTY OR A LENDING OF PUBLIC CREDIT TO A PRIVATE PERSON, ASSOCIATION OR CORPORATION IN VIOLATION OF ARTICLE III, § 38(a) OF THE MISSOURI CONSTITUTION, AND (2) AN UNCONSTITUTIONAL LENDING OF PUBLIC CREDIT IN AID TO A PERSON, ASSOCIATION, MUNICIPAL OR OTHER CORPORATION FOR THE PAYMENT OF LIABILITIES OF AN INDIVIDUAL, ASSOCIATION, MUNICIPAL OR OTHER CORPORATION IN VIOLATION OF ARTICLE III, § 39 (1) AND (2) OF THE MISSOURI CONSTITUTION.

Mo. Const. (1945), Art. III, § 38(a)

Mo. Const. (1945), Art. III, § 39(1) and (2)

*Curchin v. Missouri Ind. Development Bd.*, 722 S.W.2d 930 (Mo. banc 1987)

*Sommer v. City of St. Louis*, 631 S.W.2d 676 (Mo. App. E.D. 1982)

## **ARGUMENT**

### **I.**

THE TRIAL COURT ERRED IN RULING THAT THE GRANTING OF TAX CREDIT UNDER §99.1205 IS NOT AN EXPENDITURE OF TAX REVENUE BECAUSE THIS COURT HAS HELD THAT “THERE IS NO DIFFERENCE BETWEEN THE STATE GRANTING A TAX CREDIT AND FOREGOING THE COLLECTION OF THE TAX AND THE STATE MAKING AN OUT RIGHT PAYMENT FROM REVENUE ALREADY COLLECTED. THE ALLOWANCE OF SUCH A TAX CREDIT CONSTITUTES A GRANT OF PUBLIC MONEY OR PROPERTY WITHIN ARTICLE III, SECTION 38 (a) OF THE MISSOURI CONSTITUTION”.

Art. III, § 38(a) of the Missouri Constitution states: “the general assembly shall

have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation ...” The prohibition focuses on the nature of the aid and on the character of the recipient; its application does not depend on funds having entered the public treasury, as § 38(a)’s “public credit” language plainly attests.

There is no precedent for linking the definition of “public money” to the concept of “fixed sums” expended.” Instead, the “public funds” analysis is much more pragmatic: it recognizes that foregoing the collection of a tax – via tax amnesties, tax credits, tax forgiveness, tax exemptions or tax subsidies -- depletes the local treasury and results in public aid to the recipient. *See Curchin v. Missouri Ind. Development Bd.*, 722 S.W.2d 930, 933 (Mo. banc 1987) (“This tax credit is as much a grant of public money or property and is as much a drain on the state’s coffers as would be an outright payment by the state to the bondholder upon default. There is no difference between the state granting a tax credit and foregoing the collection of the tax and the state making an outright payment to the bondholder from revenues already collected ... The allowance of such a tax credit constitutes a grant of public money or property within Article III, Section 38(a) of the Missouri Constitution.”); *Opinion of the Justices to the Senate*, 401 Mass. 1202, 514 N.E.2d 353, 355 (Mass. 1987) (“[T]ax subsidies ... are the practical equivalent of direct government grants.”); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J. dissenting ) (“[o]ur opinions have long recognized --in First Amendment contexts as elsewhere -- the reality that tax exemptions, credits and

deductions are ‘a form of subsidy that is administered through the tax system.’’); *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 791 (1973) (money available through tax credit is charge made against state treasury; tax credit is “designed to yield a predetermined amount of tax ‘forgiveness’ in exchange for performing a certain act the state desires to encourage.”); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 861.n 5 (1995) (“the large body of literature about tax expenditures accepts the basic concept that special exemptions from tax function as subsidies.”); *Sommer v. City of St. Louis*, 631 S.W.2d 676, 680 (Mo. App. E.D. 1982) (“tax abatement does not differ significantly from an expenditure of public funds, since in either case the conduct complained of could result in the treasury’s containing less money than it ought to.”).

The Distressed Land Assemblage Tax Credit Act(herein referred to as DLATCA or §99.1205) as amended went into effect on August 28,2009. Section 99.1205 provides that any applicant shall be entitled to a tax credit against the taxes imposed under chapters 143, 147,148, R. S .Mo, except for sections 143.191 to 143.265, R. S. Mo, in an amount equal to fifty percent of the acquisition costs, and one hundred percent of the interest costs incurred for a period of five years after the acquisition of an eligible parcel. Applicants entitled to receive such tax credits may transfer, sell, or assign the tax credits. A purchaser, transferee, or assignee of the tax credits authorized under this section may use acquired tax credits to offset up to one hundred percent of the tax liabilities otherwise imposed under chapters 143, 147, and 148, R. S. Mo, except for sections 143.191 to 143.265, R. S. Mo. The statute provides that “if the amount of such tax credit exceeds the total tax liability for

the year in which the applicant is entitled to receive a tax credit, the amount that exceeds the state tax liability may be carried forward for credit against the taxes imposed under chapters 143, 147, and 148, R.S. Mo, for the succeeding six years, or until the full credit is used, whichever occurs first.” § 99.1205 (4).

The allowable tax credit under § 99.1205 is unquestionable a grant of public money or property within the meaning of Art. III, Section 38 (a) of the Missouri Constitution.

## II

THE TRIAL COURT ERRED IN RULING THAT THE APPELLANTS DID NOT CHALLENGE THE TAX CREDIT ISSUED PURSUANT §99.1205 AS AN ILLEGAL EXPENDITURE OF TAX REVENUE BECAUSE WHEN APPELLANTS CHALLENGED THE STATUTE AS AN UNCONSTITUTIONAL GRANT OF PUBLIC MONEY AND PROPERTY THEY EFFECTIVELY CHALLENGED THE TAX CREDITS UNDER §99.1205 AS AN ILLEGAL EXPENDITURES OF STATE REVENUE BECAUSE GRANTING THE INSTANT TAX CREDITS IS AN EXPENDITURE OF TAX REVENUE.

Appellants in paragraphs 11 through 13 of it First Amended Petition for Declaratory Judgment state as follow: “11 .Section 99.1205 in it original form and as amended by HB 191,Section 99.1205 constitutes a “grant of public money or property” and/or a lending of public credit to a private person, association or corporation in violation of Article III, Section 38 (a) of the Constitution of Missouri, and a” giving or lending of credit” of the State in aid of a person, association, municipal or other corporation and /or

a “pledge of credit of the State for payment of the liabilities of an individual, association, municipal or other corporation, in violation of Article III, Sections 39 (1) and (2) of the Missouri Constitution, in that the state provides public credit to prospective applicants to secure and pay for private investments , private property and does not serve a primarily public purpose because a direct private benefit is derived by the borrowers and investors to the detriment of the people of this State. 12. Section 99.1205 allows the State in v violation of Article III, Section 38(a) of the Missouri Constitution to grant property in the form of a tax credit to a private person, association, corporation “against the taxes imposed under chapters 143, 147, and 148, RSMo, except for sections 143.191 to 143.265, RSMo, in an amount equal to fifty percent of the acquisition costs, and one hundred percent of the interest costs incurred for a period of five years after the acquisition of an eligible parcel.”13. Section 99.1205 and as amended in HB 191 is an unconstitutional granting of public money to “a private person, association or corporation” because the tax credit’s legislative defined purpose “to redevelop the eligible project area” does not service as the cost basis for Defendant’s tax credit expenditure.(L.F. 11)

Unquestionably, Appellant challenged the statute at issue as an illegal grant of public money or property. Thereby, likewise asserting that Section 99.1205 allows an illegal expenditure of public funds. Appellants herein adopts the legal arguments and authorities set forth in Point I in support of Appellants’ Point II.



### III.

THE TRIAL COURT ERRED IN FINDING THAT APPELLANTS LACKED STANDING TO CHALLENGE §99.1205 BECAUSE APPELLANTS HAVE STANDING AS TAXPAYERS TO CHALLENGE ILLEGAL EXPENDITURES OF STATE REVENUE.

The threshold issue that the Court must determine is whether the Plaintiffs have standing to bring this action. “Regardless of an actions merit, unless the parties have standing, a court may not entertain the action”. Standing requires that a party seeking relief have a legally cognizable interest in the subject matter and he has a threatened or actual injury. *Eastern Mo. Laborers Dist Council v. St. Louis County*, 781 S.W. 2d 43, 45-46 (Mo banc 1989).”A taxpayer has a direct interest in the proper use and allocation of tax receipts. That interest gives the taxpayer, a sufficient stake in the outcome of the suit to allow him to challenge improper use of tax funds” *Id at 47* (quoting *City of Wilmington v. Lord*, 378 A.2d 635,637(Del.1977)).The Supreme Court in *Eastern Mo. Laborers at 781 S.W. 2d at 47* called taxpayer standing the “door through which taxpayers may enter the courts to enforce the law”.

The principle of taxpayer standing to challenge an alleged illegal expenditures made by the State has been established and re-affirmed by the Missouri Supreme Court. As echoed by the Missouri Supreme Court in *Eastern Mo. Laborers Dist Council v. St. Louis County*, *Id at 48* [Emphasis added]:

We are of the opinion that, where public interests are involved, and public funds are about to be dissipated for an illegal purpose, a single taxpayer may maintain ] an action for itself, and all other taxpayers in said city, to restrain the illegal acts complained of, if injunction will lie, without being required to show, at the trial, the extent of the damages which it may sustain, should the injunction be refused. *Civic League of St. Louis v. City of St. Louis*, 223 S.W. 891, 893 (Mo. 1920). This Court has held “that citizens and taxpayers of Missouri have standing to challenge the legality of expenditures made by the Missouri State Lottery Commission. This was true even though money would probably be added to, rather than taken from, the state treasury. *Tichenor v. Missouri State Lottery Commission*, 742 S.W.2d 170, 172 (Mo. banc 1988). Taxpayers were also found to have standing when they challenged the expenditure of public funds for parochial schools, although no private pecuniary injury was alleged. *Berghorn v. Reorganized School Dist. No. 8*, 364 Mo. 121, 260 S.W.2d 573, 581 (1953). The principle of taxpayer standing to challenge illegal expenditures was also articulated by this Court in *Clark v. Crown Drug Co.*, 348 Mo. 91, 152 S.W.2d 145 (1941). There the Court stated in part:

In [taxpayer cases] it is not the damage suffered by each taxpayer or by all taxpayers as a class that opens the door to equity for relief, but it is *the public interests* which are involved in preventing the unlawful expenditure. *Missourians For Separation of Church and State v. Robertson*, 592 S.W.2d 825, 839 (Mo. App. 1979) (Emphasis added in *Missourians*) (quoting *Clark v. Crown Drug Co.*, 152 S.W.2d at 147). [Emphasis Added]

Additionally, the Missouri Supreme Court has expanded the definition of "expenditure" to include outlays which could be described as "start up cost" See *Tichenor v. Missouri State Lottery Commission*, 742 S.W.2d 170, 172 (Mo. banc 1988); *Harris v. Missouri Gaming Comm'n*, 869 S.W.2d 58, 60 (Mo banc 1994). In *Harris*, taxpayer standing was established based on the expenditure of state funds pursuant to the challenged act.

Moreover, as the Missouri Supreme Court further indicated in *Eastern Mo. Laborers Dist Council v. St. Louis County*, 781 S.W. 2d 43, 48 (Mo banc 1989) "the primary basis for taxpayer suits arises from the need to ensure that government officials conform to the law. *Comment, Taxpayers' Suits: Standing Barriers and Pecuniary Restraints*, Temp. L. Q., Vol. 59, p. 951, 971 (1986). It rests upon the indispensable need to keep public corporations, their officers, agents and servants strictly within the limits of their obligations and faithful to the service of the citizens and taxpayers. S. Flanagan, *McQuillin Municipal Corporations* § 52.29, p. 74 (3rd Ed. 1984)".

The Appellants herein as taxpayers acting in the public interest clearly have standing to challenge the illegal expenditure of public funds under § 99.1205 by seeking a declaratory judgment and injunctive relief.

#### IV

THE TRIAL COURT ERRED IN UPHOLDING §99.1205 FROM CONSTITUTIONAL CHALLENGES BECAUSE IT PERMITS A (1) GRANT OF PUBLIC MONEY OR PROPERTY OR A LENDING OF PUBLIC CREDIT TO A PRIVATE PERSON,

ASSOCIATION OR CORPORATION IN VIOLATION OF ARTICLE III, § 38(a) OF THE MISSOURI CONSTITUTION, AND (2) AN UNCONSTITUTIONAL LENDING OF PUBLIC CREDIT IN AID TO A PERSON, ASSOCIATION, MUNICIPAL OR OTHER CORPORATION FOR THE PAYMENT OF LIABILITIES OF AN INDIVIDUAL, ASSOCIATION, MUNICIPAL OR OTHER CORPORATION IN VIOLATION OF ARTICLE III, § 39 (1) AND (2) OF THE MISSOURI CONSTITUTION.

When reviewing a court-tried case, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc 1976), provides the appropriate standard of review. This Court will affirm the judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id. at 32*. The standard of review for constitutional challenges is *de novo*. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). A statute is presumed constitutional unless it clearly contravenes a constitutional provision. *Id.* Likewise, this court reviews the trial court's interpretation of the Missouri constitution *de novo*. *Id.* This Court has *de novo* review on other questions of law, including the meaning of statutes. *Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 354 (Mo. banc 1995).

Appellants submit that §99.1205 as amended is facially unconstitutional, that the lower court erroneously declared and applied the law. Moreover, a *de novo* review by this Court of the applicable constitutional provisions and the meaning of the statute at issue will unquestionably conclude the same.

**Sections 38 (a), 39 (1) and 39 (2) of Article III of the Missouri Constitution Prohibits a Grant or Lending of Public Money, property or Credit to Private Entities. Section 99.1205 constitutes a grant or lending of public money, property or credit to private entities because its benefits are derived by prospective applicants, purchasers, transferees to pay private debts, financial and personal responsibilities and offset tax liabilities.(Emphasis Added).**

Under § 99.1205 any applicant shall be entitled to a tax credit against the taxes imposed under chapters 143, 147,148, R. S .Mo, except for sections 143.191 to 143.265, R. S. Mo, in an amount equal to fifty percent of the acquisition costs, and one hundred percent of the interest costs incurred for a period of five years after the acquisition of eligible parcels. Applicants entitled to receive such tax credits may transfer, sell, or assign the tax credits. A purchaser, transferee, or assignee of the tax credits authorized under this section may use acquired tax credits to offset up to one hundred percent of the tax liabilities otherwise imposed under chapters 143, 147, and 148, R. S. Mo, except for sections 143.191 to 143.265, R. S. Mo. The statute provides that “if the amount of such tax credit exceeds the total tax liability for the year in which the applicant is entitled to receive a tax credit, the amount that exceeds the state tax liability may be carried forward for credit against the taxes imposed under chapters 143, 147, and 148, R.S. Mo, for the succeeding six years, or until the full credit is used, whichever occurs first.” § 99.1205 (4).

Section 99.1205 defines acquisition costs as (1)“ the purchase price for the eligible parcel, costs of environmental assessments, closing costs, real estate brokerage fees, reasonable demolition costs of vacant structures, and reasonable maintenance costs incurred to maintain an acquired eligible parcel for a period of five years after the acquisition of such eligible parcel”; (9). Interest costs as interest, loan fees, and closing costs and (10)maintenance costs, costs of boarding up and securing vacant structures, costs of removing trash, and costs of cutting grass and weeds”

Section 99.1205 facially provides a grant of public money and credit for private investments. It results in a direct private benefit in the form of reducing expenses for the particular private parties involved and reducing tax liabilities that are otherwise collectible from the original recipient of the tax credit, purchaser, transferee or assignee of the tax credit. The tax credits issued under DALTCA may be sold, assigned or transferred and the recipient(s) thereof can use the tax credit to offset up to one-hundred per cent of its tax liability. There is nothing in the statute that ties the use of the tax credits by purchaser(s), assignee(s) or transferee(s) to redevelopment. The granting of tax credits pursuant to § 99.1205 reduces tax revenue by the amount of the tax credit; is an expenditure of state funds and a drain on state revenues. “There is no difference between the state granting a tax credit and foregoing the collection of a tax and the state making an outright payment from revenue already collected” *Curchin at 933*.

The Missouri Supreme Court has held that ”grants with primarily private effect to be unconstitutional, despite the possible beneficial impact upon the economy of the locality and the state.”*State ex. Rel City of Jefferson v. Smith, 154 S.W. 2d 101*(Mo banc

1941.). The Court in *Curchin v. Missouri Industrial Development Board*, 772 S.W.2d930,935 (Mo. banc 1987), specifically found that the authorization of “a tax credit under Section 100.297 to be unconstitutional in violation of Article III, Section 38 (a) of the Missouri Constitution”.

**A. A Public Purpose Doctrine Has Been Judicially Added to Sections 38 (a), 39 (1) and 39 (2) of Article III of the Missouri Constitution by Which a Challenged Statute Will Be Found Constitution If Its Purpose Is Found to be Primarily for the Public Regardless of the Private Benefit.**

In *Curchin* the court state that “in examining whether a grant of public money are made to a *Center* private entities, we have required that the grants serve a public purpose” at 933 citing *Menorah Medical v. Health & Educational Facilities Auth.*,584 S.W.2d 73,78 (Mo banc 1979).

**B. Section 99.1205 Does Not Serve A Primary Public Purpose and, Therefore, Does Not Fall Within the Public Purpose Doctrine.**

The *Curchin* Court stated that ”The constitutionality of the grant depends on the ultimate use, purpose and object for which the funds is raised and not on the nature or character of the person or corporation whose immediate agency is to used in applying it” *Curchin v. Missouri Industrial Development Board*, 772 S.W.2d930,933(Mo. banc 1987). The lower court found that the tax credits issued pursuant to §99.1205 are designed to promote the public purpose of redevelopment.(LF, 48). The Supreme Court in *Curchin* found that “In determining whether there is a sufficient public purpose behind a grant of

public money, Missouri has used the “primary effect” test” The Court continued, citing *State ex. Rel City of Jefferson v. Smith*, 154 S.W.2d 101,102 (Mo banc 1941, and said that under this test,**[t]he true distinction drawn in the authorities, is this: If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which standing alone, would not be lawful. But if the primary object is not to subserve a public municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose.**

In determining the primary effect of the tax credit, the stated purpose of the legislature in §99.1205 which the lower court is “redevelopment” is not dispositive. *Curchin*, at 934. “Rather, we must make the determination based upon the history and purpose of Article III, Section 38(a) of the Missouri Constitution and upon cases in which we applied that constitutional provision.” *Id.*

“ In connection with [Article III, Section 38 (a)of the Missouri Constitution], it might be well to recall very, very briefly the origin of [this] section []. Along in the 1820 and’30 and’40[,], it was the custom of the state to give large sums of money to railroads, canal, banks and so forth and the custom became so abused that nearly all the state constitutions wrote such sections as this in their fundamental law.” *Id.* As indicated in the *Debates of the Missouri Constitution, 1945 3215 (debate of May 23, 1944) (Statement of Mr. Garten)*. “Article IV Section 46 of the Missouri constitution of 1875, the predecessor of Article III, Section 38 (a) of the Missouri Constitution was adopted to prevent railroad grants. Moreover, the provision was adopted despite the significant



public benefit of railroad grants”. *Id.* The Court in *Curchin* pointed out that providing the tax credit to only a select few companies lends itself to abuse and is analogous to the railroad grants of yesteryear, which prompted the enactment of Article III, § 38(a) of the Missouri Constitution. *Id.* at 935.

The DLATCA (§ 99.1205) imposes the following preconditions on an applicant seeking issuance of the tax credits certificate: The applicant must be a redeveloper which is a person, firm, partnership, trust, limited liability company or corporation; an eligible area of at least 75 acres; at least 80% must be in within a distressed community as that term is defined in §135.530, R.S.Mo.(2009)) or a federal “Qualified Census Tract” (26 U.S.C. Section 42); the redeveloper must acquire at least 50 acres of the area; the average parcels per acre must be four or more; and less than five percent of the acreage for acquisition by the redeveloper under the redevelopment plan shall consist of owner-occupied residences. The redeveloper must have incurred acquisition cost for at least 50 acres of eligible parcels, have been appointed the redeveloper of the area by a city or county; have entered into a redevelopment agreement, and have been approved for redevelopment incentives for the area. § 99.1205(2) (7)(8) These preconditions to the issuance of tax credits under § 99.1205 make certain that only a few perhaps only one entity would qualify for these tax credits. Thus, lending itself to abuse and making it analogous to the railroad grants.

Section 99.1205 is an unconstitutional granting of public money to “a private person, association or corporation” because the tax credit’s legislative defined purpose “to redevelop the eligible project area” does not service as the cost basis for Defendant’s tax

credit expenditure. The tax credits are granted in the first instance to the applicant for investing and obtaining loans for the acquisition and assemblage of large parcels of land (eligible parcels) in an area designed as a distressed community and not for redevelopment. As indicated above the tax credits may be sold, assigned or transferred and the recipient(s) thereof can use the tax credit to offset up to one-hundred per cent of its tax liability. *Id, subsection(5)*. There is nothing in the statute that ties the use of the tax credits by purchaser(s), assignee(s) or transferee(s) to “redevelopment”, the assumed public purpose of tax credits under § 99.1205. While it is possible that the tax credit could perhaps help to redevelop the designated area, its primarily purpose is to benefits the Applicant by reimbursing by it for 50% of it acquisition cost, including maintenance, brokerage fees, and a 100% of its interest cost including loan fees.

DALATCA actually incentivizes the accumulation of large parcels of land in the eligible area and the holding of those parcels for at least five years.

There is an old adage that says “you get what you pay for”. Respondent has paid out tax revenue and the Respondent-Intervenor has surely received tax revenue. Section 99.1205 requires the Respondent to pay for 50% of Respondent- Intervenor’s acquisition cost, **including maintenance, brokerage fees, and a 100% of its interest cost including loan fees for up to five years with nothing in return.** (Emphasis added) The purchaser(s), assignee(s) and transferee (s) can use the tax credit to offset up to one-hundred per cent of its tax liability.*id at subsection(5)*. What do taxpayers/citizens and Respondent State receive in return? Taxpayers/citizens in Missouri and Respondent state do not receive anything in return (**ZERO**).

The tax credit(s) issued pursuant to § 99.1205 is clearly an unconstitutional grant of public money or property or a lending of public credit to a private person, association or corporation in violation of Article III, § 38(a) of the Missouri Constitution, and (2) an unconstitutional lending of public credit in aid or to a person ,association, municipal or other corporation, or the pledging of public credit for the payment of liabilities of an individual, association, municipal or other corporation in violation of Article III,§ 39 (1) or (2) of the Constitution.

### **CONCLUSION**

This Court has the authority to fetter the unconstitutional grant of tax revenue that § 99.1205 allows. Appellants seek an order that protects the public interest and bridles the Legislature to its constitutional boundaries. Thus, Appellants urge this Court to declare the Distressed land Assemblage Tax Credit Act (§ 99.1205) void and reverse the trial court.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The undersigned certifies that on this 20th day of December, 2010, one true and correct copy of the foregoing brief, appendix and one CD containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 6,209 words.

The undersigned further certifies that the labeled CD, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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