NO. SC88647

IN THE SUPREME COURT OF MISSOURI

CITY OF ARNOLD,
Plaintiff-Appellant,

V.

HOMER TOURKAKIS, ET AL.,
Defendants-Respondents.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY

The Honorable M. Edward Williams, Judge

BRIEF OF *AMICUS CURIAE* SHOW-ME INSTITUTE

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INTEREST OF THE AMICUS CURIAE

The Show-Me Institute is a non-partisan, non-profit research and educational institute dedicated to improving the quality of life for all citizens of Missouri by advancing sensible, well-researched solutions to state and local policy issues. The work of the Institute is rooted in the American tradition of free markets and individual liberty. The Institute's scholars offer private-sector solutions to the state's social challenges, presenting policies that respect the rights of the individual, encourage creativity and hard work, and nurture independence and social cooperation. By applying those principles to the problems facing the state, the Show-Me Institute hopes to pave the way to a Missouri with a thriving economy and a vibrant civil society—a Missouri that leads the nation in wealth, freedom, and opportunity for all.

The Show-Me Institute has published studies and commentary addressing Missouri municipalities' improper use of eminent domain, and the Institute is dedicated to the proposition that individual property rights are the cornerstone of a stable, free society. Because this case involves the constitutional guarantees regarding individual property rights, this case is of significant interest to the Institute. The attorneys working for the Show-Me Institute are familiar with the legal issues and facts raised by this case and believe that their public policy perspective and litigation experience in support of property rights will provide a useful viewpoint when this Court is considering the outcome of this case.

All parties to this appeal have consented to the filing of this brief by the Show-Me Institute, as required by Supreme Court Rule 84.05(f) (2).

STATEMENT OF FACTS

The Show-Me Institute accepts the statement of facts as set out in the Brief of Respondents.

ARGUMENT OF AMICUS CURIAE

The Missouri Supreme Court's decision in this case will determine whether the Missouri Constitution affords citizens of this state any meaningful protection from governmental efforts to take their homes, businesses, and houses of worship for the use of commercial developers or other private parties. This Court's early interpretations of the property-related provisions set out in the Bill of Rights for the Missouri Constitution of 1875 affirmed the judiciary's responsibility to protect citizens' property rights. Later opinions, however, have allowed an expansion of the government's eminent domain power and called for near-total judicial deference to the decisions made by condemning authorities. If this Court determines that the Missouri Constitution allows the City of Arnold, a municipality without a constitutional charter, to use "blight" as a justification for taking Dr. Tourkakis's office to hand it over to a private developer, it will effectively nullify the Missouri Constitution's protections of individual property rights.

At issue in this case is the proper understanding of Article VI, Section 21, of the Missouri Constitution in light of the Constitution's other property-related provisions. The section plainly authorizes constitutional charter cities and counties to condemn properties in "blighted, substandard or insanitary areas" and sell them to private parties for subsequent redevelopment. But this Court has not yet considered whether Article VI, Section 21, allows the General Assembly to extend this authority to non-charter

municipalities, as Appellant (and other non-charter cities across the state) argue it has already done. App. Br. at 8; Amici MML and Participating Municipalities Br. at 7. Believing themselves to be so authorized, many non-charter cities have been using blight designations to threaten their citizens with condemnation even if there is no evidence that the "blighted" area poses any threat to the health or safety of these communities.

The results have been devastating for thousands of Missouri citizens, as no fewer than twenty non-charter cities have declared perfectly normal properties "blighted" so the cities could replace modest homes and businesses with shopping malls and luxury condominiums. If this Court allows non-charter municipalities to condemn "blighted" areas in the same way currently afforded to constitutional charter cities and counties, no home, business, or house of worship in the state will be safe from government officials who would rather those properties belong to someone else. This case offers the Court an opportunity to extinguish this threat and assure Missourians that the private property rights enshrined in the Constitution are still a vital defense for individual liberty.

I. The Unique Text of the Missouri Constitution Demands That Citizens' Property Rights Must Be Protected.

The Missouri Bill of Rights contains four sections concerned with the protection of citizens' property rights:

> "[A]ll persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry;… to give security to these things is the principal office of government, and… when government

does not confer this security, *it fails in its chief design*." Mo. Const. Art. 1, § 2 (emphasis added).[1]

"[N]o person shall be deprived of life, liberty, or property without due process of law." Mo. Const. Art. 1, § 10.

"[P]rivate property shall not be taken or damaged for public use without just compensation." Mo. Const. Art. 1, § 26.[2]

"[P]rivate property shall not be taken for private use with or without compensation… [and] when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined *without regard to any legislative declaration that the use is public*." Mo. Const. Art. 1, § 28 (emphasis added).[3]

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[1] No other state constitution declares the central purpose of government in similar terms.

[2] Missouri is one of only eighteen states to prohibit either the taking *or damaging* of private property for public use without compensation. *Compare* Mo. Const. Art. I, § 26 *with* Alaska Const. Art. I, § 18; Ariz. Const. Art. II, § 17; Cal. Const. Art. I, §19; Colo. Const. Art. II, § 15; Ga. Const. Art. I, § 3, Para. I; Haw. Const. Art. I, § 20; Il. Const. Art. I, § 15; Miss. Const. Art. III, § 17; Mont. Const. Art. II, § 29; N.M. Const. Art. II, § 20; N.D. Const. Art. I, § 16; Okla. Const. Art. II, § 24; Utah Const. Art. I, § 22; Va. Const. Art. I, § 11; Wash. Const. Art. I, § 16; W.V. Const. Art. III, § 9; Wyo. Const. Art. I, § 33.

[3] Missouri is one of only eight states to specifically forbid the taking of private property for private uses. *Compare* Mo. Const. Art. I, § 28, *with* Ala. Const. Art. I, § 23; Ariz.

This four-fold layer of protection emphasizes the great importance that Missourians have historically placed on the security of their property rights. In the years following the adoption of Missouri's Constitution of 1875, this Court strictly construed these provisions, regularly striking down legislation that infringed upon the property rights protected therein. *See, e.g., State ex rel. Penrose Inv. Co. v. McKelvey*, 256 S.W. 474 (Mo. banc 1923) (striking down zoning ordinance as unconstitutional exercise of police power); *City of St. Louis v. Evraiff*, 256 S.W. 489 (Mo. banc 1923) (striking down prohibition against junk yards in industrial areas as unconstitutional exercise of police power); *Moler v. Whisman*, 147 S.W. 985 (Mo. 1912) (striking down part of statute regulating barbers as unconstitutional exercise of police power).

The Court's early opinions fastidiously noted that, however great the power of the government to regulate issues related to the health, safety, and welfare of the public, this power was not a trump card by which government officials could ignore citizens' property rights. *See Evraiff*, 256 S.W. at 495 ("It is clear that the exercise of the police power… is limited to such regulations as may be reasonably necessary for the protection of the peace, health, and comfort of society."); *State v. Loomis*, 22 S.W. 350, 353 (Mo. banc 1893) ("The constitutional declaration that no person shall be deprived of life, liberty or property without due process of law, was designed to protect and preserve their existing rights against arbitrary legislation as well as against arbitrary executive and

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Const. Art. II, § 17; Colo. Const. Art. II, § 14; Okla. Const. Art. II, § 23; S.C. Const. Art. I, § 13; Wash. Const. Art. I, § 16; Wyo. Const. Art. I, § 32.

judicial acts."); *State ex rel. Rosenblatt v. Sargent*, 12 Mo. App. 228, 240 (1882) (a government that holds the property of its citizens subject to the unlimited control of "even the most democratic depository of power" is still a despotism) (citing *Loan Assn. v. Topeka*, 87 U.S. 655, 662 (1874)); *State v. Addington*, 12 Mo. App. 214, 219 (1882) (police power is extensive and undefined, but laws are void where "passed under a specious pretence of being preservative of the health of the inhabitants") (citing *State v. Fisher*, 52 Mo. 174 (1873)).

The Court's concern for the preservation of constitutional freedoms is reflected even in those earlier cases in which it upheld exercises of the police power that infringed upon individuals' property rights, as the Court justified its holdings by clearly indicating the threat to the health, safety, and welfare that the infringement was intended to stave off. *See St. Louis Gunning Co. v. City of St. Louis*, 137 S.W. 929 (Mo. 1911) (upholding billboard regulations where the record showed billboard lots being used as "privies" and "dumping grounds for all kinds of rubbish and filth");[4] *City of St. Louis v. Galt*, 77 S.W. 876 (Mo. 1903) (upholding anti-weed ordinance as protective of public health). If a regulation restricting the use of property was not shown to be legitimately related to the preservation of the community against a demonstrable threat to its health, safety, or

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[4] Despite upholding the ordinance's constitutionality, the opinion affirmed the "solemn duty" of courts to strike down laws purportedly enacted to protect the public's health, safety, and welfare if the law is, in fact, unrelated to those objects. *St. Louis Gunning Co.*, 137 S.W. at 946.

welfare, the property rights provisions of the Missouri Constitution required its invalidation.

II. The Use of Eminent Domain Authorized Under Article VI, Section 21, Properly Understood, is Only a Limited Extension of the State's Police Power for the Remediation of Conditions Demonstrably Detrimental to the Health, Safety, and Welfare of Those Cities Authorized to Act Under the Section.

In describing the proper sources and applications of governmental authority, this Court has previously gone to great lengths to distinguish between the police power and the power of eminent domain:

> "[T]he police power may be defined as extending to the protection of the public health, morals, and safety and to the promotion of the general welfare; while that of eminent domain extends to the taking from the owner of property or an easement therein and applying it to a public use or enjoyment... A further distinguishing feature is that the effect of the police power is to restrict a property right as harmful, while that of eminent domain is to appropriate a property right because it is useful." *State ex rel. Penrose Inv. Co.*, 256 S.W. at 475-76 (citations omitted).

This distinction is important, because courts' assessments of the constitutionality of various governmental actions depended on the presumed justification of that action. Where a government entity employed the police power, the primary question was whether the action was legitimately related to the remediation or prevention of a threat to

the health, safety, or welfare of the community. Where eminent domain was invoked, the courts were tasked with determining whether the taking was for a public use and, if so, whether the level of compensation to the owner was constitutionally adequate. In regard to governmental restrictions on property rights, this Court held that the government could use its police power to prevent or punish unsafe or unhealthy uses of property, e.g., *City of St. Louis v. Galt*, 77 S.W. 876 (Mo. 1903), but it could not impose merely aesthetic restrictions on an individual's property. Likewise, the government could use eminent domain to take title to property that would henceforth belong to the public for its use and enjoyment, but it could not take property from one private person and then give it to another private entity. While later judicial rulings have erroneously tended to conflate the eminent domain power with the police power,[5] this Court has noted that, regardless of the alleged source of authority, courts evaluating infringements on citizens should emphasize the rights of the individual rather than the presumed scope of the government's power:

> "[E]xperience has demonstrated the wisdom of placing restrictions on [the police power's] use in the National and State constitutions, that those charged with the conduct of public affairs may not *in disregard of the rights of the individual* render the government despotic. *It is rather to the extent of these [constitutional] restrictions than the inherent scope of the power that we*

[5] See *Kelo v. New London*, 545 U.S. 469, 501 (2005) (Thomas, J., dissenting).

should look in determining whether it has been properly exercised." *State ex rel. Penrose Inv. Co.*, 256 S.W. at 476 (emphasis added) (citations omitted).

The Constitutional Convention of Missouri of 1945 adopted Article VI, Section 21, in order to help the state's largest cities replace slums and other "blighted" areas with low-cost housing. *St. Louis Housing Auth. v. St. Louis*, 239 S.W.2d 289, 294 (Mo. banc 1951). Several years before the convention, the General Assembly had already taken steps to allow this sort of action, passing the Housing Act of 1939 to accomplish the task. *See Laret Investment Co. v. Dickmann*, 134 S.W.2d 65 (Mo. banc 1939). The constitutional addition was perceived to be necessary because, while courts agreed that slums could be razed using the police power, the title to the property on which those slums existed would remain in the hands of those who allowed the dangerous conditions to fester in the first place. *See Land Clearance for Redevelopment Auth. of St. Louis v. City of St. Louis*, 270 S.W.2d 58, 60-61 (Mo. banc 1954). By extending the power of eminent domain to allow the "clearance, replanning, reconstruction, redevelopment and rehabilitation of blighted, substandard or insanitary areas," it was hoped that these major urban centers could concurrently eliminate threats to the cities' health, safety, and welfare and address the pressing need for low-income housing.

Because the purpose of the provision has been demonstrated to be fundamentally an effort to remediate situations posing a threat to the health, safety, and welfare of Missouri's largest cities, it is best understood as a limited extension of the government's

police power for that particular purpose.[6] As Appellant has pointed out, this Court has repeatedly affirmed its duty to interpret the Constitution in a manner consistent with the meanings as understood by the people when its provisions were adopted. *Jefferson County Fire Protection Districts Ass'n v. Blunt*, 205 S.W.3d 866, 872 (Mo. banc 2006); *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002); *Boone County Court v. State*, 631 S.W.2d 321, 324 (Mo. banc 1982); *State ex rel. Danforth v. Cason*, 507 S.W.2d 405, 408 (Mo. banc 1973). Thus, where cities propose to take private property under the authority of Article VI, Section 21, courts should subject the proposal to two fundamental questions: 1) Does the targeted area constitute a genuine threat to the health, safety, and welfare of the community; and 2) Is the proposed taking legitimately related to the removal of that specific threat? By adopting this test, the Court will permit the use of Article VI, Section 21, for its intended purpose while also ensuring that the citizens of this state are afforded the property rights guaranteed by the Missouri Bill of Rights.

III. This Court's More Recent Eminent Domain Decisions Have Rendered Constitutional Protections for Property Rights Practically Nonexistent.

As Justice Thomas of the United States Supreme Court stated in his dissent in *Kelo v. New London*, 545 U.S. 469, 518 (2005), "something has gone seriously awry with

[6] This is similar to the clauses in Article I, § 28, which allow private property to be taken for private use under very narrow circumstances—when required for private ways of necessity, or for drains and ditches for agricultural and sanitary purposes.

this Court's interpretation of the Constitution." With the passage of time, this Court has incrementally retreated from its prior vigorous defense of Missourian's property rights.

A useful example of this trend is the Court's treatment of "boulevard laws." In the late nineteenth century, Missouri's largest cities were experimenting with ways to conform the use of private property to standards that met with the approval of the city leaders. St. Louis passed an ordinance that attempted to standardize construction of houses along Forest Park Boulevard, but this Court struck down the law as an unconstitutional taking of property without compensating those whose property rights were infringed. *See City of St. Louis v. Hill*, 22 S.W. 861 (Mo. 1893). In 1892, St. Louis adopted an ordinance restricting the use of buildings along Washington Avenue to residential purposes, and the city eventually charged two citizens with operating a "confectionary business" out of a house on the boulevard. In *City of St. Louis v. Dorr*, 46 S.W. 976 (Mo. banc 1898), five of the judges voted to strike down the law, and four of them agreed that the ordinance was "an unwarranted invasion of the right of private ownership of property."

Twenty-five years later, this Court considered a Kansas City ordinance that purported to use the power of *eminent domain* (as opposed to the police power that had been invoked in justification of previous boulevard laws) to restrict the use of property along certain roads. While this Court upheld the ordinance in *City of Kansas City v. Liebi*, 252 S.W. 404 (Mo. banc 1923), its decision was based on the city's decision to pay compensation to the restricted owners. The majority opinion in *Liebi* drew a vigorous dissent from Judges Walker and Blair, who argued that the ordinance should have been

struck down because, in spite of its compensation of affected property owners, their rights were being taken for aesthetic purposes, not for a proper public use as required under the Court's prior holdings. *Id.* at 414-15. Just three years later, in *State ex rel. Oliver Cadillac Co. v. Christopher*, 298 S.W. 720 (Mo. banc 1927), this Court changed its course entirely, upholding a citywide zoning ordinance in St. Louis which shackled owners with significant restrictions on the use of property in the city, but provided no monetary compensation for the burdens thus imposed.

Similarly, the trend of this Court's eminent domain rulings for the last eighty years has been to disregard constitutional protections of citizens' property rights.[7] While a plain reading of the Missouri Bill of Rights evidences an intent to provide robust security for the state's property owners,[8] Missouri's courts have held:

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[7] To the extent that the use of eminent domain authority has been allowed to deviate from the earlier constitutional protection of individuals' property rights, this Court should remember that "no length of usage can enlarge legislative power, and a wise constitutional provision should not be broken down by frequent violations." *Dorr*, 46 S.W. at 981.

[8] After all, this state's courts are generally required to apply strict scrutiny to laws that infringe upon other freedoms protected by the constitution. *See Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006) (applying strict scrutiny to statute affecting right to vote); *Bernat v. State*, 194 S.W.3d 863 (Mo. banc 2006) (applying strict scrutiny to restriction of sexually violent predator's liberty); *GMC v. Director of Revenue*, 981 S.W.2d 561

- Private property may be taken by eminent domain even if it is soundly constructed and not insanitary, blighted, unsafe, obsolete, dilapidated, or dangerous to the health, safety, or morals of the community. *See, e.g., State on Inf. of Dalton v. Land Clearance for Redevelopment Authority of Kansas City*, 270 S.W.2d 44 (Mo. banc 1954).
- Instead of requiring government actors to prove why citizens should be forced out of their homes or businesses, courts require the citizens to meet an extraordinary burden of proof as to why they should be allowed to keep what belongs to them. *See, e.g.*, *Annbar Assoc. v. West Side Redevelopment Corp.*, 397 S.W.2d 635 (Mo. banc 1965).
- The General Assembly is permitted to delegate the power of eminent domain to administrative agencies that voters cannot hold accountable. *See, e.g., State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d 592 (Mo. banc 1980).
- While Article I, Section 28, instructs courts to judge the constitutionality of condemnations without regard to legislative statements that they are necessary for a public use, a legislative statement that a condemnation is necessary to

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(Mo. banc 1998) (applying strict scrutiny to statute that might restrict interstate commerce); *Labor's Educational & Political Club-Independent v. Danforth*, 561 S.W.2d 339 (Mo. banc 1977) (applying strict scrutiny to statute denying the right to run for office).

alleviate blight is entitled to near-total deference. *See, e.g., Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp.*, 518 S.W.2d 11 (Mo. 1974).

- Even land that has never been developed may be considered "blighted" and therefore subject to eminent domain. *See State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis*, 517 S.W.2d 36 (Mo. banc 1975).
- A municipality may take a profitable piece of property from one private person and give it to a second private entity to operate in precisely the same manner, despite the explicit prohibition on using eminent domain for private uses found in Article I, Section 28. *See State ex rel. United States Steel v. Koehr*, 811 S.W.2d 385 (Mo. banc 1991).

With these points representing the current state of eminent domain law in Missouri, no one living in a constitutional charter city or county has any assurance that their home, business, or house of worship is safe from the next commercial developer who convinces their city officials that a new shopping center would be preferable to the present neighborhood.

IV. In the Absence of Judicially Enforced Constitutional Constraints, Missouri's Non-Charter Cities Have Imposed Great Hardship on Thousands of Citizens by Using "Blight" to Threaten the Use of Eminent Domain in the Pursuit of Economic Development.

When cities designate areas as "blighted," the owners of properties in those areas suffer greatly, in both emotional and financial ways.

> "Often times [sic] the property depreciates and deteriorates, the neighborhood declines, vandalism and destruction of property occurs, and the landowner, anticipating the eventual taking of the property, does not expend money to improve his [property.]... Between the time of blighting and the time of taking, the property frequently has substantially deteriorated in value at great loss to the landowner." *State ex rel. Washington University Medical Center Redevelopment Corp. v. Gaertner*, 626 S.W.2d 373, 375 (Mo. banc 1982) (ruling that owners have no constitutional remedy for economic harm resulting from blight designation).

In the five years between December 2002 and November 2007, non-charter cities in this state used "blight" as an excuse to transfer at least 15 properties from one private owner to another. In the same time period, non-charter cities have used blight designations to threaten the use of eminent domain against more than *1,500* other properties.[9] *See chart below.*[10]

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[9] A 2003 study by the Institute for Justice revealed that from 1999-2002, tallies *for the entire state* showed only 18 filed condemnations and 437 properties threatened with eminent domain where a private party would be the ultimate owner of the property. *See* Dana Berliner, *Public Power, Private Gain: A Five Year, State-By-State Report Examining the Abuse of Eminent Domain* (2003), *available at* http://www.castlecoalition.org/pdf/report/ED_report.pdf.

City	Project Name	Area Blighted	Date Blighted	Properties Threatened	Properties Condemned
Arnold	Arnold Triangle	38 Acres	Sept. 2005	***48***	***4***
Arnold	Arnold Crossroads	44 acres	June 2005	***8***	***1***
Bel-Ridge	Clayco	78 acres	May 2006	***5***	***0***
Branson	Branson Landing	95 acres	Oct. 2003	***16***	***2***
Dellwood	Dellwood Center	90K sq. ft.	Late 2004	***3***	***0***
Eureka	Allenton	934 acres	Feb. 2006	***35***	***5***
Gladstone	Gladstone Plaza	50+ acres	Mar. 2003	***1***	***0***
Liberty	Liberty Triangle	88 acres	Dec. 2002	***19***	***1***
Liberty	Liberty Downtown	??	Nov. 2005	***90***	***0***
Manchester	Pace	70 acres	Feb. 2005	***50***	***0***
Normandy	Natural Bridge Rd.	107 acres	Feb. 2006	***34***	***0***
O'Fallon	Main Street	100 acres	Early 2003	***149***	***0***
Ozark	Finley River	47 acres	May 2004	***60***	***0***
Raytown	Central Bus. Dist.	120 acres	April 2006	***200***	***0***

[10] These numbers are based on collected public records and news reports published between December 2002 and November 2007. It is possible that they dramatically *underestimate* the true number of properties threatened and/or condemned by non-charter cities, as there is no formal system for reporting these threats and condemnations.

Rock Hill	Mkt. at McKnight	43 acres	Mar. 2005	***148***	***2***
Rolla	Highway 63/72	14 acres	Dec. 2005	***37***	***0***
Sugar Creek	Sugarland	40 acres	Mar. 2007	***71***	***0***
Sunset Hills	Sunset Manor	??	Late 2000	***301***	***0***
Valley Park	New Town	504 acres	Sept. 2005	***240***	***0***
			Total:	***1515***	***15***

Even assuming, for the sake of argument, that some non-charter cities might have a legitimate basis for finding several properties "blighted," the number of properties being targeted in the name of these redevelopment efforts is utterly staggering. The stories from the following cities are only the tip of the proverbial iceberg:

Sunset Hills—The Sunset Manor neighborhood was an ethnically diverse and affordable part of that city, composed of small but tidy houses, when the Board of Aldermen labeled the area "blighted" in 2000. The city's original plan in passing the blighting ordinance was to allow the Sansone Group, a commercial developer, to replace the area's 254 homes and 18 businesses with a $115 million, 57-acre mixed-use shopping center with retail stores, offices, and upscale residences. When that plan fell through in 2002, the Aldermen came back with a plan to have the Novus Development Company create a $165 million "lifestyle" center, and Novus representatives told area residents

(many of whom had no interest in moving)[11] that they had five days either to accept what the company would offer for their homes, or face condemnation by the city. *See* Clay Barbour, *From Sunset Hills, a Story of Hollow Homes and Lives Left in Limbo,* St. Louis Post-Dispatch, Feb. 12, 2006. A number of the owners entered into agreements to sell to the developer, moving from the neighborhood and letting their houses fall into disrepair because they believed their properties would be bulldozed. In the meantime, those residents who were not interested in moving faced the constant strain of fighting off the city's efforts to take their homes against their will.[12] After years of struggling against the threats of eminent domain, in April 2006, the citizens of Sunset Hills ousted the mayor and four aldermen, leading to the repeal of the city's blight designation and the adoption of rules making it easier for residents to improve their properties—without the interference of a commercial developer. *See* Timothy Lee and Shaida Dezfuli, *The*

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[11] For example, Margaret Henneken was an 86-year-old who had lived in the neighborhood for more than 50 years. She did not want to move, but sold because she could not handle the fear and uncertainty brought on by the blight designation. Phil Sutin, *Eminent Domain is Issue for Some in Sunset Manor*," St. Louis Post-Dispatch, January 13, 2005.

[12] *See Eminent Domain Task Force, Jefferson City, Missouri, August 18, 2005*, 23-55 (2005) (statements from many Sunset Hills residents affected by eminent domain), *available at* http://www.mo.gov/mo/eminentdomain/minutes/transcript081805.pdf.

Specter of Condemnation: The Case Against Eminent Domain for Private Profit in Missouri, 16-17, *available at* http://www.showmeinstitute.org/docLib/20071015_smi_study_10.pdf.

Ozark—In February 2004, Ozark voters approved the creation of a redevelopment authority, believing it would be used only to remove a four-acre mobile home park from the Finley River neighborhood. Instead, the city's leaders blighted 47 acres of mostly well-kept waterfront property and adopted a redevelopment plan that would wipe out 37 homes and at least one business. Didi Tang, *Ozark Board Declares Old Neighborhood Blighted*, Springfield News-Leader, June 8, 2004. The city eventually used the threat of eminent domain to prompt the sale of the mobile home park—which has since been razed, eliminating the nuisance that prompted the creation of the redevelopment authority in the first place—but the blight designation and its accompanying cloud of uncertainty remained over the area's residents.

When the homeowners continued to express concern about the security of their rights, Mayor Donna McQuay did not seem to understand their fears, saying, "It's just a house. Home is wherever you make it." Of course, the owners' plight was not shared by the mayor or the four original members of the redevelopment authority whose properties were situated just outside of the redevelopment footprint. *See* Jane Carpenter, *Mayor's Attitude is Proof That City Doesn't Care About Displaced Residents*, Springfield News-Leader, July 16, 2006 at 8A. In Spring 2007, Ozark's residents voted Mayor McQuay out of office, but they are still struggling to remove the blight designation that has hung

over them for three and a half years. *See* Chad Hunter, *Blighted Homes in Ozark to Remain So, for Now*, Springfield News-Leader, November 22, 2007.

<u>Rolla</u>—In 2003, city officials in Rolla declared a 10-acre area blighted so they could remove the current residents and hand the property over to Kaplan Real Estate for a retail center. By September 2004, however, Kaplan had failed to attract any tenants for the project, so the City Council turned to the Sansone Group. Sansone demanded 14 acres, so the Tax Increment Financing Commission dutifully prompted the Council to blight additional acreage that would suit the developer and allow for the use of eminent domain to remove any homeowners uninterested in selling.[13] Janese Heavin, *TIF Commission Approves Sansone Plan, 6-4*, Rolla Daily News, December 14, 2005.

In an unusual twist, most of the property in the redevelopment area belongs to 81-year-old Warren Dean and American Realty, both of whom were already working on their own privately funded redevelopment plans while city officials were offering incentives to attract outside developers.[14] Dean expressed the injustice very simply: "I

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[13] Sansone has said it would be unwilling to proceed with the project unless eminent domain was an option. *See* Martin W. Schwartz, *TIF Passes*, Rolla Daily News, March 21 2006.

[14] American Realty had already cleaned up several run down areas in Rolla in order to build a Pizza Inn complex, a Staples, and a Hallmark and Payless shopping center. Robert W. Nash, *Guffey Proceeding with Center, Despite Plans for TIF Redevelopment*, Rolla Daily News, Aug. 28, 2005.

don't like this eminent domain," he said. "I want them to negotiate like I had to." Janese Heavin, *Dean Cautiously Optimistic He Will Be Treated Fairly*, Rolla Daily News, October 30, 2005. Among other efforts in Rolla, American Realty had planned to build a Walgreens store in the designated redevelopment area. Rolla officials denied American Realty's permits and stalled all use of the targeted property so that Sansone could ultimately use the land… to build a Walgreens store. Jaime Baranyai, *City Council Votes 7-4 to Approve TIF Phases 1 and 2*, Rolla Daily News, November 23, 2006.

Valley Park—In July 2005, soon after the United States Supreme Court handed down its ruling in *Kelo*, homeowners in Valley Park became concerned when they started receiving unsolicited offers from the Sansone Group. Despite city officials' assurances that no redevelopment would be happening in the near future, by September the Board of Aldermen had sent developers a request for proposals—including a statement that the city could use eminent domain within the 504-acre redevelopment area. *See* Margaret Gillerman, *Valley Park Plan Could Doom Food Pantry*, St. Louis Post-Dispatch, September 20, 2005, at B2. By the end of the year, the Board had announced that Sansone and McBride & Son Homes would oversee the New Town project, which was slated to replace more than 150 affordable homes and the headquarters for Circle of Concern, a charity that provides a variety of services to hundreds of low-income families. In response to the city's plan, a group of the property owners banded together, forming the Old Town Neighborhood Association to ensure any redevelopment would be done with old-fashioned negotiation, rather than government-backed coercion. Unwilling to

proceed if it had to pay the market rate for the area's properties, Sansone abandoned the project in July 2006.

The Valley Park story does not end there, however. In recent weeks, the Board of Aldermen has once again imperiled the homes and businesses of Valley Park residents, proposing the creation of the Valley Park Redevelopment Corporation to facilitate the reshaping of the area near Vance Road and Highway 141. Roland Young, a lifelong Valley Park resident who has already suffered through the loss of two properties taken through eminent domain, sees the writing on the wall and has put out a new sign at the site of his successful restaurant: "Eminent Domain for Private Gain Alive and Well in Valley Park."[15] *See* Bill McClellan, *Roots Mean Little in Path of Progress*, St. Louis Post-Dispatch, November 18, 2007, at D1.

Regrettably, it appears that unless this Court intercedes and revives constitutional limitations on municipalities' ability to offer their citizens' properties to the highest-bidding commercial developer, the wave of eminent domain abuse will continue to roll across the state. Sixteen non-charter cities (only three of whom have redevelopment projects noted in the table above) have joined an *amicus* brief in hopes of securing non-charter cities' ability to give their citizens' property to commercial developers. A review

[15] Wary of the publicity stirred up by the *Post-Dispatch* story, the Board of Aldermen has postponed consideration of the proposal by sending it back to committee. *See* Bill McClellan, *Aldermen Listen to the People. How About That!?* St. Louis Post-Dispatch, November 21, 2007, at B1.

of the Missouri Department of Economic Development 2006 Annual Report on Tax Increment Financing Projects in Missouri, mentioned in their brief, reveals that dozens of non-charter municipalities have already shrouded parts of their communities with blight designations.[16] The Show-Me Institute is uncertain whether eminent domain has been threatened in many of those cities. But if this Court determines that Article VI, Section 21, allows the unfettered use of that power, non-charter cities definitely will threaten its use against thousands of Missourians who want no more than to enjoy their homes, businesses, and houses of worship in peace.

CONCLUSION

The Show-Me Institute respectfully asks this Court to affirm the decision of the Circuit Court for the reasons stated herein.

Respectfully Submitted,

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[16] The Report may be found online at:

http://www.missouridevelopment.org/upload/tifannualreport032907.pdf

CERTIFICATION

I hereby certify that this brief contains 6,420 words and therefore complies with the type-volume limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This document was created in Word 2003 and uses Times New Roman 13-point font. The enclosed diskette contains the full text of this brief and has been scanned for viruses and is hereby certified to be virus-free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief in paper format and on virus-free diskette was provided by depositing same, postage-prepaid, with the United States Postal Service on this 29th day of November, 2007, to:

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