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# Interpreting Eminent Domain in Missouri: Elimination of Blight Is *Allright*

*Allright Properties, Inc. v. Tax Increment Financing Commission of Kansas City*<sup>1</sup>

## I. INTRODUCTION

The power of eminent domain is viewed as a quintessential component of a sovereign's power.<sup>2</sup> It allows the government to utilize private land for public good in exchange for just compensation as provided by the Takings Clause of the Fifth Amendment of the United States Constitution.<sup>3</sup> The meaning of "public use" has evolved over the centuries from taking land to build public roads, to taking land for use by private railroad companies, and, most recently, to taking land to build private businesses to spur economic growth.<sup>4</sup> With this progression comes a great backlash from private citizens, sometimes resulting in legislative reforms. Now, many states like Missouri are attempting to find the proper balance between private property rights and the desire and need of many cities to eliminate blight conditions and spur economic growth.

In 2006, Missouri reformed its eminent domain laws in order to protect private land from being taken solely for economic development purposes.<sup>5</sup> This legislation was a reaction to the United States Supreme Court decision in *Kelo v. City of New London*, which allowed private, non-blighted land to be taken so that the city could achieve economic growth.<sup>6</sup> The new Missouri statute continued to allow condemnation of private property in order to remove blight, but the condemning authority cannot condemn private property for solely economic development purposes.<sup>7</sup> The blight statute states:

[w]here eminent domain authority is based upon a determination that a defined area is blighted, the condemning authority shall individually consider each parcel of property in the defined area with regard to whether the property meets the relevant statutory

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1. 240 S.W.3d 777 (Mo. App. W.D. 2007).

2. Daniel N. Lerman, Note, *Taking the Temple: Eminent Domain and the Limits of RLUIPA*, 96 GEO. L.J. 2057, 2074 (2008).

3. The Takings Clause states "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. IV.

4. Jennie Jackson Miller, Comment, *Saving Private Development: Rescuing Louisiana from Its Reaction to Kelo*, 64 LA. L. REV. 631, 635-637 (2008).

5. Matt Blunt, *Preventing Eminent Domain Abuse*, GOVERNOR'S COLUMN, July 14, 2006, <http://www.gov.mo.gov/column071406.htm> (last visited Nov. 13, 2008).

6. *Id.*

7. MO. REV. STAT. § 523.271.1 (Supp. 2008).

definition of blight. If the condemning authority finds a preponderance of the defined redevelopment area is blighted, it may proceed with condemnation of any parcels in such area.<sup>8</sup>

In Missouri, blight is property which “constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use.”<sup>9</sup> In *Allright Properties, Inc. v. Tax Increment Financing Commission of Kansas City*, the Missouri Court of Appeals for the Western District interpreted the statute for the first time.<sup>10</sup> Under the court’s reading of this new law, the condemning authority must meet a two-prong test before it can properly condemn an area of redevelopment.<sup>11</sup> The court found that the condemning authority must assess each individual parcel to determine whether it is blighted, but it does not have to make a specific finding as to whether each parcel is blighted.<sup>12</sup> In addition, the predominance requirement is satisfied if a larger share of the total square footage of the redevelopment area is blighted.<sup>13</sup>

This Note argues that the court in *Allright* improperly interpreted the statute’s requirement of a specific finding of blight for each parcel but it properly applied the predominance requirement. It also examines the impact of the new eminent domain legislation in Missouri and argues that the legislation does not provide as much protection to private property owners as the legislature claims.

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8. MO. REV. STAT. § 523.274.1 (Supp. 2008). For the definition of a “blighted area,” see *infra* note 9.

9. MO. REV. STAT. § 99.805(1) (Supp. 2008).

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

*Id.* (emphasis omitted).

10. 240 S.W.3d 777 (Mo. App. W.D. 2007).

11. *Id.* at 779.

12. *Id.*

13. *Id.* at 780-81.

## II. FACTS AND HOLDING

Allright Properties owned two parcels of land located at the corner of Cherry Street and East 11<sup>th</sup> Street in Kansas City, Missouri.<sup>14</sup> In April 2006, pursuant to the Missouri Real Property Tax Increment Allocation Redevelopment Act, Kansas City's Tax Increment Financing Commission (TIFC) created a redevelopment plan determining that an area encompassing Allright's property was blighted.<sup>15</sup> TIFC, therefore, attempted to purchase Allright's property, but Allright refused to sell.<sup>16</sup> As a result, TIFC petitioned the Circuit Court of Jackson County to have the property condemned.<sup>17</sup> On July 2, 2007, the circuit court granted TIFC's petition and condemned the property.<sup>18</sup> Allright appealed the judgment to the Missouri Court of Appeals, Western District, claiming that the circuit court erred by failing to require "TIFC to prove . . . that the city council as the condemning authority individually considered its two parcels or determine that a preponderance of the individual parcels were blighted" as required by section 523.274(1).<sup>19</sup>

The appellate court determined that section 523.274(1) was ambiguous and, therefore, turned to the statute's legislative history in order to interpret its meaning.<sup>20</sup> The original language of the statute was designed to prevent the government from condemning property unless "each parcel of [the] property' was blighted."<sup>21</sup> Therefore, the property could not be condemned unless each parcel satisfied the condemning authority's definition of blight.<sup>22</sup> According to the appellate court, the legislature later changed the statutory language and allowed redevelopment areas to be condemned despite the fact that not every parcel within the area was blighted.<sup>23</sup> In light of this change, the appellate court found that TIFC was not required to make a finding of blight on each individual parcel.<sup>24</sup> It reasoned that the new statute did not provide any stipulation as to what occurs when a parcel is not deemed to be blighted, but rather requires that a preponderance of the redevelopment area be blighted.<sup>25</sup>

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14. *Id.* at 778.

15. *Id.* at 779. The plan was then confirmed by the City Council of Kansas City in May of 2007. *Id.* at 778.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 780.

21. *Id.* at 781.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

The appellate court concluded that this change in the statutory language allows an area to be condemned if a preponderance of the square footage of the redevelopment area is blighted.<sup>26</sup> In light of the evolution of the statute, the appellate court affirmed the trial court's interpretation of section 523.274(1) and created a new test designed to determine whether eminent domain can be used to take land that is deemed blighted.<sup>27</sup> Under this new test, in order for TIFC to condemn the redevelopment area, including Allright's two parcels, it must complete this two-prong test: (1) evaluate each parcel, but need not make a specific finding as to blight, and (2) determine whether a preponderance of the square footage of the area is blighted.<sup>28</sup>

### III. LEGAL BACKGROUND

#### *A. History of Eminent Domain*

For centuries, eminent domain has been used by the government to acquire private property for the public good.<sup>29</sup> The modern approach to what constitutes "public use" expands the potential recipients of the private land beyond common carriers to other private entities that will use the property to benefit the public.<sup>30</sup> In many cases, this means transferring land ownership in order to allow a private developer to erect shopping malls and other private businesses in order to bolster the economy.

Missouri courts have also utilized a broad definition of public use. For example, in *Phillips Pipe Line Co. v. Brandstetter*, the St. Louis Court of Appeals found that the pipeline company could condemn a portion of the defendant's farmland in order to lay a pipeline because it was a public use.<sup>31</sup> The court stated that a "public use means [a] public benefit," and that "[i]t is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in an improvement in order to constitute a public use."<sup>32</sup>

Missouri, like many other states, authorizes the use of eminent domain to condemn blighted areas for redevelopment purposes.<sup>33</sup> The process of

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26. *Id.*

27. *Id.* at 781-82.

28. *Id.* at 781.

29. Miller, *supra* note 4, at 635.

30. The court often takes a broad view on what will benefit the public. See *Kelo v. City of New London*, 545 U.S. 469, 481 (2005) (finding that the Fifth Amendment of the U.S. Constitution does not prevent a legislature from finding a public use in increasing the aesthetic value of the city).

31. *Phillips Pipe Line Co. v. Brandstetter*, 263 S.W.2d 880 (Mo. App. E.D. 1954).

32. *Id.* at 886 (quoting *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 707 (1923)).

33. MO. REV. STAT. § 523.274.1 (Supp. 2008).

condemning private property in order to redevelop an area has been occurring for a long time but was recently brought to the forefront by the United States Supreme Court decision in *Kelo v. City of New London*.<sup>34</sup>

### B. The Kelo Decision

In *Kelo*, the plaintiff challenged the city of New London's use of eminent domain to take her property as part of a development plan to economically revitalize the city.<sup>35</sup> New London's unemployment rate was almost double the rate in New Jersey and the town's population was diminishing. In response, the city decided to implement a redevelopment plan to spur the economy.<sup>36</sup> The redevelopment plan included building new restaurants, shopping areas, residential neighborhoods, a marina with commercial and recreational uses, and office buildings.<sup>37</sup> Kelo argued that the government was taking her property in violation of the Takings Clause of the Fifth Amendment because they were not taking it for a "public use."<sup>38</sup> The United States Supreme Court ruled that the city's use of the property constituted "public use" under the takings clause.<sup>39</sup> In coming to this decision, the Court looked at two prior Supreme Court cases.

First, the Court examined *Berman v. Parker*, which involved a statute passed by Congress that allowed Washington D.C. to condemn a portion of the city that the legislature deemed blighted.<sup>40</sup> The city was authorized to use the land for public purposes such as for schools and roads, but it allowed the remainder of the property to be sold to private parties.<sup>41</sup> The plaintiff in the case was an owner of a department store in the redevelopment area, and claimed that the city violated the Takings Clause of the United States Constitution.<sup>42</sup> He argued that his property was not blighted and that after condemnation his property would be sold to a private entity which does not constitute a public use.<sup>43</sup> More importantly, the plaintiff argued that taking "for the purpose of ridding the area of slums is one thing; it is quite another . . . to take a man's property merely to develop a better balanced, more attractive

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34. Stanley A. Leasure & Carol J. Miller, *Eminent Domain – Missouri's Response to Kelo*, 63 J. Mo. B. 178 (2007).

35. *See Kelo*, 545 U.S. at 472.

36. *Id.* at 473.

37. *Id.* at 474. In fact, Pfizer was to build a research facility in the new redevelopment area. *Id.* at 473. The city hoped that its presence would inspire more business to enter New London and revitalize the economy. *Id.*

38. *Id.* at 475.

39. *Id.* at 489-90.

40. *Id.* at 480-81 (citing *Berman v. Parker*, 348 U.S. 26 (1954)).

41. *Berman*, 348 U.S. at 30.

42. *Id.* at 31.

43. *Id.*

community.”<sup>44</sup> However, the Supreme Court disagreed with the plaintiff’s arguments and found the taking of property to be constitutional.<sup>45</sup> The Court noted that it is within the province of the legislature to use its eminent domain powers to improve “[p]ublic safety, public health, [and] morality,”<sup>46</sup> as well as improve the aesthetic value of a community which, in itself, can have a psychological impact on its inhabitants.<sup>47</sup>

In determining whether a city’s redevelopment plan serves a public purpose, deference must be given to the legislature.<sup>48</sup> It has the power to decide that its community shall be beautiful, healthy, clean, spacious, well-balanced and easily patrolled.<sup>49</sup> The Court gives governments broad latitude to make those determinations.<sup>50</sup> Therefore, the Court gave deference to the legislature’s finding that the redevelopment area was blighted.<sup>51</sup> The Supreme Court noted that even though the plaintiff’s property was not itself blighted, the legislature does not have to redevelop on a piecemeal basis; rather, that “area must be planned as a whole” in order to be successful.<sup>52</sup>

Turning to the issue of selling the land to private entities, the Court stated that eminent domain is “merely the means to [an] end,” and once Congress has determined to redevelop an area, it can choose public or private means to achieve those ends.<sup>53</sup> According to the Court, public ownership is not the only way to successfully achieve this goal, and in many ways private developers might better accomplish this purpose.<sup>54</sup> Therefore, the redevelopment plan at issue in this case was a permissible taking under the Constitution.

The *Kelo* Court also referenced *Hawaii Housing Authority v. Midkiff*, another eminent domain case in which the Supreme Court allowed a redevelopment plan that transferred private land to private entities.<sup>55</sup> In *Midkiff*, a Hawaiian statute allowed land ownership to be taken from the lessors and transferred to the lessees in order to break up a land oligopoly.<sup>56</sup> Once again, the Court gave deference to the legislature’s finding that breaking up this land oligopoly would remove “social and economic evils.”<sup>57</sup> Although the land

44. *Id.*

45. *Id.* at 36.

46. *Id.* at 32.

47. *Id.* at 33.

48. *Id.* at 35-36.

49. *Id.* at 33; *see also* *Kelo v. City of New London*, 545 U.S. 469, 481 (2005).

50. *See Berman*, 348 U.S. at 33.

51. *Id.* at 35-36.

52. *Id.* at 34; *Kelo*, 545 U.S. at 481.

53. *Berman*, 348 U.S. at 33.

54. *Id.* at 33-34.

55. *Kelo*, 545 U.S. at 481-82 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984)).

56. *Midkiff*, 467 U.S. at 241-42.

57. *Id.*

was transferred to private entities, it remained a public taking as “it is only the taking’s purpose, and not its mechanics,” that matter.<sup>58</sup>

Drawing from *Berman* and *Midkiff*, the *Kelo* Court gave deference to the City of New London’s findings that the redevelopment plan was necessary to stimulate the economy.<sup>59</sup> The plan itself was carefully drafted in order to increase the number of jobs, attract businesses, increase the tax base, and revitalize the city as a whole.<sup>60</sup> The Court also rebuffed *Kelo*’s argument that economic development is not a public use.<sup>61</sup> According to the Court, promoting economic development is a traditional government function and economic development has as much “public character” as removing blight and eliminating land oligopolies.<sup>62</sup> In addition, the Court also rejected *Kelo*’s argument that her land cannot be taken to benefit a private entity.<sup>63</sup> It reasoned that the department store taken in *Berman* was not itself blighted, but had to be condemned since condemning the entire area was the only way to remove the slum conditions and limit their chance for return.<sup>64</sup> The Court went on to state that often “achievement of a public good . . . coincides with the immediate benefiting of private parties.”<sup>65</sup> As a result, the *Kelo* Court held that using eminent domain for economic development purposes does not violate the Takings Clause of the United States Constitution, although the Court made clear that the states were free to impose stricter limitations on the use of the takings power.<sup>66</sup>

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58. *Id.* at 244.

59. *Kelo*, 545 U.S. at 488-89.

60. *Id.* at 483.

61. *Id.* at 484.

62. *Id.* at 484-85.

63. *Id.* at 485.

64. *Id.* at 484 n.13.

65. *Id.* at 485 n.14.

66. *Id.* at 489. Many states already had a more exacting policy than the federal baseline. *Id.* These stricter state requirements were established in state constitutions or in state eminent domain statutes which limited the grounds for exercising the takings clause. *Id.*



### C. Missouri's Reaction to Kelo

Shortly after the *Kelo* decision, many states began reforming their eminent domain laws.<sup>67</sup> Several states directly banned the use of eminent domain for economic development purposes,<sup>68</sup> while other states attempted to restrict public takings for economic development.<sup>69</sup> In 2006, Missouri Governor Matt Blunt created an eminent domain task force charged with examining the state's eminent domain laws and proposing ways to better protect private property owners.<sup>70</sup> One of the concerns the task force addressed was whether land could be taken through eminent domain for purposes of economic development.<sup>71</sup>

Prior to *Kelo*, Missouri allowed the taking of private land for purely economic purposes through Tax Increment Financing projects (TIF).<sup>72</sup> In order to be the subject of a TIF project, the area must be blighted, a conservation area, or an economic development area.<sup>73</sup> In contrast, other means of redevelopment in Missouri forbid economic development from being the sole basis for eminent domain.<sup>74</sup> However, critics argued that "local governments have abused the definition of blight by finding blighted conditions when no objective observer would find anything seriously wrong with the area."<sup>75</sup>

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67. Following *Kelo*, legislation passed in 28 states. National Conference of State Legislatures, Eminent Domain: 2006 State Legislation, <http://www.ncsl.org/programs/natres/emindomainleg06.htm> (last visited Nov. 13, 2008).

68. As a matter of state constitutional law, Oklahoma and Ohio directly reject the use of eminent domain for economic development purposes. Dana Berliner, *Eminent Domain for Private Development: 2005-2007 – State Courts Disfavor Eminent Domain for Private Development*, 2008 A.L.I.-A.B.A. 389, 392. South Dakota has stated that it will not follow *Kelo*. *Id.* Florida also passed legislation stating that the government "may not exercise the power of eminent domain to take private property for the purpose of preventing or eliminating slum or blight conditions." FLA. STAT. ANN. § 73.014 (West Supp. 2009). Louisiana passed a constitutional amendment stating, "[n]either economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose." LA. CONST. art. I, § 4.

69. National Conference of State Legislatures, *supra* note 67.

70. See Blunt, *supra* note 5.

71. See *id.*

72. Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 735 (2006).

73. See MO. REV. STAT. § 99.805 (Supp. 2008).

74. Whitman, *supra* note 72, at 735.

75. *Id.* Examples in Missouri include finding a mall to be blighted, and hence qualify for a TIF project, despite its profitable and highly successful nature. *Id.* at 736. This has also been a problem in other states. A New York appellate court found Times Square to be blighted so that property could be condemned in order to provide a building for the New York Times. Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor?*, 101 NW. U. L. REV. 1931, 1934 (2007).

Once the area is deemed blighted by the government, Missouri courts are not likely to disturb their finding unless the decision was “arbitrary or was induced by fraud, collusion or bad faith.”<sup>76</sup> In fact, no appellate court in Missouri has ever reversed a local government’s finding of blight.<sup>77</sup>

The reformed eminent domain law in Missouri states, “[n]o condemning authority shall acquire private property through the process of eminent domain for solely economic development purposes.”<sup>78</sup> Economic development is defined as use of property to increase “the tax base, tax revenues, employment, and general economic health, and does not include the elimination of blighted, substandard, or unsanitary conditions.”<sup>79</sup> In addition, the statute creates an additional procedural requirement as to the determination of blight. The legislative determination cannot be arbitrary, capricious or induced by fraud, collusion, or bad faith and must be supported by substantial evidence.<sup>80</sup>

The new statute was drafted in a flexible manner, leaving certain aspects unclear. For instance, it is vague concerning whether the authority condemning property was required to provide a blight justification prior to condemnation.<sup>81</sup> The statute also failed to describe how blight was to be calculated, for example by parcel or on a square foot basis.<sup>82</sup> *Allright* became the first chance the court had to resolve this statutory ambiguity.

#### IV. INSTANT DECISION

In the instant decision, the Missouri Court of Appeals for the Western District found that section 523.274 was ambiguous because it had more than one reasonable interpretation.<sup>83</sup> In order to resolve this ambiguity, the court turned to the legislative history of section 523.274.<sup>84</sup>

The court stated that the General Assembly enacted section 523.274 in response to *Kelo* and that its original intent “was to protect non-blighted

76. State *ex rel.* Dalton v. Land Clearance for Redevelopment Auth. of Kansas City, 270 S.W.2d 44, 52 (Mo. 1954) (en banc).

77. Whitman, *supra* note 72, at 737.

78. MO. REV. STAT. § 523.271.1 (Supp. 2008).

79. *Id.* § 523.271.2.

80. MO. REV. STAT. § 523.261 (Supp. 2008). Other states have also reassessed their eminent domain laws following *Kelo* and place more emphasis on the role of judicial review and substantial evidence to support their findings of a public purpose for condemnation. Such states include South Dakota, New Jersey and Ohio. Berliner, *supra* note 68, at 392.

81. *Allright Props., Inc. v. Tax Increment Fin. Comm’n of Kansas City*, 240 S.W.3d 777, 779-80 (Mo. App. W.D. 2007).

82. *Id.* at 780.

83. *Id.*

84. *Id.*

parcels from a government's taking by eminent domain."<sup>85</sup> The court cited the original text of House Bill 1944 and suggested that the statute created a two-prong test to be satisfied by the condemning authority.<sup>86</sup> First, the condemning authority must make a finding that each parcel in the redevelopment plan is blighted.<sup>87</sup> Second, if the parcel is found to be blighted, a condemnation petition shall be filed within the five years of the finding of blight.<sup>88</sup> If any of the parcels in the development area are not blighted, the condemning authority could not condemn the property.<sup>89</sup>

The court concluded that "[t]he main focus of this bill was to make sure that every parcel was blighted."<sup>90</sup> However, the General Assembly amended the bill before it was passed.<sup>91</sup> The final version of the bill, according to the court, "still required the condemning authority to evaluate each individual parcel, but eliminated the requirement that the condemning authority find that 'each parcel' was blighted."<sup>92</sup> In addition, the final statute did not stipulate that all of the parcels must be blighted in order for the condemning authority to condemn the property; rather, it had to determine that a preponderance of the redevelopment area was blighted.<sup>93</sup> According to the court, the only "reasonable construction of the statute" is to determine blight based on total square footage.<sup>94</sup>

Applying the statute to the facts on hand in *Allright*, in order for TIFC to properly condemn the redevelopment area, it must first examine each parcel and determine if it "retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use."<sup>95</sup> If this is true, then TIFC can condemn the property, "so long as a preponderance of the area, as a whole, is blighted."<sup>96</sup>

Applying this interpretation of the statute, the court looked to the original trial court's decision and determined that the trial court had sufficient evidence from which to conclude that TIFC properly examined each parcel to determine whether it was blighted.<sup>97</sup> In particular, the instant court looked to the Civil Mall Plan and Blight Study that was offered as evidence during the

85. *Id.*

86. *Id.* at 781 (citing H.R. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006)).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* (quoting MO. REV. STAT. § 99.805(1) (Supp. 2007)).

96. *Id.*

97. *Id.* at 782.

original trial.<sup>98</sup> The Civil Mall Plan contained a map of the area, including the buildings and their parking lots, and the condition of each of the buildings was identified on the map with the terms “excellent, good, fair, or poor.”<sup>99</sup> TIFC used the plan and photos of the area in its blight assessment.<sup>100</sup> Given this data, the appellate court found that the trial court’s decision was based on sufficient evidence that TIFC did evaluate each parcel for blight.<sup>101</sup>

Furthermore, Allright’s argument that TIFC must find that “a preponderance of the individual parcels . . . were blighted” (“18 out of 35”) did not carry any weight according to the court because that was not the proper construction of the statute.<sup>102</sup> The appellate court also rejected Allright’s argument that the district court erred by relying on blight studies that were older than five years.<sup>103</sup> Deferring to section 523.274.2,<sup>104</sup> the appellate court found that redevelopment was required to start within five years of a finding of blight by the condemning authority, but the statute does not preclude a reliance on blight studies that are older than five years.<sup>105</sup> After engaging in lengthy statutory interpretation, the appellate court affirmed the circuit court’s finding that TIFC complied with the statutory provisions of section 523.274.<sup>106</sup>

## V. COMMENT

The Missouri Court of Appeals for the Western District’s interpretation of section 523.274 in *Allright* leads to the proper outcome. However, in reaching its conclusion, the court incorrectly construed the statute in relation to its legislative history. The first prong of the court’s test is that TIFC must first “individually consider each parcel of property in the defined area with regard to whether it meets the relevant statutory definition of blight.”<sup>107</sup> While the court construes this language to mean that the condemning authority must evaluate “carefully each parcel apart from the others” to assess

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. No action to acquire property by eminent domain within a redevelopment area shall be commenced later than five years from the date of the legislative determination, by ordinance, or otherwise, that the property is blighted, substandard, contains unsanitary conditions, or is eligible for classification within a conservation area as defined in section 99.805, RSMo. However, such determination may be renewed for successive five-year periods by the legislative body.

MO. REV. STAT. § 523.274.2 (Supp. 2008).

105. *Id.*

106. *Id.*

107. *Id.* at 779.

whether it meets the definition of blight,<sup>108</sup> there is nothing that requires the condemning authority to make a specific finding for each parcel. The language of the statute was purposefully vague in order to ease its passage.<sup>109</sup> However, the openness of the statute has also hindered its ability to successfully protect the rights of private parties.

The court's determination that a specific finding of blight for each parcel is not necessary is based upon the statute's legislative history. The original text of House Bill 1944 stated, "[t]he condemning authority [must find] that *each parcel* of property in the area to be condemned meets the relevant statutory definition of blighted."<sup>110</sup> The court compared this language to the current language of section 523.274 which states, "the condemning authority shall individually consider *each parcel* of property in the defined area with regard to whether [it] meets the relevant statutory definition of blight."<sup>111</sup>

According to the court, section 523.274 eliminated the requirement of finding that each parcel was blighted.<sup>112</sup> However, the text of the house bill and statute clearly indicates the contrary position. In both versions, the condemning authority is to examine each parcel of land and determine whether it is blighted. Properly construed, the difference between the two statutes is that in House Bill 1944, the property could not be condemned unless every parcel was found to be blighted. This requirement was softened in the final version of section 523.274, which allows condemnation if a preponderance of the development area is blighted. In order for the second prong of the test, the preponderance requirement, to be satisfied, the condemning authority must make some sort of finding that the parcel is blighted.<sup>113</sup> The court even found that TIFC properly made a finding as to blight since they marked the conditions of the buildings in the redevelopment area according to their condition.<sup>114</sup>

It is possible for the redevelopment area to consist of one large parcel of land that is blighted and a few less sizable parcels which are collectively much smaller in size. In this scenario, it might not be necessary for each parcel to be deemed blighted since the blighted larger parcel will no doubt meet

108. *Id.*

109. Chris Blank, *Missouri Court of Appeals Western District Clarifies How to Quantify Blight*, MO. LAW. WKLY., Dec. 24, 2007. There are other provisions of the new eminent domain law that have not yet been addressed such as how to calculate whether an area is blighted when the property is a single building rather than open land. *Id.*

110. *Allright Properties, Inc. v. Tax Increment Fin. Comm'n of Kansas City*, 240 S.W.3d 777, 781 (Mo. App. W.D. 2007) (emphasis added) (quoting H.R. 1944, 93d Gen. Assem., 2d Reg. Sess. (Mo. 2006)).

111. *Id.* at 779 (quoting MO. REV. STAT. § 523.274 (Supp. 2006)).

112. *Id.* at 781.

113. *Id.* at 781-82.

114. *Id.* at 782.

the predominance requirement. However, the wording of the statute requires each parcel to be examined, and absent such an extreme circumstance, the procedure should be followed. Therefore, the court was wrong to conclude that a blight determination as to each parcel is not necessary.

Despite this error, the court properly applied the second prong of the test, the preponderance requirement. The statutory language is vague because it does not suggest how the measurement is to be made.<sup>115</sup> The court chose to fulfill this requirement by requiring a showing that a preponderance of the total square footage of the redevelopment area is blighted.<sup>116</sup> This method of determining blight appropriately effectuates the intent of the statute, which is to allow blighted areas to be redeveloped by the city.<sup>117</sup> Under the court's approach, a single property owner living in the middle of the redevelopment area cannot throw a wrench in the city's redevelopment plan by refusing to sell the land.

The court's finding that Allright's property could be condemned in an effort to redevelop a portion of the city, even though his specific property was not deemed blighted, is not a break from Missouri law.<sup>118</sup> The statute in question was designed to prevent the taking of private property for solely economic development purposes like in *Kelo*.<sup>119</sup> However, the statute itself only prevents the taking of land for "solely economic development" which does not include blight.<sup>120</sup> This provision was placed into the statute because the drafters were afraid that blight removal projects would be rejected because they also had economic development goals.<sup>121</sup> This allows for manipulation of the system since governments can condemn the land for economic development purposes, such as to lower the unemployment rate, under the pretense of blight. Critics argue that the lack of a precise definition of blight has contributed to abuse by local governments.<sup>122</sup> Rather than address this issue head-on by providing a carefully drafted definition of blight, the drafters of the new eminent domain statute decided to amend the procedural requirements.

115. Whitman, *supra* note 72, at 739.

116. *Allright*, 240 S.W.3d at 781.

117. *See* Blank, *supra* note 109.

118. *See, e.g., Allright Mo., Inc. v. Civic Plaza Redevelopment Corp.*, 538 S.W.2d 320, 323 (Mo. 1976) (en banc).

119. Whitman, *supra* note 72, at 734.

120. MO. REV. STAT. § 523.271.1 (Supp. 2008). Missouri law provides that: "economic development" shall mean a use of a specific piece of property or properties which would provide an increase in the tax base, tax revenues, employment, and general economic health, and does not include the elimination of blighted, substandard, or unsanitary conditions, or conditions rendering the property or its surrounding area a conservation area as defined in section 99.805, RSMo.

*Id.* § 523.271.2 (emphasis omitted).

121. Whitman, *supra* note 72, at 741.

122. *See, e.g., id.* at 742-43.

The current statute now requires substantial evidence that the legislative blight determination is not made in an arbitrary and capricious manner.<sup>123</sup> The purpose of this change was to provide additional protection to ensure that the local governments were properly utilizing their eminent domain power rather than setting up a false pretense in order to transfer private property to another private entity.<sup>124</sup> However courts have interpreted “not arbitrary and capricious” and “supported by substantial evidence” as having the same meaning.<sup>125</sup> Therefore, critics argue that the addition of this phrase will likely have little impact on judicial review of legislative blight determination.<sup>126</sup> The strength of this argument is unclear as the Missouri Supreme Court has already reversed a legislative finding of blight for lack of “substantial evidence.”<sup>127</sup>

In order to properly address the issue of taking private property for redevelopment purposes, the legislature should have created a better definition of blight so that it would be harder for condemning authorities to claim that a property was blighted so as to give a material advantage to a private entity at the expense of another private owner. Under the current statute, which was meant to prevent takings for economic development, local governments can still condemn an area for economic development purposes as long as that is not the sole reason for its condemnation.<sup>128</sup> This means that there is nothing stopping the local government, for example, from condemning a shopping mall because it is obsolete in design and unable to compete with larger malls even though the mall itself is profitable and successful.<sup>129</sup>

The property at issue in *Allright* was the subject of prior redevelopment projects but, despite these attempts, it continued to deteriorate over the years.<sup>130</sup> Prior to condemning the property, the TIFC conducted a blight study and found that Allright’s parking lots “suffer[ed] from lack of maintenance and deterioration reflecting disinvestments and decline.”<sup>131</sup> In this type of situation, a legislative finding of blight appears reliable because of the prior similar findings of blight throughout the years. However, it is easy to

123. For more states that apply a similar standard, see *supra* note 75.

124. Whitman, *supra* note 72, at 735-38.

125. *Id.* at 738.

126. *Id.* Although in 2007, the Missouri Supreme Court found that a blight determination failed for lack of substantial evidence. *Centene Plaza Redevelopment Corp. v. Mint Props.*, 225 S.W.3d 431, 439 (Mo. 2007) (en banc).

127. See *Centene Plaza Redevelopment Corp.*, 225 S.W.3d 431.

128. See *supra* note 120 and accompanying text.

129. See *supra* note 75 and accompanying text.

130. Brief of Respondent at 3, *Tax Increment Fin. Comm’n of Kansas City v. Allright Props., Inc.*, 240 S.W.3d 777 (Mo. App. W.D. 2007) (No. WD 68406), 2007 WL 2589731.

131. *Id.*

imagine a situation where the city can attempt to achieve economic development like the kind in *Kelo* while hiding behind a blight study.<sup>132</sup>

Governor Matt Blunt stated that the objective of the task force was to respond to the Supreme Court's "terrible ruling"<sup>133</sup> in *Kelo* and prevent the use of eminent domain "solely to increase tax revenue for [the] government."<sup>134</sup> He claimed that "this legislation ensures that property owners' rights are protected . . . from the abuses of eminent domain."<sup>135</sup> Although the statute makes an attempt to curb taking for economic development purposes, it does not completely resolve the issue because of the potential for abuse in finding that a specific area is blighted. The substantial evidence requirement has prevented one condemning authority from deeming a property blighted in Missouri and is a step towards protecting private owners.<sup>136</sup> However, there remains a possibility that abuses could continue as the legislature did not define what constitutes blight, thereby making the term amenable to various interpretations.

Legislation passed in several states after *Kelo* contained a broad definition of blight.<sup>137</sup> These statutes, like Missouri's, often include conditions that constitute an "economic or social liability" in the definition of blight.<sup>138</sup> This definition is broad enough to "justify virtually any condemnation that could be justified under an economic development rationale" and are "largely ineffective, providing little or no real protection to property owners against economic development takings."<sup>139</sup>

The appellate court in *Allright* engaged in the process of interpreting the new eminent domain statute. The court's interpretation of the predominance requirement allows for the local government to exercise its sovereign power of eminent domain in order to provide for the public good. However, the court's determination that a specific finding of blight is not required under the new statute is improper. The statute requires each parcel to be assessed for blight in order to determine whether the predominance requirement is met.

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132. See, e.g., *supra* note 75 and accompanying text.

133. Blunt, *supra* note 5.

134. *Id.*

135. *Id.*

136. See *supra* note 126 and accompanying text.

137. Somin, *supra* note 75, at 1933 ("These [states] include . . . Alaska, Colorado, Missouri, Nebraska, North Carolina, Ohio, Texas, Vermont, and West Virginia." (footnotes omitted)).

138. *Id.* at 1933-34; see MO. REV. STAT. § 99.805(1) (Supp. 2008).

139. Somin, *supra* note 75, at 1932-34.



## VI. CONCLUSION

The court's interpretation of the new eminent domain legislation has set an important standard for future Missouri decisions. The ambiguous nature of the predominance requirement is now interpreted to mean measurement by total square footage. However, the court's finding that a specific determination of blight for each parcel is not a requirement is inconsistent with the language of the statute and its legislative history. In most cases, the predominance standard requires the condemning authority to determine whether each parcel is blighted in order to compare square footage. Therefore, individual determinations are necessary.

The eminent domain statute was created to make sure that private property owners are afforded rights and that their land will not be taken for solely economic development purposes. The statute makes strides towards achieving these ends. However, the statutory language still allows private land to be taken for economic development purposes so long as the city can cloak its true intentions under a claim of blight elimination. In order to remedy this occurrence, an exacting defining of "blight" should be constructed by the legislature.

ANITA J. PATEL